

ARTICLES

THE FLAT TAX: A PANACEA FOR PRIVACY
CONCERNS?

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INTRODUCTION

Americans prize privacy, particularly from government intrusion, and our Constitution provides fundamental privacy protections. For example, the Fourth Amendment guarantees “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”¹ Notwithstanding these Constitutional protections, Congress has found it necessary to authorize the Internal Revenue Service (“IRS”) to use mandatory measures to collect a comprehensive body of personal financial information about each American, in order to ensure compliance with the federal income tax.² Increasingly, the IRS stores this information in digital form and frequently³ shares it with other agencies of the federal government and the states.⁴ Some commentators view this collection of

1. U.S. CONST. amend. IV.

2. See, e.g., PRIVACY PROTECTION STUDY COMM’N, REPORT OF THE PRIVACY PROTECTION STUDY COMM’N: THE CITIZEN AS TAXPAYER 6 (1977) [hereinafter PRIVACY COMM’N REPORT] (stating that “[t]o fulfill the requirements of the Internal Revenue Code, the Internal Revenue Service collects and maintains vast amounts of information about all individual taxpayers. Congress has determined that the compelling societal need to finance government activities warrants the intrusion into the lives of individuals that compliance with the Internal Revenue Code inevitably entails.”); see also William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1032 (1995) (explaining that “[t]he government needs certain kinds of information from taxpayers in order to enforce the tax laws. It cannot require disclosure only in cases in which it has some basis for suspecting a violation, because then it could not uncover violations”).

3. Congress’s concern about disclosures by the IRS to other government agencies is not a recent development. The Privacy Act of 1974 directed the Privacy Commission to examine this issue. Pub. L. No. 93-579, § 5(c)(2)(B)(ii), 88 Stat. 1896 (1974). Prior to 1974, Congress had “delegated to the Executive branch substantial discretion to decide to what extent, and under what conditions, tax returns and other information about taxpayers would be disclosed by the Service to other government agencies.” PRIVACY COMM’N REPORT, *supra* note 2, at 2. Because of certain exceptions in the Privacy Act of 1974, the IRS did not “interpre[t] it as prohibiting disclosures of records about individuals currently authorized by regulation.” *Id.* at 2-3. After a preliminary report was issued by the Commission, Congress adopted a comprehensive amendment to the rules regarding tax return disclosure in the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976). Subsequently, the Commission revised its report and stated that “[t]he Tax Reform Act of 1976 is consistent in the main with the Commission’s general recommendations.” PRIVACY COMM’N REPORT, *supra* note 2, at 30; see also JOINT COMM. ON TAXATION, 106TH CONG., STUDY OF PRESENT-LAW TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS AS REQUIRED BY SECTION 3802 OF THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998, VOLUME I: STUDY OF GENERAL DISCLOSURE PROVISIONS 128 (Comm. Print 2000) [hereinafter 2000 JCT REPORT] (providing a more recent review of these rules).

4. See *infra* Part III.B.3 (discussing situations in which the IRS is authorized to disclose tax return information to other government agencies). Some commentators have proposed that certain information about specific tax returns be released publicly. See, e.g., Stephen W. Mazza, *Tax Compliance: Should Congress Reform the 1998 Reform Act? Taxpayer Privacy and Taxpayer Compliance*, 51 U. KAN. L. REV. 1065, 1070, 1142 (2003) (arguing that the IRS should be allowed to publicly release information about a taxpayer’s “criminal tax evasion; failure to pay assessed taxes; and investments in abusive tax shelters”); see also Marc Linder, “*Tax Glasnost*” for Millionaires: *Peeking Behind the Veil*

information by the IRS as an unacceptable invasion of privacy; they urge that privacy be restored to Americans by replacing the income tax with a “flat tax,” a form of consumption tax.⁵ They emphasize that, under the flat tax,⁶ most taxpayers would be required to file only a postcard-sized return, in contrast to the extensive reporting required on the current Form 1040.⁷

President Bush has recently announced his intention to pursue tax reform in his second term and has appointed an advisory panel to examine various options, including adoption of the flat tax.⁸ This Article seeks to contribute to the upcoming debate by examining whether the issue of privacy should provide a strong argument in favor of replacing the income tax with a flat tax.

of Ignorance Along the Publicity-Privacy Continuum, 18 N.Y.U. REV. L. & SOC. CHANGE 951, 959-60 (1990-1991) (recommending that the tax returns of millionaires be made public to foster public debate about income disparities and redistribution).

5. See generally DAN MITCHELL, INSTITUTE FOR POLICY INNOVATION, *TAX REFORM: THE KEY TO PRESERVING PRIVACY AND COMPETITION IN A GLOBAL ECONOMY* 9 (2002) (arguing that “fundamental tax reform is the solution to an invasive tax code that gives government the right to know every detail about a taxpayer’s financial existence”), available at <http://www.ipi.org>. Mitchell also states that “the reduction of government prying is sufficient reason to scrap the Internal Revenue Code.” *Id.* at 2. Mitchell concludes that “[t]ax reform is a way of returning privacy and control to the American people.” *Id.* at 10; see also CATO INSTITUTE, *Fundamental Tax Reform*, in CATO HANDBOOK FOR CONGRESS, 106TH CONGRESS 57, 69 (2001) (arguing that “[n]o other institution is as great a threat to our civil liberties as the IRS. Congress has tried to transform the IRS into a kinder, gentler agency. But the truth is that IRS abuses will assuredly continue as long as we retain a flawed income tax system”); Stephen Moore, *The Economic and Civil Liberties Case for a National Sales Tax*, 71 TAX NOTES 101, 103-04 (1996) (explaining that “without a search warrant, the IRS has the right to search the property and financial documents of American citizens,” and noting that in 1995, “Congress added 5,000 IRS agents even as it was forced to acknowledge that hundreds of auditors were illegally scouring through the returns of American citizens”). Moore argues that the retail sales tax, and not the flat tax, would cause our tax system to be less intrusive. *Id.* at 104.

6. Privacy is not the only reason offered for replacing the income tax with the flat tax. Flat tax advocates also claim that the flat tax is fairer and easier to administer than the income tax, and that the flat tax would stimulate savings and economic growth. See, e.g., MITCHELL, *supra* note 5, at 2 (arguing that “the loss of privacy [under the income tax] is a result of bad tax policy”). Opponents of the flat tax argue that the income tax is fairer and that predictions of an improved economy and greater administrative simplicity under the flat tax are exaggerated. See generally Stephen B. Cohen, *The Vanishing Case for Flat Tax Reform*, 86 TAX NOTES 675, 690 (2000) (concluding that “[p]redictions that the flat tax would benefit the middle and lower classes should be viewed skeptically”; “the flat tax seems as likely to decrease as to increase savings”; and “much of the flat tax’s promised simplification for individuals could be achieved by reforming the existing income tax”). This Article will not attempt to resolve this controversy. Rather it is limited to the goal of determining what role, if any, privacy concerns should play in the upcoming tax reform debate.

7. See MITCHELL, *supra* note 5, at 9 (explaining that the flat tax would replace current tax forms with two postcards—one designed for households and one for businesses).

8. Exec. Order No. 13,369, 70 Fed. Reg. 2323 (Jan. 7, 2005), available at <http://www.taxreformpanel.gov/executive-order.shtml>. See generally Martin A. Sullivan, *Economic Analysis, Waiting for Tax Reform: A Commission Report Preview*, 106 TAX NOTES 152 (2005) (predicting the recommendations of President Bush’s advisory panel); Heidi Glenn, *Bush Panel to Outline Tax Reform Options by July 31*, 2005 TAX NOTES TODAY 6-1 ¶ 12 (Jan. 10, 2005)(on file with the American University Law Review) (describing the purview of the nine-member bipartisan panel appointed by the President).

Part I will briefly describe the flat tax, and Part II will consider what changes in IRS information-gathering would occur if a flat tax is adopted. The most salient change is that, under a flat tax, the IRS would no longer routinely collect information about *dividends, interest, and capital gains* received by taxpayers. Part III will examine whether the IRS's current collection and use of this category of information is, in fact, as dangerous and harmful as flat tax advocates contend. This Part also will examine whether the flat tax would avoid any harms found to occur under the income tax. Next this Part will analyze the difficulties that other government agencies and units would face if the IRS no longer collected and shared this information.

In conclusion, this Article notes that dividends, interest, and capital gains are highly concentrated among wealthy taxpayers, so that any improvements in privacy resulting from adoption of the flat tax would be unevenly distributed among Americans. It also concludes that the privacy of Americans would be better served by retention of the income tax and renewed efforts to protect against misuse of the information that the IRS collects.

I. BRIEF SUMMARY OF THE FLAT TAX

The "flat tax," originally proposed by Robert E. Hall and Alvin Rabushka in 1981,⁹ has been the basis for legislative proposals by Senator

9. ROBERT E. HALL & ALVIN RABUSHKA, *THE FLAT TAX* vii (2d ed. 1995) (reviewing history of their flat tax proposal). See generally GEN. ACCT. OFF., *REPORT ON THE POTENTIAL IMPACT OF ALTERNATIVE TAXES ON TAXPAYERS AND ADMINISTRATORS* (1998) [hereinafter *ALTERNATIVE TAXES*] (outlining the major differences in alternative tax systems and considering the potential burdens on taxpayers and responsibilities for the government under those alternative systems); STAFF OF JOINT COMMITTEE ON TAXATION, 104TH CONG., *DISCUSSION OF ISSUES RELATING TO "FLAT" TAX RATE PROPOSALS SCHEDULED FOR A PUBLIC HEARING BEFORE THE SENATE COMMITTEE ON FINANCE* (Joint Comm. Print 1995) (outlining the present structure of the income tax system and proposals for the flat tax); MICHAEL GRAETZ, *THE DECLINE (AND FALL?) OF THE INCOME TAX* 212-43 (1997) (recounting the recent movement to reform the taxation system); Neil H. Buchanan, *A User's Guide to Proposals to Replace the U.S. Tax System and Strangle Fiscal Policy*, 33 J. ECON. ISSUES 505, 509 (1999) (suggesting that the "true agenda" of the flat tax proposal is to "shift the tax burden downward"); Michael Calegari, *Flat Taxes and Effective Tax Planning*, 51 NAT'L TAX J. 689 (1998) (describing potential tax avoidance strategies taxpayers could use under the Hall-Rabushka plan); Marvin A. Chirelstein, *The Flat Tax Proposal—Will Voters Understand the Issues?*, 2 GREEN BAG 147 (1999) (analyzing how political rhetoric creates misunderstanding of flat tax proposals); Alan L. Feld, *Living with the Flat Tax*, 48 NAT'L TAX J. 603 (1995) (arguing that a flat tax will not simplify taxation as its proponents suggest); William G. Gale, *Tax Simplification: Issues and Options*, 92 TAX NOTES 1463, 1478-81 (2001) [hereinafter Gale, *Tax Simplification*] (discussing potential sources of complexity under the flat tax); William G. Gale & Kevin A. Hassett, *A Framework for Evaluating the Flat Tax*, 98 TAX NOTES TODAY 42-37, ¶¶ 2-3 (Mar. 3, 1998) (on file with the American University Law Review) (analyzing the Hall-Rabushka flat tax as a consumption tax); Lawrence J. Kotlikoff, *Consumption Taxation—The A,B,C's That Every Politician Should Know*, 48 EMORY L.J. 823 (1999) (outlining the basic differences between various types of consumption taxation systems); Jerome Kurtz, *Two Cheers for the Income*

Arlen Specter (R-Pa.)¹⁰ and Senator Richard C. Shelby (R.-Ala.)¹¹ Under the Hall-Rabushka proposal, the Form 1040 for individuals would be replaced with a “postcard return,” on which the taxpayer would identify himself by name, home address, occupation and social security number. The only two items of income reported on the return would be “wages and salary” on line 1 and “pension and retirement benefits” on line 2. A personal allowance (similar to a standard deduction) would be claimed based on whether the taxpayer’s filing status is “married filing jointly,” “single,” or “single head of household.” In addition, a smaller personal allowance would be allowed for each dependent.¹² As under the current system, employers would continue to withhold taxes from a taxpayer’s

Tax, 27 OHIO N. U. L. REV. 161 (2001) (arguing that transition to an alternative tax system is administratively and politically unmanageable and that the current tax system is the fairest possible); Charles E. McLure, Jr., *The Simplicity of the Flat Tax: Is It Unique?*, 14 AM. J. TAX POL’Y 283 (1997) (examining whether simplifications often associated with the flat tax are unique to it or whether they could be found in other proposals); John K. McNulty, *Flat Tax, Consumption Tax, Consumption-Type Income Tax Proposals in the United States: A Tax Policy Discussion of Fundamental Tax Reform*, 88 CAL. L. REV. 2095 (2000) (arguing against adoption of the flat tax in light of the history of income taxation in the United States and possible modifications to the current system); Stephen Moore, *The “Freedom to Choose” Flat Tax*, 97 TAX NOTES 1609 (2002) (arguing that successful adoption of the flat tax will require a different political strategy); Deborah L. Paul, *The Sources of Tax Complexity: How Much Simplicity Can Fundamental Tax Reform Achieve?*, 76 N.C. L. REV. 151 (1997) (noting that the desire for equitable distribution of tax liabilities has resulted in tax system complexity); Ronald A. Pearlman, *Fresh From the River Styx: The Achilles’ Heels of Tax Reform Proposals*, 51 NAT’L TAX J. 569 (1998) (explaining the tax avoidance and tax evasion opportunities implicit in various tax reform proposals); Julie Roin, *The Consequences of Undoing the Federal Income Tax*, 70 U. CHI. L. REV. 319 (2003) (noting how the current taxation system is intertwined with American economic and cultural life); Robert P. Strauss, *Administrative and Revenue Implications of Alternative Federal Consumption Taxes for the State and Local Sector*, 14 AM. J. TAX POL’Y 361 (1997) (considering the effects of a federal consumption tax on local and state economies); Alvin C. Warren, Jr., *Three Versions of Tax Reform*, 39 WM. & MARY L. REV. 157 (1997) (analyzing three proposals for tax reform and comparing the current taxation system to that of other developed nations); David A. Weisbach, *Ironing Out the Flat Tax*, 52 STAN. L. REV. 599 (2000) (arguing that claims of simplicity and efficiency by flat tax proponents are not accurate); William G. Gale, *Tax Reform in the Real World*, 15 YALE J. ON REG. 387 (1998) (reviewing GRAETZ, *supra*) (noting that thoughtful tax reform proposals must consider the history and politics of taxation in the United States); Grover Norquist, *Step-by-Step Tax Reform*, WASH. POST, June 9, 2003, at A21 (arguing that each Bush administration tax cut represents a movement towards fundamental tax reform).

10. Flat Tax Act of 2003, S. 907, 108th Cong. (2003).

11. Tax Simplification Act of 2003, S. 1040, 108th Cong. (2003).

12. In the 1995 Hall-Rabushka version, the figures for the basic standard deduction are \$16,500 for “married filing jointly,” \$9,500 for “single,” and \$14,000 for “single head of household”; the amount for each dependent is \$4,500. HALL & RABUSHKA, *supra* note 9, at 59. Under the Flat Tax Act of 2003, the basic standard deduction would be \$17,500 on a joint return, \$15,000 for a head of household, and \$10,000 for an unmarried individual who is not a head of household. § 2. There would be an additional standard deduction of \$5,000 for each dependent. *Id.* Under S. 1040, the basic standard deduction is \$25,580 on a joint return, \$16,330 for a head of household, and \$12,790 for an unmarried individual who is not a head of household. Tax Simplification Act § 101. The additional standard deduction for each dependent is \$5,510. *Id.*

wages.¹³ All income would be taxed at a single rate.¹⁴

In addition, any individual or entity engaged in the conduct of a trade or business would be required to file a business tax form in the name of the business.¹⁵ On this form, the taxpayer would record two items: "gross revenue from sales" and "allowable costs." Allowable costs would include "purchases of goods, services and materials, wages, salaries and pensions, and purchases of capital equipment, structures and land."¹⁶ The wages and pensions deducted on this business tax form would, however, be included on the individual tax return of the employee.

II. HOW WOULD IRS INFORMATION-GATHERING CHANGE UNDER THE FLAT TAX?

A. *What Would Not Change*

In order to highlight the changes in information-gathering that would occur under the flat tax, it is useful to consider first the many aspects of IRS information collection that would not change.

Under the flat tax, an individual would continue to file an annual personal return showing amounts received as wages or pension distributions, if any. The taxpayer would continue to report income from a sole proprietorship, although this would be on a separate business return.¹⁷ An individual filing a personal return would indicate the appropriate filing status, the number of his dependents, and their Social Security numbers.¹⁸

13. HALL & RABUSHKA, *supra* note 9, at 59, 145.

14. *Id.* at 52. In the 1995 Hall-Rabushka plan, this would be nineteen percent. *Id.* at 56. The Tax Simplification Act sets the rate at nineteen percent initially, with a subsequent decrease to seventeen percent. Tax Simplification Act § 101. The Flat Tax Act sets the rate at twenty percent. Flat Tax Act § 2.

15. HALL & RABUSHKA, *supra* note 9, at 61-64.

16. *Id.* at 62.

17. However, one could show compensation for personal services in one's business on the personal return in order to use the basic standard deduction and dependency exemptions. *See, e.g.*, Flat Tax Act § 2. Under the income tax, an individual engaged in the conduct of a business as a sole proprietor shows the receipts and deductible expenditures of the business on a Schedule C attached to the Form 1040.

18. It seems likely that the flat tax would incorporate, in its rules for the dependency exemption and head of household filing status, the uniform definition of a "qualifying child" adopted by Congress in October 2004. *See* Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, tit. II, § 201, amending I.R.C. § 152, 118 Stat. 1166, 1170 (2004) (defining a "qualifying child" as an individual "who bears a relationship" to the taxpayer; "who has the same principal place of abode as the taxpayer for more than one-half of such taxable year"; who meets certain age requirements; and "who has not provided over one-half of such individual's own support for the calendar year in which the taxable year of the taxpayer begins"). Under the Working Families Tax Relief Act, the "support test" for claiming a dependency exemption is no longer applicable with respect to a "qualifying child" of the taxpayer; however, the child may not provide more than one-half of his own support. § 201, 118 Stat. at 1170. A "qualifying child" must be shown to have had the

In addition, the IRS would continue to receive a Form W-2 from anyone employing the taxpayer as an employee, a Form 1099-MISC from any business paying fees to the taxpayer as an independent contractor, and a Form 1099-R from any payor of pension distributions to the taxpayer.

Under the flat tax, as with the income tax, filing a tax return would not necessarily mark the end of information-gathering by the IRS.¹⁹ As under current law, the IRS could be expected to demand substantiation for some taxpayers' claims of favorable filing status and of dependency exemptions,²⁰ particularly when two taxpayers take conflicting positions.²¹ The audit of a business return would be similar to the audit of a taxpayer's Schedule C under current law. The IRS would seek to determine whether

same principal place of abode as the taxpayer for more than one-half of the taxable year. *Id.* The legislation does not eliminate the requirement, for claiming head of household status, that the taxpayer pay more than half of the cost of maintaining as a home the household that is the principal place of abode of the taxpayer and child for the current year. Working Families Tax Relief Act § 202, 118 Stat. at 1175.

19. Congress has given the IRS explicit authority to examine any books or records which may be relevant to determining an individual's tax liability, to issue a summons to the taxpayer or other persons to produce such books or records, or to give testimony under oath which is relevant to such a determination. I.R.C. § 7602 (2005). Federal district courts are authorized to compel compliance with such summons and to use the contempt power toward this end. I.R.C. § 7604 (2005); *see also* United States v. Powell, 279 U.S. 48, 57-58 (1964) (holding that the IRS Commissioner "need not meet any standard of probable cause to obtain enforcement of his summons [and that h]e must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not within the Commissioner's possession, and that the administrative steps required by the Code have been followed"). *See generally* Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 31-32 (2004) (noting that the IRS "gathers the information it needs to determine taxes voluntarily from taxpayers and third parties through the return system, through various information-sharing agreements with federal and state agencies, through access to the vast public database of courthouse records and through informal requests"). In most cases, the IRS simply requests—and usually receives—the information it needs. *Id.* When a taxpayer or a third party refuses to provide information to the IRS, it may issue a summons. *Id.*; *see also* Mazza, *supra* note 4, at 1099 (explaining the IRS summons enforcement procedure). In some cases, the IRS may elect to make an estimated assessment based on available information, ultimately forcing the recalcitrant taxpayer to turn over the information to the Tax Court so as to avoid an adverse decision. Camp, *supra*, at 32 n.147 (citing William L. Raby, *TCMP, Economic Reality, and IRS Summons Power*, 95 TAX NOTES TODAY 140-97 (July 19, 1995) (on file with the American University Law Review)).

20. *See* William G. Gale & Janet Holtzblatt, *The Role of Administrative Issues in Tax Reform: Simplicity, Compliance and Administration*, in UNITED STATES TAX REFORM IN THE 21ST CENTURY 179, 206-07 (George R. Zodrow & Peter Mieskowski eds., 2002) (noting that determination of the number of a taxpayer's qualified dependents would be just as difficult under the flat tax as under the income tax).

21. To establish that a child had the same principal abode as the taxpayer for more than half of the taxable year, the taxpayer probably would have to produce the type of proof currently called for under Form 8836 (relating to the earned income tax credit). For example, that proof might consist of a third party affidavit from a clergyman or of records or a signed letter on letterhead from a child-care provider, a social service agency, doctor, parole officer, or landlord. *See* I.R.S. Form 8836 and accompanying instructions (2004), available at <http://www.irs.gov/pub/irspdf/f8836.pdf>.

business receipts were reported in full, whether expenses were substantiated, and whether payments of personal expenses were disguised as business inputs; the IRS would also examine payments of wages to owners and family members.²²

Additionally, if the IRS suspects the existence of significant amounts of unreported wage income on a personal return or of business income on a business return,²³ it might well seek to develop a detailed and comprehensive picture of a taxpayer's financial transactions, including consumption expenditures and investments.²⁴ Thus, as under current law,

22. See Chirelstein, *supra* note 9, at 155 (stating that "borderline business expense issues" such as whether a car is used for business or personal purposes, whether certain travel expenses are for business or personal purposes, or whether an "alleged home office is in fact an 'office' . . . would be no less contestable under the Flat Tax"); see also Lester B. Snyder & Marianne Gallegos, *Redefining the Role of the Federal Income Tax: Taking the Tax Law "Private" Through the Flat Tax and Other Consumption Taxes*, 13 AM. J. TAX POL'Y 1, 72 n.278 (1996) (noting that "restrictions on home office and travel costs, which attempt to filter out the personal from the business side of the self-employed person's expenses, would not appear to be any less complicated under the consumption tax proposals"); Weisbach, *supra* note 9, at 645-49 (suggesting the need for a "small business" exemption under a flat tax). Drawing on examples from Feld, *supra* note 9, Weisbach notes that there would be "significant valuation problems" when assets (such as a room in a personal residence) were contributed to or withdrawn from a business, and "allocation of personal consumption and business would be difficult." *Id.* He argues that the latter problem would be more acute under the flat tax than under the current tax because "there is a sharper distinction between businesses and individuals under the Flat Tax." *Id.*; see also Gale, *Tax Simplification*, *supra* note 9, at 1478 ("Some areas of the existing tax code are also common to the flat tax and would prove just as difficult as ever. These include rules regarding independent contractors versus employees, qualified dependents, tax withholding for household help, home office deductions, taxation of the self-employed."). Gale notes that "the treatment of travel and food expenses might also cause problems" because businesses would not be allowed to deduct them if they constitute a fringe benefit. *Id.* In addition, "[c]onversion of business property to individual use ought to generate taxable income for the business, but would be hard to monitor." *Id.* at 1479.

23. See ALTERNATIVE TAXES, *supra* note 9, at 170 (noting that under the flat tax "[i]ssues of noncompliance, such as with sole proprietors/independent contractors, now troublesome to the IRS, would not likely change much with a flat tax, and there is nothing apparent in this tax system that would solve the current problems with underreported or unreported income, particularly of small businesses"). In addition, "[a]n underground economy would seem to be able to operate in much the same way with a flat tax as with the current system, because no obvious deterrent would seem to be available to prevent both legal and illegal transactions from occurring outside the tax system." *Id.*

24. See ROBERT E. MELDMAN & RICHARD J. SIDEMAN, FEDERAL TAXATION PRACTICE AND PROCEDURE § 19 (2001) (explaining indirect methods of proving income such as the Cash T-Account Method, Net Worth Method, and Source and Application of Funds Method); see also GEN. ACCOUNTING OFFICE, TAX ADMINISTRATION: MORE CRITERIA NEEDED ON IRS' USE OF FINANCIAL STATUS AUDIT TECHNIQUES (1997) (reviewing IRS practices in connection with so-called "financial status" audits, which are used to search for unreported income). The General Accounting Office estimated that during 1995 and 1996, twenty-two percent of a total of 421,000 audits used a "financial audit status" technique. *Id.* at 4. However, the technique was used in only seven percent of audits involving returns with no business or farm income. *Id.* at 9. See generally Douglas Frazer, *Lifestyle Audit Aims to Uncover Tax Cheating*, MILWAUKEE J. SENTINEL, Aug. 12, 1996, at 6 (stating that taxpayers view financial status audits as government interference and it is clear that the audits blur "the distinction between civil audits and criminal investigations"). Under the IRS Restructuring and Reform Act of 1998, use of "financial status or economic reality

the IRS might obtain a taxpayer's bank or credit card records by way of a third-party summons if the taxpayer did not provide them voluntarily.²⁵

Finally, under the flat tax as under the current tax, the IRS would continue to have the task of collecting taxes not collected by withholding or paid with the return.²⁶ Tax collection with respect to the business return would be as difficult as under current law. Collection problems with respect to the personal return would be less likely than under the Form 1040,²⁷ but would continue to be significant.²⁸ If collection action is necessary, the IRS would seek extensive financial information about the taxpayer to determine how much could realistically be paid under an

examination techniques to determine the existence of unreported income of any taxpayer" is permitted only if "the Secretary has a reasonable indication that there is a likelihood of such unreported income." Pub. L. No. 105-206, §§ 3412, 3417(a), 112 Stat. 685, 751 (codified as amended at I.R.C. § 7602(e) (West 2002)). Camp explains that "the open-ended nature of these audits created significant opposition among tax practitioners, taxpayers and politicians." Camp, *supra* note 19, at 23 n.94, citing Barbara Whitaker, *When the I.R.S. Agent Peeks Under the Mattress*, N.Y. TIMES, July 28, 1996, at F8; Stephen Moore, *Remarks of CATO Institute at IRS Restructuring Meeting*, 97 TAX NOTES TODAY 75-39 ¶ 14 (Apr. 18, 1997) (on file with the American University Law Review).

25. I.R.C. § 7609 (2005). This section of the Code imposes special procedures, including notice, for a third-party summons. *Id.*; see also Camp, *supra* note 19, at 64-72 (considering the scope of the IRS's authority, specifically with regard to obtaining records from a taxpayer's employer); Mazza, *supra* note 4, at 1100-01 (noting that "the IRS's expansive authority to obtain taxpayer information also extends to facts and records held by third parties, including the taxpayer's employer, bank, customers, and business associates"). In *United States v. Miller*, the U.S. Supreme Court held that a bank depositor "takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government," and that the obtaining of those records by the U.S. Attorney's office by means of a grand jury subpoena was not an "intrusion upon the depositors' Fourth Amendment rights." 425 U.S. 435, 443-44 (1976). In response to that decision, Congress enacted the Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3697 (codified as amended at 12 U.S.C. §§ 3401-3422 (West 2002)). See generally Matthew N. Kleiman, Comment, *The Right to Financial Privacy Versus Computerized Law Enforcement: A New Fight in an Old Battle*, 86 NW. U. L. REV. 1169, 1187-90 (1992) (discussing *Miller* and Congress's response to concerns about personal privacy violations by the IRS). However, the Tenth Circuit has concluded that "there is no basis for saying that [the Financial Privacy Act of 1978] overrides the summons authority contained in the I.R.C." *United States v. MacKay*, 608 F.2d 830, 834 (10th Cir. 1979).

26. See MELDMAN & SIDEMAN, *supra* note 24, § 14 (discussing the collection process); see also Mazza, *supra* note 4, at 1127-35 (proposing that the IRS be permitted to publicize delinquent tax accounts); Amy Hamilton, *IRS Considers Privatizing Tax Collection, and a Lot More*, 98 TAX NOTES 652 (2003) (considering proposals to privatize various administrative aspects of the IRS's collections procedures). See generally Christina N. Smith, Note, *The Limits of Privatization: Privacy in the Context of Tax Collection*, 47 CASE W. RES. L. REV. 627 (1997) (arguing against tax collection privatization proposals in the interest of protecting personal privacy interests).

27. See ALTERNATIVE TAXES, *supra* note 9, at 171 (suggesting that with the elimination of "information reports of earnings from savings and investments" and of audit issues relating to "capital gains and itemized deductions," there would be a decline in "matches with taxpayer data and related audit issues and findings," which would in turn "affect the need for collection follow-up with individuals").

28. An individual taxpayer may elect not to have withholding with respect to pension distributions. In addition, withholding with respect to wages is not always adequate, and taxes might be higher than expected if the individual's filing status or dependency exemptions are challenged.

installment plan, whether it would be worthwhile to accept reduced payment pursuant to an offer in compromise, what flows of income (such as wages or pensions) could be garnished, and what assets could be seized, if no agreement is reached with the taxpayer.²⁹

B. *What Would Change*

Under the Hall-Rabushka proposal, expenditures made by individuals, except pursuant to a business, would no longer yield deductions and credits.³⁰ Therefore, taxpayers would no longer be required to reveal on their returns (and the IRS would not need to confirm) the amounts of various expenditures that currently form the basis for such deductions and credits, such as alimony, fees for child care, IRA contributions, higher-education tuition, moving expenses, charitable contributions, state and local taxes, medical or dental expenses, interest expenses, or job-related or investment-related expenses.

Information regarding these expenditures is often considered to be particularly sensitive. For example, contributions to religious groups and other charities may reveal a great deal about one's personal beliefs and associations. Payments for medical expenses relate to a very sensitive aspect of our lives, our physical and mental health, and have important implications for our personal relationships, employment, and sense of well-being. Nevertheless, flat tax advocates have not focused on these items in making the argument that the flat tax would enhance our privacy. A reason may be that, under the income tax, one arguably has a choice about whether to claim these deductions on one's return. More importantly, it is by no means certain that the deduction for charitable contributions (or other itemized deductions) would in fact be eliminated if a flat tax is enacted.³¹

29. See generally MELDMAN & SIDEMAN, *supra* note 24, § 14.

30. See HALL & RABUSHKA, *supra* note 9, at 58-59 (proposing a flat tax in which charitable deductions and mortgage interest deductions as well as dividend taxes, capital gains taxes, and interest taxes would be eliminated).

31. See, e.g., Flat Tax Act of 2003, S. 907, 108th Cong. § 2 (2003) (retaining limited deductions for home mortgage interest and charitable contributions, allowing a deduction for interest incurred with respect to acquisition indebtedness of up to \$100,000 and a deduction of up to \$2,500 for charitable contributions made in cash); Tax Simplification Act of 2003, S. 1040, 108th Cong. (2003) (not permitting these deductions); see also Exec. Order No. 13369, 70 Fed. Reg. 2323 (Jan. 7, 2005) (appointing a tax reform advisory panel and specifying that the panel's recommendations should "recogniz[e] the importance of homeownership and charity in American society"); Chirelstein, *supra* note 9, at 154 (questioning whether those taxpayers who currently itemize would "really welcome" elimination of itemized deductions under the flat tax "in exchange for [the promised] lowered tax rate"); Gale & Hassett, *supra* note 9, ¶ 30 (arguing that if the flat tax is adopted, "there will be pressure to retain each of several major deductions and possibly many minor ones as well. The key ones include: the tax exclusion for employer-financed health insurance; the earned income credit; the deduction for charitable contributions, tax preferences for housing, especially, the deductibility of mortgage interest and property taxes; and deductions for state and local income taxes."); Kurtz, *supra* note 9, at 166 (stating

Finally, these and other personal deductions could just as easily be eliminated by reforming the current income tax system, without adopting the flat tax.³²

Instead, flat tax advocates direct attention to the fact that the flat tax would eliminate the need for reporting³³ investment income,³⁴ primarily interest, dividends, and capital gains.³⁵ By contrast, under the income tax, these items are annually reported by the taxpayer on Form 1040³⁶ and by payers on Form 1099.³⁷

that “I am convinced that most of the personal deductions and exclusions would reappear as part of the Flat Tax If there exists the fortitude in our lawmakers to resist these pleadings for relief under the Flat Tax, that same fortitude should support a serious effort to simplify our current income tax by eliminating many or most personal deductions”).

32. See Chirelstein, *supra* note 9, at 154-55 (contending that “there is nothing inherent in our present income tax that requires us to retain [the itemized] deductions even now. The fact is that we *choose* to retain them despite the record-keeping burdens they entail just because we consider that the activities they support—home-ownership, for example—are deserving and desirable and merit a subsidy via the tax system . . . [Without adopting the flat tax,] we could make the standard deduction universal under the income tax and consign the personal expense deductions to the ash heap of history.”); see also McClure, *supra* note 9, at 286-87 (arguing that the simplification benefits offered by the flat tax are “not unique to the flat tax”).

33. See Robert P. Strauss, *Administrative and Revenue Implications of Alternative Federal Consumption Taxes for the State and Local Sector*, 14 AM. J. TAX POL’Y 361, 419-23 (1997) (discussing the impact of this change on state and local tax administration).

34. The flat tax would also eliminate the need for reporting of certain other miscellaneous items of income (not earned in a business) that are reported under the income tax. These include cancellation of indebtedness income, lottery and gambling winnings, receipts from a hobby, income from treasure trove, alimony, Social Security benefits, prizes (that are not employment-related), certain illegal receipts, such as amounts embezzled, and damages from a lawsuit (which are reportable under the income tax when they are punitive or are not from a personal physical injury).

35. See Mitchell, *supra* note 5, at 10. Other investment income not taxable under the flat tax might include rent from investment real estate and royalties not received as part of a business.

36. See DEP’T OF THE TREASURY, YOUR FEDERAL INCOME TAX: PUBLICATION 17, 66, 71 (2004) (indicating that under the income tax, receipts of interest must be shown on Schedule B to Form 1040, when taxable interest exceeds \$1500, and taxable dividends of more than \$1500 must be shown on Schedule B), available at <http://www.irs.gov/publications/p17/index.html>. Schedule B also requires an individual taxpayer to reveal any authority over any foreign bank or securities account. DEP’T OF THE TREASURY, 2004 INSTRUCTIONS FOR SCHEDULES A AND B (FORM 1040), at B-2. Capital gains are shown on Schedule D. Publication 17, at 116.

37. See I.R.C. § 6042 (West 2002) (providing information on reporting requirements for dividends); I.R.C. § 6045 (West 2002) (brokers); I.R.C. § 6049 (2005) (interest); see also JOEL SLEMROD & JON BAKIJA, TAXING OURSELVES: A CITIZEN’S GUIDE TO THE GREAT DEBATE OVER TAX REFORM 160-61 (2d ed. 2000) (noting that “[f]or types of income subject to information reporting, and especially for those with tax withholding at the source of payment, evasion is much less prevalent”); Gale & Holtzblatt, *supra* note 20, at 192-93 (discussing misreported income on individual tax returns); Camp, *supra* note 19, at 9-10 (explaining that the IRS “uses information returns to monitor and enforce the duty to report all income and has become increasingly sophisticated in doing so. In 2001, for example, it was able to verify about eighty percent of reported income through matching.”).

III. HOW IMPORTANT ARE THE CHANGES IN TERMS OF PRIVACY?

Privacy has been defined as “a limitation of others’ access to an individual.”³⁸ Conversely, we see that a “loss of privacy” involves *obtaining* access to an individual.³⁹ Under the income tax, the IRS needs to obtain routine access to information about an individual’s investment income; under the flat tax it generally⁴⁰ does not.

Lack of privacy has been linked to a wide variety of harms, including improper interference with one’s property, actions, political associations, or safety; unwarranted harm to one’s reputation; excessive pressure to conform to social norms that stifles one’s creativity and autonomy; loss of one’s dignity; and the inability to relax or concentrate.⁴¹ On the other hand, too much privacy may interfere with appropriate accountability to others, so one cannot simply conclude that more privacy is better than less privacy.⁴² Therefore, it is necessary to look at the particular context⁴³—the IRS obtaining information about a taxpayer’s investments under the income tax—and to evaluate the particular harms that this activity may entail.

38. Ruth Gavison, *Privacy and the Limits of the Law*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 346, 351 (Ferdinand David Schoeman ed., 1984).

39. *See id.* at 350-51 (noting that “[a] loss of privacy occurs as others obtain information about an individual, pay attention to him or gain access to him These three elements of secrecy, anonymity, and solitude are distinct and independent, but interrelated”).

40. As noted above, the IRS may require access to information about investments, when using an indirect method to determine the amount of any unreported income; it would also need access when it must pursue collection.

41. *See* Gavison, *supra* note 38, at 363 (explaining that privacy “severs the individual’s conduct from knowledge of that conduct by others,” and thus “prevents interference, pressures to conform, ridicule, punishment, unfavorable decisions, and other forms of hostile reaction”). This may have the desirable effects of promoting “learning, creativity, and autonomy,” contributing to “mental health,” and “enhanc[ing] the capacity of individuals to create and maintain human relations of different intensities.” *Id.* at 364-65. Privacy also protects us from types of “exposure” that threaten “an individual’s dignity.” *Id.* at 369. Freedom from “physical access” allows us to concentrate, relax, or maintain intimate relations. *Id.* at 363. Gavison points out that privacy by contributing to “moral autonomy” and allowing “liberty of political action” is essential to the functioning of a democratic society. *Id.* at 369-70.

42. *See, e.g., id.* at 366 (recognizing that privacy is not always beneficial for society when it “permit[s] individuals to escape responsibility for their actions”). Gavison suggests that “privacy will only be desirable when the liberty of action that it promotes is itself desirable, or at least permissible.” *Id.* at 366; *see also* Anita L. Allen, *Privacy-as-Data Control: Conceptual, Practical, and Moral Limits of the Paradigm*, 32 *CONN. L. REV.* 861, 872 (2000) (arguing that many public benefits require “moral accountability in the form of personal financial disclosures”).

43. Helen Nissenbaum argues that
[W]hether a particular action is determined a violation of privacy is a function of several different variables, including the nature of the situation, or context; the nature of the information in relation to that context; the roles of agents receiving information; their relationships to information subjects; on what terms the information is shared by the subject; and the terms of further dissemination.
Helen Nissenbaum, *Technology, Values and the Justice System: Privacy as Contextual Integrity*, 79 *WASH. L. REV.* 119, 155 (2004).

A. *How Is the Information Obtained?*

Some of the harms associated with an individual's loss of privacy result from the *manner* in which others obtain access to the individual, as compared to the fact of others *having or misusing information* about the individual, however obtained.⁴⁴

The two complementary means by which the IRS generally obtains access to information about a taxpayer's investment income are by the individual reporting the information on a Form 1040, or by a payer or broker reporting the information to the IRS on a Form 1099. These twin reporting systems are mandatory, and thus deny a taxpayer the opportunity to keep the information secret from the government. But these systems are much less intrusive than if the IRS conducted a search of a taxpayer's home or eavesdropped on his conversations to obtain the information.

As a result, even though the reporting of information to the IRS constitutes a loss of privacy,⁴⁵ it is not the type of loss that is subject to regulation by the Fourth Amendment of the Constitution.⁴⁶ Professor

44. See Bernard W. Bell, *Prosecuting White-Collar Crime, Theatrical Investigation: White Collar Crime, Undercover Operations & Privacy*, 11 WM. & MARY BILL RTS. J. 151, 151 (2002) (examining the privacy implications of "[t]hose who seek to ferret out white-collar wrongdoing" by use of "assumed identities or confidential informants"); see also Bernard W. Bell, *Wiretapping's Fruits, the First Amendment, and the Paradigms of Privacy* 22 (Mar. 4, 2004) [hereinafter Bell, *Wiretapping's Fruits*] (unpublished manuscript, on file with the American University Law Review) (explaining that "[s]ometimes we seek to protect privacy by forbidding particular means of intrusion that are especially destructive of privacy"), available at <http://law.bepress.com/rutgersnewarklwps/fp/art1>.

45. Stuntz explains that the failure of the courts to use the Fourth Amendment to invalidate IRS reporting requirements is not due to a lack of sensitivity of the information reported. Stuntz, *supra* note 2, at 1032. He gives the example of the requirement on the Form 1040 that an individual claiming a charitable deduction for property with a value exceeding \$500 must provide the name of the charity recipient on the return. *Id.* at 1032-33. He notes that "[t]his information is undoubtedly private in any ordinary sense of the word, and it more than exceeds the Fourth Amendment privacy threshold. The objects of my charity are much more sensitive than the usual contents of my glove compartment, and the latter are protected against unreasonable searches." *Id.* at 1033.

46. See *id.* at 1034 (explaining that "[j]udges are not about to start invalidating commonplace items on tax forms on Fourth Amendment grounds. Nor should they. But explaining why not turns out to be hard, given that the system protects much weaker privacy interests against invasion by the police."). Stuntz argues that a number of possible explanations for this result are inadequate. First, he rejects the argument that government interests are stronger, or privacy interests are weaker, in the tax context than in the criminal context. *Id.* at 1033, 1035. He explains that if the Tax Code were subject to judicial review on Fourth Amendment grounds

[T]he government would typically have to defend not the tax code as a whole, but only the particular feature that caused the relevant privacy invasion. No court would need to choose between privacy protection and the tax code . . . for the relevant tax . . . rules could always be recast to require less disclosure.

Id. at 1035. Further, he argues that "[w]ith respect to the mass of car searches and street stop-and-frisks, the informational privacy interest at stake does not seem any weightier than the taxpayer's interest in keeping secret the objects of his charity." *Id.* at 1036. He considers the argument that privacy is less relevant in the regulatory than in the criminal context because the regulatory context usually involves regulation of the conduct of institutions, not individuals. *Id.* at 1036-38. But he notes that the argument is inadequate

Sherry Colb explains that the Fourth Amendment is not implicated by regulatory disclosure requirements because the Fourth Amendment is addressed not at the “right to keep information secret from the government,” but at the right to “privacy from . . . governmental ‘personal knowledge’ of the individual’s private life.”⁴⁷ By “personal knowledge” Colb means a person “directly perceiv[ing] a material event through the use of one or more of her five senses.”⁴⁸ Similarly, Professor Louis Michael Seidman has commented that: “Modern Fourth Amendment law focuses on what might be called the ‘collateral damage’ imposed by searches and seizures rather than on informational privacy [T]he focus is . . . on violence, disruption, and humiliation,” for example, in a search of a house.⁴⁹ Moreover, he notes: “It is one thing to fill out a form that requests information about even the most personal details of one’s life. It is quite another to discover after the fact that someone has been observing these

because it does not apply to the information-gathering on individual tax returns. *Id.* at 1038. Stuntz also considers the argument that information-gathering by the IRS could be viewed as less subject to “a kind of overbreadth problem” than a search of car or house. *Id.* at 1039. Thus, he notes “[w]hen the police search a car, they see anything that happens to be in the car, not just guns or drugs [But t]ax forms . . . ask only for the information the government needs under the tax laws, not for generalized financial disclosure.” *Id.* Yet, he explains that “in any across-the-board disclosure regime, most of the disclosure is about legitimate conduct. A great many law-abiding taxpayers must disclose a great deal about their finances in order to help catch a few frauds.” *Id.* at 1040. Stuntz also considers the argument that when the IRS asks for information substantiating a charitable deduction this can be distinguished from a search in the criminal context because “if he [the taxpayer] does not want to share the information, he does not have to claim the deduction.” *Id.* But he rejects this argument because “it requires that one treat the money as belonging to the government, which then bestows deductions as a matter of grace on whatever conditions it chooses.” *Id.*

47. Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness,”* 98 COLUM. L. REV. 1642, 1666 (1998).

48. *Id.* (explaining that “[u]nder the Fourth Amendment, the government’s obligation to respect individual privacy has generally amounted to a prohibition against such direct perception of individuals’ physical or mental states, activities, conversations, and other personal experiences that are manifestly hidden from observation, absent some justification that would qualify a proposed inspection as ‘reasonable’”).

49. Louis Michael Seidman, *Response: The Problems With Privacy’s Problem*, 93 MICH. L. REV. 1079, 1086-87 (1995). He continues:

Consider, first, the search of a house Obviously, police raids can be a terrifying experience for all involved, and the slightest miscalculation can result in serious injury or death Consider searches on the street A typical search requires the police to delay a suspect who is going about his business, force him to assume a vulnerable and uncomfortable position, embarrass him before others, and touch all parts of his body. Even if the search is less intrusive . . . the suspect may have no way of knowing these limits while the search is progressing Wiretaps, visual surveillance, searches of parked cars, and the like are not violent or invasive in this sense. Once again, however, it distorts analysis to analogize the damage that they do to the damage to informational privacy that occurs when an *individual fills out a tax form*. The key difference is that these police investigative techniques typically catch people unaware. Because they reveal things about people in circumstances in which they do not know that they are being spied upon, these techniques violate human dignity.

Id. at 1087-90 (emphasis added).

personal details firsthand with a telescope aimed at one's bedroom window."⁵⁰

Moreover, the Supreme Court has held that the Constitution does not protect a citizen from mandatory disclosure to the government, where the information is needed for a legitimate government purpose,⁵¹ and where the government has adopted adequate procedures to safeguard the information.⁵² In *Whalen v. Roe*,⁵³ the Court upheld the constitutionality of a New York statute requiring doctors to provide information about prescriptions written for certain dangerous drugs to the state health department.⁵⁴ The information, including the names of the patients, was to be recorded by the health department in a centralized computer file, but public disclosure was forbidden.⁵⁵ The Supreme Court pointed out that government regulation necessarily entails extensive collection of personal information:

The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if

50. *Id.* at 1090; see also Daniel Yeager, *Does Privacy Really Have a Problem in the Law of Criminal Procedure?*, 49 RUTGERS L. REV. 1283, 1309 (1997) (arguing that the "self-disclosure" required on tax returns or by subpoenas involves coercion that is "justifiable because both entail actions by, not just against, the suspect," that is, because of a "participatory element").

51. Mazza notes that "[i]f the information sought by the IRS would be incriminating, the taxpayer may exercise his Fifth Amendment rights, but the taxpayer must assert the claim on a document-by-document basis Moreover, the precise scope of the Fifth Amendment protection against disclosure of information to the IRS is unclear In any case, as a means of shielding information from the IRS, a claim of self-incrimination is of little use to the average taxpayer simply because the taxpayer has no grounds for asserting the privilege." Mazza, *supra* note 4, at 1100.

52. See Mazza, *supra* note 4, at 1101 (stating that "[n]either Congress nor the courts recognize a generalized right of privacy as a defense against submitting information relevant to the determination of the taxpayer's tax liability").

53. 429 U.S. 589 (1977).

54. *Id.* at 600 (concluding that the statute "does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation" in light of the statutory and administrative procedures designed to avoid unwarranted disclosures of the information).

55. *Id.* The patients and doctors argued that the statute "threatens to impair both their interest in the nondisclosure of private information and also their interest in making important decisions independently." *Id.* The Court found that the disclosures of the information to health department officials were not "meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care." *Id.* at 602. It noted that "public disclosure" would occur only if health department employees "fail[] to maintain proper security." *Id.* at 600. It had noted that "[p]ublic disclosure of the identity of the patients is expressly prohibited by statute." *Id.* at 594. See Bell, *Wiretapping's Fruits*, *supra* note 44, at 30 (noting that the Supreme Court in *Whalen* "focused on the means of intrusion, considering collection of information by itself less intrusive than collection and dissemination of information").

disclosed.⁵⁶

Further, the Court explained that only “unwarranted disclosure of accumulated private data—whether intentional or unintentional” or an absence of adequate “security provisions” would “arguably” raise a constitutional issue regarding the collection of data by the government.⁵⁷

To say that there is no constitutional issue raised by the mandatory reporting of information to the IRS on Form 1040 or 1099 (assuming adequate protection against public disclosure) is not to say that such reporting does not have important privacy implications or that Congress should not take these into account in crafting the income tax laws. However, it does suggest that one should carefully analyze the actual harms that may result from the reporting of investment income before concluding that abolishing such reporting would bring significant privacy benefits.

B. Who Obtains the Information and For What Purpose Is it Used?

Since 1976, the Code has provided that tax return information is “confidential” and is to be inspected or disclosed by IRS employees only in situations specifically authorized and under conditions designed to protect the information.⁵⁸ Nevertheless, Congress’s enactment of these requirements does not necessarily ensure⁵⁹ that they are fully enforced.⁶⁰

56. *Whalen*, 429 U.S. at 605.

57. *Id.* at 605-06. The Court said:

The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York’s statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual’s interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data—whether intentional or unintentional—or by a system that did not contain comparable security provisions.

Id.

58. See I.R.C. § 6103 (2005); see also 2000 JCT REPORT, *supra* note 3, at 21-58 (detailing this provision, its background, and subsequent amendments); Mazza, *supra* note 4, at 1086-96.

59. See Peter P. Swire, *Financial Privacy and the Theory of High-Tech Government Surveillance*, 77 WASH. U. L.Q. 461, 497 (1999) (stating that “a major potential problem of government access to financial data is that the information may flow to unauthorized third parties”). He notes that unauthorized persons can seek to obtain the information through a “‘friendly’ insider or a bribable one.” *Id.* He also warns of the danger posed by “skilled hackers,” and notes that the “Defense Department reports hundreds of thousands of successful intrusions into military computers per year” although he concedes that “many of the intrusions are undoubtedly done by teenagers and others who get access to part of the system but do not steal any sensitive data.” *Id.* He concludes that “[t]he possibility of intrusions, nonetheless, is a powerful argument against allowing unlimited government access to sensitive personal information of any kind, including detailed financial information.” *Id.*

60. See Mazza, *supra* note 4, at 1095 (noting that “the number of wrongful disclosure claims each year has been relatively few given the total number of disclosures the IRS makes on an annual basis”). He notes that, according to the Joint Committee on Taxation,

Therefore, in analyzing the harms that might be caused by mandatory reporting of investment income to the IRS, it is necessary to consider both authorized and unauthorized uses and disclosures of information.⁶¹

1. Authorized use by IRS employees to determine correct amount of tax liability and to collect tax

This Part will first consider whether the inspection of information about a taxpayer's investment income by a law-abiding IRS employee creates any potential for harm to the taxpayer. Under the current tax system, there may be very few employees who actually inspect this data in the vast majority of cases. Increasingly, 1099 and 1040⁶² forms are being transmitted via computer,⁶³ resulting in less information being viewed by human eyes. The computer may simply match the items of investment income reported on the Form 1040 with the items reported on Form 1099. Even if a discrepancy is found, it might not require human intervention for a notice to be mailed to the taxpayer. Only if the taxpayer responds with an explanation of the discrepancy (as compared to ignoring the notice, or paying the additional tax due) would an IRS employee actually view the information.

An IRS employee might also scrutinize the taxpayer's investment income as part of an audit, even if no discrepancy is found between a taxpayer's Form 1040 and Form 1099.⁶⁴ For example, an auditor might focus on whether the taxpayer properly computed his basis on the sale of an asset or whether he properly characterized his gain as capital gain. Alternatively, the auditor might pursue a broad inquiry into a taxpayer's financial affairs because of a suspected omission of business income. However, under the current system, the likelihood of any particular individual being audited is quite low.⁶⁵ Moreover, a broad audit of the

"between 1994 and 1999, the Government lost 24 unauthorized disclosure cases and won 97." *Id.* at 1095-96 n.144.

61. See Mazza, *supra* note 4, at 1098 (stating that "privacy is a multi-faceted concept, implicating proscriptions against intrusiveness (the extent to which the individual should be forced to divulge information), misuse (the extent to which protections against unauthorized use should exist), and unauthorized disclosure (the extent to which information should remain confidential)").

62. See Press Release, Internal Revenue Service, Enforcement Revenue Reaches Record in 2004: Prepared Remarks of IRS Commissioner Mark W. Everson (Nov. 18, 2004) (on file with the American University Law Review) (explaining that for the 2004 tax year, more than half of individual taxpayers are expected to file electronically).

63. See SLEMROD & BAKIJA, *supra* note 37, at 157 & n.50 (noting that "[e]ach year, the IRS receives one billion information reports, most of them on magnetic tape or transmitted electronically").

64. The GAO has estimated that for 1992 taxpayers reported on their returns 97.7% of their true net income from interest, 92.2% for dividends, and 92.8% for capital gains. SLEMROD & BAKIJA, *supra* note 37, at 154 tbl. 5.1.

65. See Dan Horn, *Tax Audits Aim More At Individuals IRS Ducking Complicated Corporate Cases, Critics Say*, CINCINNATI ENQUIRER, Apr. 1, 2004, at 1A (indicating that

financial affairs of a business person is at least as likely under the flat tax as under the income tax.⁶⁶

Another situation in which the IRS might scrutinize a taxpayer's investments assets is if the taxpayer fails to pay an assessed tax voluntarily and the IRS must find a source of payment. This situation would occur under the flat tax, as well as the income tax.⁶⁷

Assuming that an IRS employee does in fact scrutinize the taxpayer's investment income, is this harmful to the taxpayer? It is hard to imagine, unless the taxpayer is a celebrity, that an IRS employee assigned to the taxpayer's case⁶⁸ would take anything other than a professional interest in the matter, even if the amount of investment income is extremely high. The taxpayer should find assurance in the fact that the IRS employees with access to the information are strangers, anonymous bureaucrats in unfamiliar places, whom the taxpayers do not expect to see or deal with in any other role or context and who can be expected to have no particular interest⁶⁹ in knowing any of the details of the taxpayer's life (except to carry out the employee's duties).⁷⁰ In fact, IRS employees are specifically barred from examining a tax return "if a relationship impairs impartiality."⁷¹

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the individual audit rate is 0.65%).

66. See *supra* notes 23-24 and accompanying text (discussing problems that would not be solved even if flat tax were implemented).

67. See *supra* notes 26-29 and accompanying text (comparing the current collection process to the flat tax collection process).

68. See *infra* notes 122-125 and accompanying text (discussing "browsing" of a taxpayer's records by an IRS employee *not* assigned to the case).

69. See ALAN WESTIN, *PRIVACY AND FREEDOM* 31-32 (New York 1967) (describing "anonymity" as the "third state of privacy" after "solitude" and "intimacy"). The author explains that

[A]nonymity . . . occurs when the individual is in public places or performing public acts but still seeks, and finds, freedom from identification and surveillance. . . . he is among people and knows that he is being observed; but unless he is a well-known celebrity, he does not expect to be personally identified and held to the full rules of behavior and role that would operate if he were known to those observing him. . . . the individual can express himself freely [to a stranger] because he knows the stranger will not continue in his life and . . . is able to exert no authority or restraint over the individual.

Id.

70. See Stuntz, *supra* note 2, at 1041 (discussing the lack of necessity to consider privacy issues seriously in regulatory matters). The author notes:

One might plausibly say that telling the IRS who receives my charitable contributions does not really intrude on my privacy very much. After all, my friends and neighbors and co-workers do not know; the only people who have the information are a few government employees who have no contact with me, do not know or care who I am, and are under strict orders not to spread the information around.

Id.

71. The IRS's Internal Revenue Manual states that "[a] conflict of interest exists if an examiner's personal relationship(s) or private interest (usually of a financial or economic nature) conflict, or raise a reasonable question of conflict with the examiner's public duties and responsibilities." INTERNAL REVENUE SERVICE, INTERNAL REVENUE MANUAL

Most people can imagine that there might be some secrets about a taxpayer that are so sensitive that he would feel embarrassed, humiliated, or unhappy if any bureaucrat (however distant and anonymous) were to have access to them. A secret of this type might be the fact that the taxpayer's father was a serial killer or that he has a venereal disease or male breast cancer.⁷² However, no conceivable information about one's investment income seems to fit into this category. This may be because an investment, by its very nature, requires merely a passive involvement from the investor (as compared to one's more active involvement with a business activity or employment). Therefore, an investment does not relate directly to one's personal identity.⁷³

On the other hand, one may feel that the amount of one's personal wealth is an important part of one's identity.⁷⁴ Generally, only *lack of* wealth, not wealth, is viewed as humiliating or embarrassing.⁷⁵ Furthermore, it would seem very odd for Congress to eliminate taxation of investment income to protect the sensibilities of taxpayers who would otherwise have to reveal to the IRS their relative lack of wealth.

If the taxpayer is publicly known as a savvy investor (such as Peter Lynch, Louis Rukeyser, or Warren Buffet), the IRS official might take some interest in the particular investments held by the taxpayer. But, if the

4.10.2.2.3, ¶ 1 (May 14, 1999), available at <http://www.irs.gov/irm/part4/ch10s02.html#d0e132491>. Further, it states that “[p]ersonal relationships can include family members, friends, and associates.” *Id.* at ¶ 1A.

72. See, e.g., ANITA L. ALLEN, WHY PRIVACY ISN'T EVERYTHING: FEMINIST REFLECTIONS ON PERSONAL ACCOUNTABILITY 117 (2003) (discussing various reasons for seeking privacy regarding an individual's health status). Allen notes that, among other things, “[t]he discovery of health problems may cause anxiety and emotion. Unfortunately, for some, illness leads to shame, embarrassment, and defeat that lower self-esteem and increase feelings of vulnerability. Hoping to manage common forms of psychological distress brought on by health concerns, a person may choose secrecy.” *Id.* at 118. She also notes that “encounters with health providers require . . . [that] informational and physical privacy must be sacrificed.” *Id.* at 126. She notes that “[d]octors are not robots, but human beings with religious perspectives and social agendas that can openly clash with those of their patients.” *Id.* She concludes that “the confidentiality promise and professional manner of health care providers make the sacrifice tolerable, but without completely eliminating all of the vulnerability and low self-esteem many patients feel.” *Id.* at 127.

73. See Linder, *supra* note 4, at 973-74 (stating that “[i]f the ethical, cognitive, and moral developmental underpinnings of personhood are made the focus of a right to privacy, then it becomes very difficult to apply a protective shield to such mundane material matters as income”).

74. See *id.* at 971 (stating that “in the United States a person's income level plays a crucial part in determining ‘worth,’ that is, others' estimation of her economic, social, and moral value as a human being, and in turn shapes her self-worth and self-image”). The author explains that his article “challenges the underlying reality and desirability of this set of interlocking assumptions.” *Id.*

75. See *id.* at 971 n.131 (citing *The Internal Revenue Law—Telling Other People's Secrets*, N.Y. TIMES, Dec. 29, 1864, § 1, at 4). During the Civil War, income tax returns were subject to public inspection, and Marc Linder recounts that a *New York Times* editorial stated that “many people with small incomes made no tax return in order to avoid ‘sneers.’” *Id.*

taxpayer is famous in any other way (e.g., as a movie star), there likely would be little interest in the details of that taxpayer's investments, although there might be some titillation value in the amount of investment income (as an indication of wealth).⁷⁶ Assuming (for the time being) that the IRS employee is conscientiously carrying out his responsibilities and not using the information for any other purpose or disclosing it to others, it is hard to see a serious harm, even to the celebrity taxpayer. Moreover, it is not at all clear that the tax law should be crafted with particular concern for the financial privacy of celebrities.

In conclusion, unless a taxpayer is seeking to avoid tax liability with respect to investment income, the mere fact that IRS employees may be reviewing information about the taxpayer's investment income as shown on a 1040 or 1099 form does not in itself represent a serious harm.⁷⁷

2. *Unauthorized uses by IRS employees or others*

It is, of course, possible that IRS employees will inspect or disclose data without proper authorization, either because they are corrupt or negligent, or because the IRS culture does not put sufficient emphasis on confidentiality.⁷⁸ Breaches of confidentiality may also occur when information is in the hands of persons outside of the IRS to whom disclosure was authorized.⁷⁹ Furthermore, it is conceivable that persons not employed by the IRS will gain unauthorized access to IRS data due to

76. One would expect that the IRS employee would be more interested in the celebrity's family situation (e.g., whether one spouse was disclaiming knowledge of underreporting by the other spouse or how many months an ex-spouse lived in the house).

77. In a number of cases addressing the constitutionality of mandatory financial disclosure for public officials, the courts have stressed the much greater intrusion of public disclosure as opposed to disclosure merely to government officials. *See, e.g., Barry v. City of N.Y.*, 712 F.2d 1554, 1565 (2d Cir. 1983) (upholding a law requiring that various city officials file annual information reports with the City Clerk and providing for public inspection). The court noted that "the degree of intrusion stemming from public exposure of the details of a person's life is exponentially greater than exposure to government officials." *Id.* at 1561 (quoting *Slevin v. City of N.Y.*, 551 F. Supp. 917, 934 (D.C.N.Y. 1982)).

78. *See Mazza, supra* note 4, at 1102 (noting that "[w]ith so much taxpayer information at the IRS's disposal, individualized cases of misuse and inadvertent leakage of tax return information outside the agency seem inevitable").

79. *See* Memorandum from Gordon C. Milbourn, III, Acting Deputy Inspector General for Audit, Dep't. of Treasury, to Internal Revenue Service (Dec. 19, 2002), *in* DEP'T. OF TREASURY, IMPROVEMENTS ARE NEEDED TO PREVENT THE POTENTIAL DISCLOSURE OF CONFIDENTIAL TAXPAYER INFORMATION (2002) [hereinafter IMPROVEMENTS ARE NEEDED] (concluding that "the IRS . . . has established procedures to help ensure third parties, such as government agencies and private contractors, [receiving tax information from the IRS] safeguard taxpayer information," and "the IRS conducts on-site safeguard reviews of the agencies receiving taxpayer information every 3 years, as required"). Milbourn notes that "a review of the IRS' disclosure procedures and a judgmental sample of IRS agreements with federal and state agencies and private contractors . . . indicated that the IRS needs to make improvements to its safeguard processes and procedures." *Id.* at 10. One of the specific conclusions of the report was that "[t]he IRS does not have adequate staffing to effectively implement all the safeguard procedures required by I.R.C. section 6103" in that "[t]he IRS' Headquarters Safeguard Office has a staff of 8 employees." *Id.*

inadequate security of the IRS offices or computers.

What are the potential consequences of these unauthorized acts for taxpayers and what is the likelihood of these consequences occurring?⁸⁰

a. Use to perpetrate theft of assets, credit, or investment strategy

Theft of one's property is obviously a serious harm from which individuals universally desire protection. Therefore, it is important to consider whether information obtained by the IRS about a taxpayer's investments creates significant opportunities for theft.⁸¹ Under the current income tax, the IRS has information about each of the taxpayer's financial or securities accounts, as well as the account numbers. This information, though, is not sufficient to permit a criminal to withdraw funds from an account. The criminal would also need the taxpayer's passwords, which the IRS would not possess. Thus, even assuming that IRS data falls into the hands of a corrupt employee, or a criminal hacking into its computer system, a taxpayer's accounts should be safe.

On the other hand, information about a taxpayer's financial accounts, even without the passwords, might be valuable to a creditor who is unable to track down a taxpayer's assets. With this information, the creditor could use legal proceedings to seize the assets. Therefore, it is possible that a corrupt IRS employee or a computer hacker could seek to profit by selling this information to creditors. The likelihood of this actually occurring is slim, though, because (1) assets hidden from creditors are often hidden from the IRS and (2) the assets might be held in such a form (e.g., in an asset protection trust) that creditors would not be able to use the legal system to seize them. If a creditor was actually able to utilize the information collected by the IRS to obtain payment of debt, the only harm would be that the IRS had not lived up to its obligation to protect the

80. It is dangerous to use anecdotal evidence for this purpose. See Leandra Lederman, *Of Taxpayer Rights, Wrongs, and a Proposed Remedy*, 87 TAX NOTES 1133, 1133, 1136 (2000) (noting that "[t]wo of the existing taxpayer bills of rights were prompted by anecdotal evidence of Internal Revenue Service 'horror stories,'" and urging "caution" with respect to "wholesale acceptance of taxpayer horror stories"). Lederman notes that many elements of a story told about an IRS raid by John Colaprete at Senate hearings were later corrected. *Id.* at 1136. Lederman explains that a 1999 report of the General Accounting Office "failed to substantiate various allegations of taxpayer abuse and IRS employee misconduct." *Id.*

81. See SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 24 (1989) (explaining that "secrecy is invoked to protect what one owns. We take for granted the legitimacy of hiding silver from burglars and personal documents from snoopers and busybodies . . . [H]ad we no belongings whatsoever, our identity and our capacity to plan would be threatened"); see also Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 400-01 (1978) (explaining that people "conceal an unexpectedly high income in order (1) to avoid the attention of tax collectors, kidnappers, and thieves, (2) to fend off solicitations from charities and family members, and (3) to preserve a reputation for generosity that might be demolished if others knew the precise fraction of their income that they give away").

confidentiality of tax return information;⁸² the fact that the taxpayer was required to repay a debt that he was already obligated to pay is not in itself harmful from the societal perspective.

Collection of investment information by the IRS under the income tax does not increase the likelihood of identity theft. Identity theft occurs when a criminal steals information that an individual uses as identification for financial purposes (e.g., his name, address, Social Security number, mother's maiden name), and uses it to obtain credit in the individual's name.⁸³ The same type of identifying information used by the IRS under the income tax (name, address and Social Security number) would also be used by the IRS under the flat tax. Therefore, there is no greater protection from identity theft under the flat tax. Moreover, there is no reason to believe that under the current tax system, the IRS has been an important source of that information for those perpetrating identity theft.⁸⁴

82. This might have implications for a taxpayer's willingness to voluntarily provide information to the IRS. See 2000 JCT REPORT, *supra* note 3, at 5 (stating that the policy of confidentiality in section 6103 "is based on persons' right to privacy, as well as the view that voluntary compliance will be increased if taxpayers know that the information they provide to the government will not become public"); see also *id.* at 128 (stating that "[p]rivacy advocates argue that a taxpayer is more willing to comply with the tax laws if he or she knows the information will be treated as confidential"). *But cf.* Mazza, *supra* note 4, at 1070-73 (arguing that there is little direct evidence linking confidentiality and compliance).

83. See Lynn M. LoPucki, *Human Identification Theory and the Identity Theft Problem*, 80 TEX. L. REV. 89 (2001) (discussing identity theft); see also 2000 JCT REPORT, *supra* note 3, at 128 (stating that if tax return information "were publicly available . . . [t]he available information, which could include names, addresses, social security numbers and financial holdings, could be used to establish credit fraudulently and run up debts in the taxpayer's name") (citing GREGORY D. KUTZ, GENERAL ACCOUNTING OFFICE, INTERNAL REVENUE SERVICE: RESULTS OF FISCAL YEAR 1998 FINANCIAL STATEMENT AUDIT 8, 11 (1999); Press Release, Internal Revenue Service, *IRS Updates the 'Dirty Dozen' for 2003: Agency Warns of 12 Common Scams* (Feb. 19, 2003) (on file with the American University Law Review) (warning taxpayers that tax return preparers may use information such as Social Security numbers and financial information to commit identity theft)).

84. See, e.g., SYNOVATE, FEDERAL TRADE COMMISSION—IDENTITY THEFT SURVEY REPORT (Sept. 2003) (not mentioning IRS in particular as a source of personal information for identity thieves), available at http://www.ftc.gov/os/2003/09/synova_tereport.pdf. This survey found that thirty-four percent of those victims whose personal information had been misused to open new credit accounts or take out new loans were aware of the thief's identity; fifty-two percent of those who knew the thief's identity identified a family member or relative as the perpetrator, while thirteen percent identified the perpetrator as an employee or a company or financial institution that had access to the victim's personal information. *Id.*; see also *Identity Theft: How It Happens, Its Impact on Victims, and Legislative Solutions: Hearing Before the Subcomm. On Technology, Terrorism, and Government Information of the Senate Comm. on the Judiciary*, 106th Cong. (2000) (written testimony of Beth Givens, Director, Privacy Rights Clearinghouse) (discussing various "methods used by identity thieves to obtain identifying information about their victims" but not mentioning leakage from IRS files), available at http://www.privacyrights.org/ar/id_theft.htm. Recently a guilty plea was obtained in one of the most alarming cases of identity theft in U.S. history in terms of the number of victims (approximately 30,000), and the extent of their losses, which exceeded \$50 million. Julia Preston, *Man Admits Role in Ring That Stole Credit Identities*, N.Y. TIMES, Sept. 15, 2004, at B7. The person pleading guilty had been employed by Teledata Communications, which

Information held by the IRS about a taxpayer's investments may be considered valuable when it reveals the taxpayer's investment insights and strategies. A corrupt IRS employee or computer hacker might somehow seek to take advantage of this information in making personal investments,⁸⁵ but this does not seem to be a serious concern. Much of this information is already freely available as the SEC requires disclosure by investors buying more than five percent of a company.⁸⁶ More importantly, the wisdom of using this type of information is highly questionable, as illustrated by a recent case where many small investors lost large amounts after buying a stock that had been known to be purchased by Peter Lynch.⁸⁷

b. Use for targeting the wealthy

Under the current system, the IRS has access to more information about the wealth of each taxpayer than under a flat tax.⁸⁸ If the fact that a taxpayer is particularly wealthy falls into the hands of criminals (either through a corrupt IRS employee or other leakage of the information), this might result in the individual becoming a target for certain crimes. For example, criminals could use the information to target wealthy individuals for kidnapping⁸⁹ with a view towards collecting ransom.⁹⁰ However, while

provides services to connect businesses to large credit bureaus via computer. *Id.* The employee had access to confidential access codes that enabled him to review the financial records of credit bureaus, "including bank accounts, credit cards and loans." *Id.*

85. See, e.g., Swire, *supra* note 59, at 493. Peter Swire, former Chief Counselor for Privacy in the U.S. Office of Management and Budget, suggests the following possibilities: "Access to detailed financial records might reveal confidential business information or otherwise give officials an advantage in choosing their own investments." *Id.* Swire notes that "officials might benefit financially by sharing data with outside parties, who might pay an official for the data and then use the data for their own purposes." *Id.* at 494. He also points out that "[s]haring data with outside parties might also open up investments for officials that they could not otherwise afford. For instance, if confidential data revealed that a piece of expensive property would soon rise in value, then an official might join up with other 'investors' to purchase the property." *Id.*

86. See Securities and Exchange Act, 15 U.S.C.A. § 78m (West 2002) (detailing the information reporting required of persons who acquire over five percent of certain classes of securities).

87. See Ianthe Jeanne Dugan, *Hard Lesson: Copying Peter Lynch, Investors Bought a Stock, Watched It Tank; Fund Star Reported a Stake in Tiny Firm, Which SEC Now Calls Fraud-Ridden, Big Buys Get Chance to Recoup*, WALL ST. J., Oct. 15, 2004, at 1A (noting that "[t]he case shows how badly things can go wrong as small investors try to ape the moves of celebrity stock-pickers").

88. See *infra* note 152 and accompanying text (suggesting that if the government has less information about an individual, as it would under a flat tax, there is less risk of the government mishandling that information).

89. In the 1930s, when Congress adopted and then immediately repealed the so-called pink slip system for disclosing tax return information to the public, opponents argued that it would contribute to kidnapping. See Mazza, *supra* note 4, at 1089 (pointing out that opponents of the so-called "pink slip" tax disclosure provision in the Revenue Act of 1934 "warned that releasing the information to the public would facilitate blackmail, kidnapping, and related crimes"); see also 2000 JCT REPORT, *supra* note 3, at 254 (noting that public opposition to the "pink slip" provision was partially driven by the view that "the slips would only be of use to a person's competitors, the 'malicious and idle curious,' kidnappers, and

kidnapping is epidemic in some countries,⁹¹ kidnapping for ransom has not been a significant problem in the United States.⁹² Moreover, there seem to be many easier ways to discover wealthy targets for kidnapping, such as SEC documents published online, the *Forbes* 500 list, and newspaper business pages.

Information that an individual is wealthy could also be leaked to those making commercial solicitations, such as purveyors of luxury goods or investment managers. Furthermore, the information could be used by charities or political organizations in an effort to find people capable of making large donations. Even if the solicitations were legitimate, they could constitute a nuisance for the individual. Moreover, some of these solicitations could be made by scam artists, rather than by legitimate businesses or charities. Some of the individuals targeted might not otherwise be easily identifiable as wealthy because of their modest life style.⁹³

blackmailers”); OFFICE OF TAX POLICY, DEP’T OF THE TREASURY, REPORT TO THE CONGRESS ON SCOPE AND USE OF TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS 19 (Oct. 2000) [hereinafter 2000 TREASURY REPORT] (stating that repeal of the pink slip provision was “[f]ueled by images of kidnappers sifting through pink slips looking for worthwhile victims”), available at <http://www.treas.gov/offices/tax-policy/library/confide.pdf>.

90. Cf. MITCHELL, *supra* note 5, at 15 (asserting that financial privacy makes it more difficult for criminals to select potential victims). Mitchell further notes that “[m]any citizens, particularly those from the developing world, want confidentiality so they are less likely to be targeted for kidnapping and other violent crimes.” *Id.*

91. See *Fear of Captivity*, THE ECONOMIST, June 19, 2004, at 54 (citing a New York security consultant’s estimate that in 2003 there were approximately 4,000 kidnappings in Colombia, 3,000 in Mexico and 2,000 in Argentina, and expressing skepticism that lower figures provided by government bodies are correct); V. Groginsky, *Crime as Threat; The Rising Tide of Latin Crime Reaches the Level of a Regional Security Threat*, DEF. & FOREIGN AFFAIRS’ STRATEGIC POLICY, Jan. 2004, at 4 (noting that Colombia leads the world in kidnappings, much of it commercially-motivated and perpetrated by guerilla and para-military groups, and criminal gangs); Niko Price, *A New Type of Kidnapper Terrorizes Latin America; Brutal Crime Wave Overwhelms Region*, WASH. POST, Aug. 29, 2004, at A20, (noting that according to a business risk consultancy, Latin America accounts for seventy-five percent of all kidnappings in the world); Niko Price, *Spotlight on Kidnap and Ransom*, INT’L MONEY MKTG., Sept. 9, 2004, at 32 (stating that commercial kidnapping is a “significant threat in Latin America, the Asia Pacific region, the former Soviet Union, Africa, the Middle East, India, Pakistan and Eastern Europe”); Melanie Simpson-Mills, *Welcome To Mexico City—The New Kidnap Capital of the World*, INDEP. (London), Sept. 5, 2004, at 19 [hereinafter *Welcome to Mexico City*] (noting that in Mexico City, each day an average of four people are kidnapped and approximately seventy people are victims of “express kidnappings,” in which victims are driven to an ATM and forced to withdraw cash before they are released).

92. See Halcyon Ellis, *Vanishing Point*, WASH. POST MAG., May 6, 2004, at 10 (analyzing the kidnap and ransom insurance market and noting that compared to other “global hotspots” for kidnappings, the several kidnap and ransom cases in the United States usually result in the rapid arrest of kidnappers, thanks to the high quality of domestic law enforcement). In contrast, in a kidnapping hotspot such as Mexico City, “police corruption is not just a matter of taking bribes to turn a blind eye but of policemen who are active kidnappers.” Simpson-Mills, *supra* note 91, at 18.

93. See THOMAS J. STANLEY & WILLIAM D. DANKO, THE MILLIONAIRE NEXT DOOR 7 (1996) (asserting that “most people who are not wealthy . . . think millionaires own expensive clothes, watches, and other status artifacts. We have found this is not the case”).

Again, it is by no means clear that a leak, or other unauthorized disclosure, from the IRS is a common means for businesses or other organizations to identify wealthy targets for their legal or illegal solicitations. In many cases, data about one's financial accounts is more easily available as a result of leakage from databases of financial institutions.⁹⁴

c. Use of information to exercise government power against political enemies and other disfavored groups

Professor Peter Swire offers the example of "Nazi insistence in the 1930s that Jews give detailed reports of their financial assets" to show "how personal data can be used to discriminate against individuals and groups."⁹⁵ He explains that "the Nazis then used these reports as part of a systematic program to seize Jewish assets."⁹⁶ This example may lead one to wonder whether the IRS's collection of information about a taxpayer's investments may facilitate the IRS's illegal seizure of the taxpayer's assets for corrupt purposes or to harass a political enemy. However, there is little evidence that the IRS has engaged in patently illegal seizures of assets (based on concocted tax liabilities). If such an IRS action did occur, the taxpayer should be able to obtain judicial review. If the judiciary refused to invalidate the action or if judicial orders were ignored by the agency, it

94. See, e.g., Bruce Mohl, *Forget Your Bank Balance? It's Available On the Internet*, BOSTON GLOBE, Jan. 4, 2004, at D1 (reporting how I.C.U., an online asset search firm, was able to determine, with only minor mistakes, the bank, checking account number and current balance of Eric F. Bourassa, a privacy advocate who had authorized the search). Bourassa discussed three ways in which the information may have leaked out: (1) I.C.U. called the bank and illegally impersonated him; (2) the bank sold or shared his information with I.C.U.; or (3) the bank shared the information with a third party, which then released it to I.C.U. *Id.* According to the *Boston Globe*, I.C.U. claimed that it "complies with the Gramm-Leach-Bliley Act, which prohibits the use of false pretenses to obtain consumers' personal financial information," and that "there are a number of legal ways to get the same information, including going through a subject's trash to obtain bank and brokerage statements[,] spying on a subject to get a bank account or debit card number, obtaining the subject's credit report, or culling bank account information from credit applications filed with auto dealerships or department stores." *Id.*; see also George Guttman, *The Confidentiality Statute Needs Rethinking*, 86 TAX NOTES 318, 322 (2000) (noting that "[m]ore and more of the income data reported on tax returns is becoming available commercially in the new information age"); Winnie Hu, *Chase Bank Agrees to Stop Sharing Data; A Pledge of Protection for Consumer Privacy*, N.Y. TIMES, Jan. 26, 2000, at B1 (describing how Chase Bank allegedly violated its own privacy policy by sharing financial information about eighteen million customers with four marketing companies in return for a commission on sales of those companies' products); Robert O'Harrow, Jr., *For Sale on the Web: Your Financial Secrets; Bank Accounts Vulnerable to Data Brokers*, WASH. POST, June 11, 1998, at A1 (describing how information brokers often keep calling banks and posing as customers until someone provides them with the information they are requesting).

95. Swire, *supra* note 59, at 495.

96. *Id.* Professor Swire further suggests that "more subtly, officials might use control over detailed financial information to favor or disfavor groups in the release of sensitive political data, the administration of regulatory programs, the award of government contracts, or otherwise." *Id.*

would be a sign that our system of government was no longer functioning.⁹⁷ It would not seem practical to craft our income tax system with a view to warding off dangers that might occur under such extreme circumstances.⁹⁸

There are other ways that the IRS's control over information relating to the taxpayer could be misused for political purposes.⁹⁹ One of the articles of impeachment against President Nixon in 1974 contained the allegation that Nixon "endeavored to obtain from the [IRS] . . . confidential information contained in income tax returns for purposes not authorized by law, and to cause . . . income tax audits and other income tax investigations to be initiated or conducted in a discriminatory manner."¹⁰⁰ One concern is that the IRS (perhaps under the direction of the White House) could leak information about the taxpayer to the press or to the public in such a way as to embarrass or discredit a political enemy of the administration.¹⁰¹ In another scenario, the IRS or the White House could intimidate the taxpayer

97. A contrary example is the internment of thousands of Japanese Americans by the U.S. government during World War II. The government used data provided by the U.S. Census Bureau to help locate Japanese Americans for this purpose. See William Seltzer & Margo Anderson, *The Dark Side of Numbers: The Role of Population Data Systems in Human Rights Abuses*, 68 SOC. RES. 481, 492 (2001) (stating that there is a general agreement that the Census Bureau's "provision of mesodata and professional expertise violated the spirit . . . [of] the census confidentiality laws" and noting that the Census Bureau has denied that it released microdata about Japanese Americans during World War II); see also PRIVACILLA.ORG, ASSESSING THREATS TO PRIVACY: THE GOVERNMENT SECTOR—GREATEST MENACE TO PRIVACY BY FAR, at http://www.privacilla.org/releases/Threats_to_Privacy.pdf (Sept. 2000) (on file with the American University Law Review). Although the U.S. Supreme Court failed to invalidate the government's actions during the World War II period, *Korematsu v. United States*, 323 U.S. 214, 217-28 (1944), most people have not concluded that this is a strong reason for the Census Bureau to discontinue its collection of data about ethnic origin. See, e.g., Seltzer & Anderson, *supra*, at 507 (noting that numbers themselves are "morally neutral" and that it is what we do with numbers and data that must be monitored).

98. *But cf.* Swire, *supra* note 59, at 507 (stating that "[i]n our most pessimistic moments, we might even contemplate how tracking of all financial transactions, perhaps combined with other forms of high-tech surveillance, might contribute to an increased risk of tyranny in our society").

99. Professor Swire explains the dangers as follows:

The patterns of misuse for political gain track those for financial gain. First, the officials might use the data in their political dealings. The data may be an inexpensive and effective form of opposition research, and give officials inside information to make them more effective in achieving their political goals. Second, officials might use the inside information to extract concessions from the targets of surveillance, the way that J. Edgar Hoover apparently used secret files to protect his tenure in office and to influence policy debates. Third, officials might benefit politically by sharing the data with friendly outside parties. In wiretap scandals involving the Los Angeles police in the early 1980s, the police allegedly leaked confidential data to allies in right-wing political groups.

Id. at 494.

100. IMPEACHMENT OF RICHARD M. NIXON[,] PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 93-339, at 3 (1974).

101. See *infra* note 103 and accompanying text (providing examples of executive branch officials revealing confidential tax information about political enemies to allies or the news media in order to gain political advantage).

by threatening to disclose this information without actually doing so. In the past, tax return information has been obtained by the White House¹⁰² and leaks have occurred.¹⁰³ However, after Watergate, Congress enacted greater restrictions on White House access to tax return information¹⁰⁴ and

102. See REPORT ON ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. DOC. NO. 94-266, at 968-71 (1975) (describing requests for tax data by the White House beginning in the 1950s). The Senate report provides a summary of specific instances, uncovered from Watergate-related testimony, in which tax information was provided to the White House. *Id.* at 1119 n.566; see also 2000 TREASURY REPORT, *supra* note 89, at 21 (stating that “[t]he Watergate Committee’s hearings revealed that former White House counsel John Dean had sought political information on so-called “enemies” from the IRS [and] the White House actually was supplied information on IRS investigations of Howard Hughes and Charles Rebozo. The Committee noted that tax information and income tax audits were commonly requested by White House staff and supplied by IRS personnel”).

103. See John Berlau, *JFK Used Audits to Silence his Critics*, INSIGHT ON THE NEWS, Sept. 29, 2003, at 21 (noting an admission by Ben Bradlee of the Washington Post that President Kennedy had shared tax return information about billionaires J. Paul Getty and H.L. Hunt with him). In 1970, H.R. Haldeman, White House Chief of Staff for President Nixon, leaked to a news columnist a confidential IRS report indicating that it was investigating George Wallace and his brother. DAVID BURNHAM, *A LAW UNTO ITSELF: POWER, POLITICS, AND THE IRS* 250 (1989). The columnist published the information several weeks before Wallace was to run in an Alabama gubernatorial primary. *Id.* Burnham also describes how a mid-level IRS official suggested to a *Life* magazine reporter in 1968 that he investigate the association between Supreme Court Justice Abe Fortas and his former client, Wolfson. *Id.* at 247-48. The reporter’s work revealed that Fortas, while a Supreme Court Justice, had received a \$20,000 fee from the Wolfson Foundation, at a time when Wolfson was appealing a securities law conviction in a U.S. court of appeals. *Id.* at 248. It is not clear exactly what motivated the IRS official to leak this information but it resulted in Fortas’ resignation and gave Nixon an opportunity to alter the Supreme Court’s makeup. *Id.* at 248-49. Burnham also describes how John Ehrlichman, a Nixon White House official, requested that the IRS conduct an interview of Lawrence O’Brien, then chairman of the Democratic National Committee, in 1972. *Id.* at 250. The IRS conducted the interview in violation of its own policy regarding the questioning of political figures in an election year, but it concluded that no further investigation was necessary. *Id.* at 250-51. Ehrlichman then attempted to leak to the press a claim that O’Brien had unreported income. *Id.* at 251. For additional details about this incident, see Lawrence F. O’Brien III, *Burnham Omitted Nixon Incident on IRS Tampering*, 46 TAX NOTES 1198, 1198 (1990). O’Brien’s son explains that Burnham’s book did not mention a memo written by Nixon to H.R. Haldeman which instructed Haldeman to personally push the highest-level IRS officials to conduct an audit of O’Brien for political purposes. *Id.* Finally, Burnham describes how some IRS officials leaked information to Bob Woodward in 1975, accusing Senator Joseph Montoya of having used his role as the chairman of a Senate subcommittee that set the IRS’s funding to influence IRS Commissioner Alexander to stop an IRS investigation of Senator Montoya. BURNHAM, *supra*, at 300-02. Although it was unclear whether the leak was made in an effort to harm Senator Montoya or Commissioner Alexander, in fact, Senator Montoya lost his bid for re-election one year later. *Id.* at 302.

104. See 2000 JCT REPORT, *supra* note 3, at 127 (noting that prior to 1976, “executive orders and regulations approved by the President controlled access to” information on income tax returns). In response to the abuses of Watergate, the Tax Reform Act of 1976 eliminated “the President’s ability to control the dissemination of returns and return information” by amending section 6103 to make “returns and return information confidential, only to be disclosed as authorized by statute.” *Id.* at 127-28. Section 6103 of the Internal Revenue Code requires that requests by the White House for taxpayer information must be signed by the president personally and requires the president to make a quarterly report to the Joint Committee on Taxation regarding any returns that the president requested and the reasons for reviewing those returns. I.R.C. § 6103(g)(1), (5) (West 2002). Mazza notes that this provision guards against “politically motivated misuse of return

unauthorized disclosures.¹⁰⁵ Moreover, any such leaks would not necessarily pertain to a taxpayer's investment assets. For example, the IRS might leak information about a taxpayer's failure to pay or to report his taxes accurately or about the ensuing investigation.¹⁰⁶ The IRS might also leak information about a taxpayer's consulting fees, business-related activities, or dependents. Therefore, the opportunity for abuse would not be significantly different under the flat tax.

Another type of abuse of power occurs when the IRS exercises its discretion to decide which returns to audit, what cases to pursue, and how rigorously to pursue them, based on political considerations.¹⁰⁷ Political allies might be protected from scrutiny,¹⁰⁸ while political enemies might be

information" and severely limits the president's ability to access tax return information. Mazza, *supra* note 4, at 1094.

105. The Tax Reform Act of 1976 provided that willful unauthorized disclosure could be punishable as a felony by a maximum fine of \$5,000 and a maximum prison sentence of five years. Pub. L. No. 94-455, 90 Stat. 1520 (codified as amended at I.R.C. § 7213(a) (West 2002)). Additionally, an officer or employee of the United States convicted of such offense "shall be dismissed from office." *Id.* (codified as amended at I.R.C. § 7213(a)(1) (West 2002)). In contrast, the prior version of section 7213 treated such disclosure as a misdemeanor, punishable by a maximum fine of \$1,000 and a maximum prison sentence of one year. I.R.C. § 7213(a) (1970), *amended by* Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (codified as amended at I.R.C. § 7213(a)). In addition, Congress has authorized taxpayers to bring civil actions for damages against the United States if an officer or employee of the United States made an unauthorized disclosure about an individual taxpayer knowingly or negligently. I.R.C. § 7431(a)(1) (West 2002). Section 7431 authorizes damages of the greater of \$1,000 for each act of unauthorized disclosure or the sum of actual damages plus punitive damages (which can be awarded in cases of willful disclosure or gross negligence). I.R.C. § 7431(c) (West 2002).

106. *See supra* note 103 (discussing leaks of IRS information about political figures George Wallace, Senator Joseph Montoya, and Lawrence O'Brien).

107. *See* George Lardner, Jr., *Nixon Sought 'Ruthless' Chief to 'Do What He's Told' at IRS; Tape Includes Mention of Pursuing Enemies*, WASH. POST, Jan. 3, 1997, at A1 (describing how John Dean, the White House counsel under President Nixon, had requested that newly-appointed IRS Commissioner Walters audit taxpayers on Nixon's "enemies list"). Nixon had complained that there had been a probing audit of his own tax return in 1963, initiated by the Kennedy Administration. *Id.* According to the *Washington Post*, Commissioner Johnnie Walters, with the backing of Treasury Secretary George P. Shultz, refused the request transmitted by Dean and later handed over the "enemies list" to congressional investigators. *Id.*; *see also* BURNHAM, *supra* note 103, at 300-01 (reporting that in December 1972, after Senator Joseph Montoya of New Mexico had announced hearings to air citizens' complaints against the IRS, the director of the IRS district in New Mexico began an investigation of the Senator's tax files); Mazza, *supra* note 4, at 1094 n.137 (noting that "[c]laims that the executive branch caused the IRS to initiate politically motivated audits resurfaced in the wake of President Clinton's impeachment") (citing *Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401 (4th Cir. 2003)); *supra* note 103 (discussing the subsequent investigation of Senator Montoya). Congress has prohibited the executive branch from asking that the IRS initiate or terminate an investigation. I.R.C. § 7217 (West 2002) (prohibiting the President, Vice President, and certain executive branch employees from directly or indirectly requesting that the IRS "conduct or terminate an audit or other investigation of any particular taxpayer with respect to the tax liability of such taxpayer").

108. David Burnham describes how former President Eisenhower intervened in the 1960s with Presidents John F. Kennedy and Lyndon Johnson to prevent the Justice Department's prosecution of Sherman Adams, a former White House Chief of Staff under Eisenhower. *See* BURNHAM, *supra* note 103, at 246-47. Burnham explains that Kennedy and Johnson "sought psychological advantage over a former president by persuading the

subjected to greater than usual scrutiny.¹⁰⁹ These political allies might end up paying less tax than owed and be free from the annoyance of audits; political enemies might end up undergoing a detailed, intrusive audit and having to pay every penny of tax that they owe (even while knowing that most taxpayers do not). Conceivably, a political enemy could end up paying even more than he actually owes, after deciding that it is too embarrassing or politically damaging to bring the matter to Tax Court, an institution which publicly disseminates opinions.¹¹⁰ When the IRS brings a criminal case against a taxpayer based on political motives, even if the charges are not sustained in court, the taxpayer is put through a terrible and expensive ordeal.¹¹¹

In 1998, Congress adopted an explicit “prohibition on executive branch influence over taxpayer audits and other investigations.” It prescribed criminal penalties for White House officials willfully making improper requests to the IRS and for IRS employees failing to report improper requests to the Treasury Inspector General.¹¹² Such legislation will not necessarily eliminate this abuse under the income tax. However, if such political abuses are a concern under the income tax, it is hard to see that such concern would disappear under the flat tax. Individuals would still be required to file personal tax returns showing wages and pension payments, and, if engaged in business, a business tax return. (Non-profits would also

IRS not to prosecute [Eisenhower’s] former assistant.” *Id.*

109. See *supra* notes 103, 107 (providing relatively recent examples of executive branch officials using the IRS to exert political pressure on political enemies). Burnham recounts how Eleanor Roosevelt sent a note to Treasury Secretary Henry Morgenthau suggesting an investigation of whether Cornell University improperly provided funds to conservative newspaper publisher Frank Gannett, who was also the vice chairman of the Republican National Committee. BURNHAM, *supra* note 103, at 236-38. Because Gannett was also the chairman of the executive committee of the Board of trustees of Cornell, this allegation was pertinent to Cornell’s tax exemption. *Id.* The subsequent investigation did not result in any IRS challenge to Cornell’s tax exemption. *Id.* Burnham describes another occasion, in which Morgenthau demanded that the IRS criminal division bring criminal tax charges against Andrew Mellon, a former Republican secretary of the treasury. *Id.* at 229-30. The government alleged that Mellon owed over a million dollars in additional taxes as a result of claiming illegitimate stock losses. *Id.* at 230. The grand jury, however, did not indict him, and in a subsequent civil case, most of the IRS claims were rejected. *Id.* Morgenthau also ordered an investigation of Huey Long and his associates; however, this investigation “los[t] momentum” with Long’s assassination. *Id.* at 234.

110. On the other hand, the taxpayer may wish to bring to public attention the political motivation for the IRS action.

111. See BURNHAM, *supra* note 103, at 240-43 (describing the prosecution on criminal tax evasion charges of Reuben G. Lenske, a lawyer suspected by local law enforcement officials of being “politically suspicious”). Lenske’s conviction was overturned by the court of appeals, and one of the appellate judges wrote a separate opinion referring to the prosecution as “a witch-hunt, a crusade by the key agent of the United States in this prosecution, to rid our country of unorthodox thinkers . . . by using federal income tax laws.” *Id.* at 241. A total of four years passed between the original indictment and Lenske’s acquittal. *Id.* at 240.

112. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1105(a), 112 Stat. 685, 711 (1998) (adding I.R.C. § 7217).

continue to have dealings with the IRS,¹¹³ and these could potentially be politically influenced).¹¹⁴ In all, there would continue to be a great deal of room for the IRS to exercise discretion with respect to auditing returns or pursuing deficiencies or criminal investigations, and this discretion could still be exercised for political reasons.

d. Use of information by someone already familiar with taxpayer

People who have some familiarity with the taxpayer (either through direct dealings with the taxpayer or because the taxpayer is well-known) may be interested in the financial information that the taxpayer provided to the IRS. They may seek this information in order to make decisions regarding their dealings with the taxpayer, in an effort to formulate an opinion of the taxpayer, or out of pure curiosity. Because of the power of computers and database search capabilities,¹¹⁵ IRS employees may be in a position to search for information about particular individuals in whom they have an interest. Moreover, with the cooperation of corrupt IRS employees or if computer security is not adequate, people outside the IRS could also browse IRS databases for information about particular

113. Under the Hall-Rabushka proposal, nonprofit organizations would be exempt from the business tax, except with respect to income from an actual business. *See* HALL & RABUSHKA, *supra* note 9, at 126. Presumably, such organizations would still need to meet IRS requirements to obtain and maintain exempt status, as under current law. For the treatment of nonprofits under other proposals, *see* Evelyn Brody, *Charities in Tax Reform—Threats to Subsidies Overt and Covert*, 66 TENN. L. REV. 687, 743 (1999). Brody notes that

The Arney-Shelby Flat Tax proposal would exempt governments and nonprofits from the business tax, except for their unrelated business activities. However, the Flat Tax would limit the nonprofit exemption to charities, while imposing business taxes on transfers of property or the provision of services by all other nonprofits, “even if such activities are substantially related to what historically has been considered to be the exempt purposes of these organizations.”

Id. at 743 (footnotes omitted).

114. *See* BURNHAM, *supra* note 103, at 259-60 (describing how the IRS questioned the exempt status of the North American Congress on Latin America, an organization that frequently criticized the Reagan administration’s policies); *see also id.* at 261 (discussing the IRS Commissioner’s decision in 1948 to withdraw tax exemptions for certain small organizations considered to be “subversive,” such as the National Council of American-Soviet Friendship). Burnham also describes the IRS’s investigation of the National Council of Churches during the Johnson and Nixon administrations. *Id.* at 264-67. Burnham argues that the investigation was triggered by the IRS’s opposition to the Council’s liberal views on race, rather than tax law concerns. *Id.* at 267; *see also id.* at 270-73 (describing the Kennedy administration’s push for IRS investigations of “extremist organizations,” particularly Kennedy’s right-wing political enemies, as a result of which the IRS recommended revocation of the exempt status of H.L. Hunt’s Life-Line Foundation and of Dr. Fred Schwarz’s Christian Anti-Communist Crusade). The intervention by political officials in the Nixon administration resulted in IRS rejection of the exemption application of the Center for Corporate Responsibility, in 1973, which was overturned by a federal judge, who cited “political intervention” and a “political atmosphere generated by the White House in the Internal Revenue Service.” *Id.* at 284-85.

115. *See* Bell, *Wiretapping’s Fruits*, *supra* note 44, at 25 (stating that electronic record-keeping “removes the ‘practical obscurity’ of records that are ‘available’ but difficult to acquire and compile” and thus implicates privacy concerns) (footnote omitted).

taxpayers.

At the same time, there are myriad reasons why an individual taxpayer might wish to keep investment information concealed from particular individuals or categories of people. Some of these reasons are based on the individual's desire to conceal the amount of his wealth (whether low or high). In our society, lack of wealth is often considered a disadvantage or even a sign of lesser moral worth.¹¹⁶ Therefore, many individuals may wish to hide information about a low amount of wealth in order to maintain a good reputation with friends, family, acquaintances, potential business associates, potential creditors, or potential dates. Some individuals may feel shame or embarrassment about their relative poverty; others might seek to avoid unsolicited advice about ways to improve their financial wellbeing.

There are also situations in which being perceived as wealthy may be a disadvantage, and an individual would seek to hide his wealth.¹¹⁷ An individual's wealth may make his employer reluctant to raise his salary. A wealthy individual may receive undesired requests for gifts or loans from family and friends, or requests for charitable contributions. An individual may live below his means and seek to hide his wealth from his children in an effort to develop their self-reliance and adherence to a modest life style. An individual may seek to hide his wealth from a prospective marriage partner to assure himself that the decision to marry him is based on other factors. Finally, an individual may seek to hide his wealth to avoid having his friends who have lesser wealth feel uncomfortable around him,¹¹⁸ to avoid appearing boastful, or to foster a reputation for favoring "the little guy."¹¹⁹

116. See *supra* notes 74-75 and accompanying text (describing how income levels can shape people's opinions of themselves and of others).

117. See *Slevin v. City of N.Y.*, 551 F. Supp. 917, 931-35 (S.D.N.Y. 1982), *aff'd in part, rev'd in part*, *Barry v. City of N.Y.*, 712 F.2d 1554 (2d Cir. 1983) (discussing various reasons for concealing financial information, such as the wish to structure one's family life without regard to one's wealth; wanting to keep one's finances secret from one's spouse, especially in a relationship where both spouses have independent incomes; or wanting to avoid salespeople, investment seekers, and other commercial interests that target individuals with financial means).

118. See Terri Cullen, *Fiscally Fit: Lasting Friendships Can Be Tough*, WSJ.COM (Sept. 16, 2004) (noting that friends and neighbors are already able to compare each other on the basis of their consumption habits) (on file with the American University Law Review).

119. When Ralph Nader revealed details about his finances for the first time in 2000 (immediately prior to receiving a presidential nomination by the Green Party), the press focused on the apparent inconsistency between his wealth and his political positions. See, e.g., *Advocate Rails Against Wealth, Is Worth Millions*, ORLANDO SENTINEL, June 19, 2000, at A4 (suggesting that Nader's personal status as a multi-millionaire did not correlate with his outspoken political opposition to the concentration of America's wealth in corporate hands); Mike Allen, *Nader's Worth at \$3.8 Million; Green Party Hopeful Invested Heavily in Tech*, WASH. POST, June 18, 2000, at A1 (noting that "[a]fter 35 years of bashing big business, ruffled Ralph Nader is worth at least \$3.8 million and is heavily invested in

An individual may also have reasons for hiding particular investments from others with whom he has dealings or who know him by reputation. Some investments may be perceived as involving a conflict of interest (even when not violating any formal prohibition, such as might apply to a government official).¹²⁰ For example, a doctor may not want his patients to know that he owns stock in a particular pharmaceutical company. Some investments may be perceived as inconsistent with the political or social views that an individual displays, or with the views of his friends or colleagues. For example, an environmental activist may not want his friends or supporters to know that he owns stock in a company that shows disregard for the environment.¹²¹ One may wish to conceal one's ownership of stock in a casino from a religious relative who believes that gambling is sinful. Alternatively, a taxpayer may want to avoid having his family or associates examine the wisdom of his investment strategy. For example, an individual may not want to reveal a purchase of Enron stock shortly before it lost most of its value. A person may want to avoid giving family members the opportunity to criticize an investment portfolio for lack of diversity or for excessive emphasis on investments in emerging markets.

Overall, these reasons for hiding information about one's investments seem legitimate and worthy of protection (even if they do not rise to the same level as the desire to avoid theft, kidnapping, or political dirty tricks). Moreover, it is difficult to argue that being an IRS employee should give someone a special license to ferret out others' secrets of this sort. Therefore, the development of reliable safeguards against browsing is highly desirable.

Throughout the 1990s Congress received considerable evidence that some IRS employees were improperly browsing taxpayer's records.¹²² In 1997, Congress enacted legislation that made unauthorized inspection of a tax return by an IRS employee a criminal offense, if willful, and also

technology stocks"); *Nader Defends Wealth, Portfolio of Tech Stocks*, CHI. TRIB., June 19, 2000, at 10 (noting that "Nader, a longtime consumer advocate and critic of corporate America, is worth millions thanks to investments in high-tech companies").

120. Under 18 U.S.C. § 208, an officer or employee of the executive branch is prohibited from participating personally and substantially in an official capacity in any particular matter in which, to the employee's knowledge, he or any other person whose interests are imputed to him under this statute has a financial interest.

121. When Ralph Nader was questioned by reporters about his investments in technology stocks in 2000, he pointed out that his stock investments were in "the most neutral-type companies," ones that were not monopolistic and did not "produce land mines, napalm, [or] weapons." He also said that he shunned tax shelters, including municipal bonds. Allen, *supra* note 119, at A1.

122. See Cynthia Blum, *Sharing Bank Deposit Information with Other Countries: Should Tax Compliance or Privacy Claims Prevail?*, 6 FLA. TAX REV. 579, 616-17 (2004) (describing how unauthorized browsing by IRS employees led to a Senate Committee hearing and providing various examples of this practice).

authorized a suit for civil damages.¹²³ This legislation apparently has not put an end to employee browsing.¹²⁴ Nor is the security of IRS computers sufficient to preclude entirely the possibility of browsing by non-employees. However, there appears to be no reason that, in the long term, improvements in training of IRS employees, and new methods of prevention and detection in IRS computers¹²⁵ could not minimize the extent of this browsing.

Such improvements in safeguards against improper browsing would seem to be a better solution than removing investment information from the hands of the IRS through the adoption of a flat tax. Even under the flat tax, the IRS would have a considerable amount of personal information about taxpayers that might be of interest to potential browsers and that taxpayers would have legitimate reasons for wishing to conceal. This would include information about one's dependents and filing status, detailed information about one's salary, retirement income, and the income and expenses of

123. See Taxpayer Browsing Protection Act of 1997, Pub. L. No. 105-35, 111 Stat. 1104 (codified as amended at I.R.C. § 7213A (West 2002)) (imposing a criminal penalty consisting of a fine not to exceed \$1,000 or a prison term of up to one year, or both). The Act also provided civil damages for "unauthorized inspection of returns and return information." Pub. L. No. 105-35 (codified as amended at I.R.C. § 7431). In addition, the changes require the IRS to notify a taxpayer if an employee is criminally charged with unauthorized inspection of the taxpayer's return. *Id.*

124. In the two years following the statute's enactment, the Treasury substantiated 198 cases of unauthorized browsing. 2000 JCT REPORT, *supra* note 3, at 174-75. According to the report, these cases involved the following kinds of employees: "auditors and tax examiners (77), collection (48), Taxpayer service (31), clerical (19), Criminal Investigation Division (3), Management (6), Professional/Technical (2) and other (12)." *Id.* at 175; see also U.S. GENERAL ACCOUNTING OFFICE, CONFIDENTIALITY OF TAX DATA: IRS' IMPLEMENTATION OF THE TAXPAYER BROWSING PROTECTION ACT (1999) (analyzing the Office of Chief Inspector's investigations of instances of unauthorized access to IRS data), available at <http://www.gao.gov/archiv e/1999/gg99043.pdf>.

125. See 2000 JCT REPORT, *supra* note 3, at 178 (citing the IRS as having acknowledged in 2000 that, in the short-term, its computer systems are not capable of modification to prevent and promptly detect unauthorized browsing). See also Memorandum from Pamela J. Gardiner, Deputy Inspector General for Audit, Dep't. of the Treasury, July 8, 2005, in DEP'T. OF TREASURY, MANAGERS AND SYSTEM ADMINISTRATORS NEED TO LIMIT EMPLOYEES' ACCESS TO COMPUTER SYSTEMS, available at 2005 TNT 136-55 (recommending that the IRS configure computer systems to automatically disable users' accounts after forty-five days of inactivity to prevent access by employees who leave the IRS or have changed job responsibilities); Memorandum from Pamela J. Gardiner, Deputy Inspector General for Audit, Dep't. of the Treasury, March 15, 2005, in DEP'T. OF TREASURY, WHILE PROGRESS HAS BEEN MADE, MANAGERS AND EMPLOYEES ARE STILL SUSCEPTIBLE TO SOCIAL ENGINEERING TECHNIQUES, available at 2005 TNT 52-27 (recommending that IRS continue reminding employees of how hackers might seek to get access to passwords); U.S. GENERAL ACCOUNTING OFFICE, INFORMATION SECURITY: INTERNAL REVENUE SERVICE NEEDS TO REMEDY SERIOUS WEAKNESSES OVER TAXPAYER AND BANK SECRECY ACT DATA, APRIL 2005, REPORT TO THE HOUSE JUDICIARY COMMITTEE, available at 2005 TNT 73-42 (concluding that "[u]ntil IRS fully implements a comprehensive agencywide security program, its facilities, computing resources and [data] will remain vulnerable").

one's business.¹²⁶ This could also include information uncovered in an audit and information about the nature of one's interactions with the IRS. Under the flat tax, taxpayer concerns would continue to justify vigorous action to prevent unauthorized browsing.

3. *Authorized disclosures to other government agencies*

Investment information obtained by the IRS may be disseminated much more widely than thus far indicated, because Congress has authorized a number of other federal and state agencies to receive tax return information¹²⁷ for purposes other than federal tax administration.¹²⁸ Pursuant to section 6103 of the Internal Revenue Code, the IRS may make a disclosure to state tax officials for purposes of state tax administration;¹²⁹ to congressional committees and the Government Accounting Office ("GAO") in certain cases;¹³⁰ to a federal, state, or local agency administering various welfare or government assistance programs;¹³¹ to the U.S. Customs Service;¹³² to federal, state, and local child support enforcement agencies;¹³³ and to certain federal officials for use in non tax-related criminal investigations.¹³⁴ As a result, in addition to IRS

126. One might make the argument that business and employment activities are by their very nature open to public view and, hence, disclosure of information about such activities should not be feared. However, some employment, consulting, and business activity can be conducted in the privacy of one's home using nothing more than a telephone, fax machine, and computer. Moreover, even if the nature of the activity is not hidden, the individual in such a situation still has an interest in avoiding disclosure of detailed information regarding salary, professional fees and expenses, business profits, and pension payments.

127. The Congressional Joint Committee on Taxation and the Department of the Treasury each carried out a thorough review of these disclosure rules at Congress's request. See 2000 JCT REPORT, *supra* note 3, at 21-55 (providing a thorough description of each of these authorized disclosures and their limitations); 2000 TREASURY REPORT, *supra* note 89, at 42-94 (analyzing each of the disclosure authorizations and providing recommendations for further changes).

128. See *supra* note 3 (tracing Congress's changing position towards IRS disclosures to other governmental entities).

129. I.R.C. § 6103(d)(1) (West 2002).

130. I.R.C. § 6103(f), (i)(8) (West 2002).

131. See I.R.C. § 6103(l)(7) (West 2002) (specifying that this information is to be used only for the purpose of determining eligibility or the correct amount of benefits).

132. I.R.C. § 6103(l)(14) (West 2002).

133. I.R.C. § 6103(l)(6) (West 2002).

134. I.R.C. § 6103(i)(1), (2), (3), (5), (7) (West 2002). In addition, some federal and state agencies require individuals to provide a copy of the federal income tax return in certain circumstances. See William J. Turnier, *PAYE as an Alternative to an Alternative Tax System*, 23 VA. TAX REV. 205, 210 (2003-2004) (noting that "[t]he individual income tax return has taken on a significant role as an informal provider of financial information about individuals in a variety of circumstances"). Turnier cites the following examples: (1) student loan applicants must file copies of their past tax returns as well as their parents' past tax returns; (2) divorce lawyers routinely obtain copies of tax returns to assess the financial status of the parties, and judges often use them to assess a party's ability to provide alimony and child support; (3) banks regularly seek copies of past tax returns to make credit decisions; and (4) social service providers often request past tax returns to determine whether an applicant satisfies the agency's need-based criteria. *Id.* at 210-11; see also TAXPAYER ADVOCATE SERVICE, NATIONAL TAXPAYER ADVOCATE 2003 ANNUAL REPORT TO

employees, a vast number of people have access to taxpayers' investment information.¹³⁵

This increased access to IRS information raises a number of concerns. Some might argue that, despite the safeguards established by Congress,¹³⁶ such widespread disclosure cannot be adequately policed for leakage to unauthorized users.¹³⁷ Others may argue that there is something inherently objectionable in the practice of allowing information that was obtained by the government for one purpose to be used for another unrelated governmental purpose, even if there is advance warning to the taxpayer.¹³⁸ Finally, some have warned that taxpayers will be less forthcoming in providing information to the IRS¹³⁹ if they believe the information will be disclosed to other government agencies.¹⁴⁰

But none of these concerns (even if accepted as valid) necessarily

CONGRESS 249 (2003) (noting that it has become customary for taxpayers applying for and obtaining mortgage loans to sign a Form 4506 (Request for Copy or Transcript of Tax Form) during the closing process), available at http://www.irs.gov/pub/irs-utl/nta_2003_annual_update_mcw_1-15-042.pdf; 2000 TREASURY REPORT, *supra* note 89, at 69-78 (providing a detailed discussion of how tax return information is legitimately gained by third parties pursuant to taxpayer consent and noting that as technology advances, the number of third-party requests for taxpayer consents will only increase).

135. However, in a case where a taxpayer is simply required to provide a copy of Form 1040, a copy may be filed that does not correspond to the version of the return that was filed with the IRS. See *supra* note 134 (describing situations in which a taxpayer may be required to provide tax return information to an entity other than the IRS, such as a bank or an attorney).

136. See I.R.C. § 6103(p)(4), (5), (6) (West 2002).

137. See, e.g., IMPROVEMENTS ARE NEEDED, *supra* note 79, at 9-18 (noting that a review of IRS safeguard procedures showed that these safeguards had not been adequately implemented).

138. See generally Lillian R. BeVier, *Information about Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J. 455, 466 (1995) (examining whether information obtained by the government for a specific purpose should be disclosed to other government agencies for a different purpose without the individual's consent). BeVier notes that, on the other hand, the public's interest in allowing disclosure by one agency to another can be quite high. *Id.* at 476. BeVier states that "vis-à-vis the government generally, and its demands that citizens supply it with personal information in connection with its regulatory, welfare, revenue-raising, or crime-fighting agenda, an individual has very little in the way of a 'privacy interest' to be waived." *Id.*

139. This argument may have less relevance for information provided to the IRS through Form 1099 reporting because individuals have limited options for avoiding such reporting.

140. See, e.g., PRIVACY COMMISSION REPORT, *supra* note 2, at 6-7 (stating that "confidentiality of tax returns and related information is an essential element of preserving the effectiveness of the tax system in this country . . . [in] that widespread use of the information a taxpayer provides to the [IRS] . . . cannot help but diminish the taxpayer's disposition to cooperate with the IRS voluntarily"); see also 2000 TREASURY REPORT, *supra* note 89, at 34 (stating that "[o]vertly tying tax reporting to needs-based government benefits may lead some individuals to underreport their income in order to qualify for such benefits Conversely, overtly tying tax reporting to the ability to qualify for loans, credit, etc., may lead some individuals to overreport their income In addition to these specific effects on tax compliance, there is the more general issue of confidence in the tax system"). But see Mazza, *supra* note 4, at 1070-73 (stating that the link between confidentiality and taxpayer compliance has not been directly proven).

provide support for the adoption of a flat tax in order to reduce the amount of investment information in the hands of the IRS and, thus, available for disclosure to other agencies. A more direct response to these concerns would be for Congress to remove authorization for all or some of the disclosures that the IRS is allowed to make¹⁴¹ to other agencies, or to require greater safeguards as a precondition for making such disclosures. The latter approach might be criticized as unrealistic.

Professor Peter Swire suggests that once the government incurs the costs of acquiring information for one purpose (e.g., enforcing the income tax), it becomes inefficient and therefore politically difficult to prevent its use for other legitimate government purposes (e.g., determining eligibility for social security benefits). He feels that we may fall down a “slippery slope” leading to the “complete loss of privacy of highly personal information . . . [so that] tax returns might become essentially public documents.”¹⁴² But, as Swire recognizes, Congress has not actually allowed the IRS to disclose tax return information freely to all government agencies.¹⁴³ Moreover, the boundaries that Congress established between authorized and unauthorized disclosures have remained relatively stable since 1976.¹⁴⁴ It appears,

141. See *supra* notes 127-134 and accompanying text (noting that the IRS may disclose information to certain government entities pursuant to section 6103 of the Internal Revenue Code).

142. Swire, *supra* note 59, at 498. Swire discusses the fact that once the initial costs of building the database and infrastructure have been incurred, “then additional uses may be cost-justified that would otherwise not have been.” *Id.* at 497. As he explains, since “costs have already been incurred in the tax system to gather and organize . . . tax return data . . . there is a low incremental expense to transfer the data to other federal agencies and perhaps to state and local welfare and other agencies.” *Id.* at 498. Therefore, “an efficiency argument can . . . be made that additional uses of data, such as protecting against welfare fraud, should be authorized where the costs of gathering and organizing the comprehensive tax data would not have been justified solely to protect against welfare fraud.” *Id.* He points out that “[i]n recognition of this problem, there are federal laws [i.e., section 6103] restricting use of tax returns for other purposes.” *Id.* He further explains that “[i]f the government . . . already has fifteen uses for a category of data, it may be impossible politically to stop the sixteenth or seventeenth uses, even where those additional uses would never have been approved at the time the data collection system was first instituted.” *Id.* at 499.

143. See *id.* at 498 (noting that specific restrictions exist to limit the government’s use of tax returns and return information).

144. See 2000 TREASURY REPORT, *supra* note 89, at 3 (stating that although the disclosure laws have been amended since the implementation of the Tax Reform Act of 1976, the Act’s basic statutory scheme remains in force today). However, the Treasury Report also noted the addition of exceptions to section 6103 over the years since the Act’s enactment, noting that questions have arisen about whether the balance Congress intended to strike through section 6103 has been eroded. *Id.* at 67. For example, since the 1976 Act, new paragraphs (7) through (18) have been added to I.R.C. § 6103(b), a provision governing “disclosure of returns and return information for purposes other than tax administration.” See, e.g., Pub. L. No. 103-66, § 13402(a), 107 Stat. 312, 563-64 (1993) (adding ¶ (13)); Pub. L. No. 103-182, § 522(a), 107 Stat. 2057, 2161 (1993) (adding ¶ (14)); Pub. L. No. 99-335, § 310(a), 100 Stat. 514, 607-08 (1986) (adding ¶ (12)); Pub. L. No. 98-369, § 2653(b)(3)(A), 98 Stat. 494, 1155 (1984) (adding ¶ (10)); Pub. L. No. 96-249, § 127(a)(1), 94 Stat. 357, 365 (1980) (adding ¶ (7)).

therefore, that Congress is capable of making individualized determinations of whether IRS disclosures to a particular governmental agency or unit for a specific purpose are warranted.¹⁴⁵

Moreover, privacy concerns raised by authorized IRS disclosures to other government units under current law would not necessarily be resolved by Congress's adoption of a flat tax. Notwithstanding a repeal of the federal income tax, federal and state governments might continue to need information about an individual's investment income. For example, Congress would probably¹⁴⁶ continue to require means-testing to determine eligibility for participation in certain federal programs, and some state governments might wish to continue to collect their revenue through an income tax. If the Form 1099 reporting system for investment income were no longer required for administering federal taxes, Congress might still consider it necessary for these other purposes (whether administered by the IRS or another federal body).¹⁴⁷ In that case, there might be no change in the broad dissemination of information about investment income to various government agencies, and the potential for leakage would remain unchanged.

Alternatively, if the Form 1099 reporting system for investment income were abolished when a flat tax was adopted, particular federal agencies or state governments¹⁴⁸ requiring the information might simply rely on

145. See BeVier, *supra* note 138, at 503-04 (arguing that the appropriate answer to each question of whether a particular unconsented-to use ought to be permitted is highly context-specific. Proper resolution depends on a multitude of variables including the purpose for which use or disclosure is desired and the efficiency gains its use would generate; the extent to which non-disclosure would permit the data subject to misrepresent herself to the recipient agency; the purposes for which the information was originally collected; the kind of information at issue (whether of a highly personal, intimate, or embarrassing nature); the subjective or objectively reasonable expectations of the data subject with respect to its subsequent use; and the unjustified adverse consequences that might befall the individual if the information is used for a different purpose").

146. See Gene Steuerle, *Taxing the Capital Income of Only the Poor and the Middle Class*, 107 TAX NOTES 239 (Apr. 11, 2005) (explaining that currently Congress provides for a phasing out of benefits on the basis of income in many federal programs, such as food stamps, Pell grants, Temporary Assistance to Needy Families, Medicaid, rental housing vouchers, school lunch programs, child care vouchers, and supplemental security income). Steuerle states that "advocates of consumption taxes never deal with how those various 'income tax layers' within spending programs would be handled." But he concludes that "[f]rom what I have seen of all consumption tax proposals to date . . . those proposals do not change the income accounting required in all those other programs such as food stamps or EITC, even though they may eliminate the income tax." As a result, he argues, "all the lower- and middle-income households who receive educational or work-related or child or welfare or health benefits . . . would need to fill out income tax forms for these other programs, because the IRS form no longer would be available to be sent as a substitute." *Id.*

147. See Strauss, *supra* note 33, at 419-21 (pointing out the difficulties that a state government might have in establishing its own information reporting program).

148. See Roin, *supra* note 9, at 333 (noting, as one of the ramifications of replacing the income tax with a value-added tax ("VAT"), that currently the state tax authorities "obtain

mandatory reporting by individuals, perhaps supplemented by selective audits. This would not seem to offer any significant advantages in terms of privacy. Honest individuals would continue to provide complete information about their investments to the requesting government agency; some unlucky individuals would be subjected to the intrusiveness of a detailed audit of their finances; and dishonest, risk-taking individuals would conceal information about their investment income¹⁴⁹ at the expense of other citizens. In conclusion, the flat tax does not seem to offer protection against any harm that might result when federal agencies or state governments seek information about an individual's investment income.

CONCLUSION

I have sought to demonstrate that certain privacy concerns under the current income tax system may not be as serious as some suggest, and that other privacy concerns will continue even under the flat tax. I have argued that the manner in which the IRS generally obtains information about investment income (Form 1040 or Form 1099) is not particularly intrusive.¹⁵⁰ I have also argued that the use of this information solely by the IRS and solely for administration of the income tax does not in itself cause serious harm for taxpayers (other than their being required to pay their share of the income tax).¹⁵¹

When information is misused by IRS officials or others, there is a potential for serious harm, and such misuse may not be able to be completely eradicated. However, it does not appear that information held by the IRS contributes significantly to the crimes of theft, identity theft, or kidnapping, or to annoying solicitations for investment services or charitable contributions. Moreover, the harms stemming from the use of taxpayer information for political purposes or from the browsing of taxpayer information by IRS employees or others would seem to be a

considerable amounts of information from federal authorities on the auditing side, information generated by the federal government in the course of monitoring and auditing the implementation of the federal income tax," such as, "information gleaned from its much more extensive system for matching information returns to individual and corporate returns"). If the federal income tax is repealed, Roin concludes that state tax systems will become more costly to administer. *Id.*

149. See BeVier, *supra* note 138, at 470-72 (arguing that it is not desirable for citizens to "mislead" the government as to facts that are relevant to application of its regulatory programs, as determined by Congress through legitimate processes); see also Allen, *supra* note 42, at 872 (noting that while public benefits such as "[w]elfare, Social Security, disaster relief, [and] student loans" should be available, "moral accountability in the form of personal financial disclosures" should be required in order to obtain these benefits).

150. See *supra* notes 44-50 and accompanying text (comparing mandatory information reporting to police searches and surveillance).

151. See *supra* notes 62-77 and accompanying text (noting that actual scrutiny by an IRS employee is rare and that even if such scrutiny occurs the IRS employee is a stranger and has little personal interest in the taxpayer's investment income).

continuing concern under the flat tax, in that the IRS would continue to have information regarding taxpayers' wages, pensions, business income and expenses, filing status, and dependents.

Nevertheless, it cannot be disputed that the elimination of routine reporting of investment income under the flat tax would result in there being less information about taxpayers in the hands of the IRS, and thus less information vulnerable to potential leakage or abuse. Peter Swire has suggested that information that is not placed in a government Avault@ is not at risk of Aleaking@ from the vault.¹⁵²

In light of this, why not simply accept the argument that adopting a flat tax would somewhat improve the privacy of American taxpayers? This argument glosses over the fact that any new privacy benefits to be obtained would be distributed very unequally among taxpayers.¹⁵³ As others have pointed out, the only significant investment assets of most taxpayers are their residences, their pensions, and their life insurance reserves.¹⁵⁴ Since most taxpayers lack any significant amount of dividends, interest, or capital gains, the only increase in their privacy under the flat tax would be the ability to keep secret from government their *lack* of significant investment income. If the flat tax is promoted as a boon for privacy, such individuals could justifiably feel that their privacy concerns are being taken less seriously than the privacy concerns of taxpayers with significant investment income.¹⁵⁵ For the vast majority of taxpayers, the goal of greater privacy with respect to the tax code would be better served by strengthening safeguards against misuse of government information, rather than by providing complete protection for information about investment

152. See Swire, *supra* note 59, at 478-79 (introducing the metaphor of our financial data being in a "vault 600 feet down," and "each use of data as a pipeline going from the vault to the surface"). Swire argues that "[w]hen there are inadequate controls on data that leave the vault, then one might have filters on flows into the vault." *Id.* at 484.

153. See *id.* at 505-06 (noting that "[n]ew surveillance technologies may have disproportionate impacts on different economic classes or racial or other groups"). For example, Swire points out that electronic benefits transfers for food stamps "apply predominantly to the poor and to minority groups that are disproportionately poor [while] the rich, the well-educated, and the savvy may also have ways, unavailable to the poor, to avoid or reduce government surveillance." *Id.*; see also William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1267 (1999) (arguing that under the Fourth Amendment, "the kind of privacy protection citizens have vis-à-vis the police is tied to the kind of privacy protection the same citizens have with one another [and since] that kind of privacy can be bought . . . people with more money have more of it than people who don't").

154. See Kurtz, *supra* note 9, at 166 (noting that the average taxpayer's wealth primarily consists of a home, life insurance, and interests in a pension plan and the social security retirement system). Citing IRS statistics based on 1997 returns, Kurtz notes that out of the 5.8% of returns with adjusted gross income in excess of \$100,000, "fewer than 6% . . . reported over 67% of taxable interest, dividends and gains." *Id.* at 168.

155. Cf. BOK, *supra* note 81, at 27 (arguing that "[w]hatever control over secrecy and openness we conclude is legitimate for some individuals should, in the absence of special considerations, be legitimate for all").

income alone.

Concerns about privacy should not play an important role in the debate about the desirability of adopting a flat tax. Instead, the debate should focus on considerations of fairness, administrability, and economic effects. Regardless of the outcome of this debate, the government and the IRS will continue to collect a great amount of information about Americans. We will need to rely on the rules enacted by Congress, on the adherence to these rules by the agency, and on continuing judicial scrutiny to prevent abuses.