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Fighting Conflicts of Interest in Officialdom: Constitutional and Practical Guidelines for State Financial Disclosure Laws

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A "conflict of interest" may be defined as any circumstance in which the personal interest of a public official in a matter before him in his official capacity may prevent or appear to prevent him from making an unbiased decision with respect to the matter. There have been statutes dealing with conflicts of interest in the United States at least since 1789, and at present nearly all states have some conflict of interest statutes. Such statutes fall into two categories. The older type either forbade officials from acting in conflict of interest or required them to disclose potential conflicts of interest before letting a public contract or voting on a bill. The newer statutes attempt to discourage conflicts of interest by requiring disclosure of a wide variety of financial information, usually on a yearly basis. They vary widely in the types of persons of whom they require disclosure.

2. E.g., Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67 (forbidding the Secretary of the Treasury from participating in the public securities market).
3. Three states apparently do not have any conflict of interest statutes: Montana (although such statutes are authorized by the state constitution, Mont. Const. art. 13, § 4). Rhode Island, and South Carolina.
require disclosure: candidates, elected and appointed public officials, public employees, and even related parties such as spouses, children, and business associates may be included.

The financial disclosure statutes have generated considerable controversy and litigation in some states, born out of the conflict be-


7. Public employees are distinguished from appointed public officials primarily by the rank of the person conferring the job. Appointments are made at the state level by the governor or a state commission and at the local level by a mayor. Legislative approval may be necessary and the term of office may be fixed or left to the appointing official’s discretion. E.g., Mich. Comp. Laws Ann. § 299.1 (1967) (governor appoints members of state commission on conservation, subject to confirmation by state senate, for terms of six years; commissioners appoint director of conservation, who serves at pleasure of commission); N.Y. Exec. Law § 180 (McKinney 1972) (director of Division of Budget appointed by governor without legislative ratification to serve at governor’s pleasure). Public employees are hired by the head of a department or agency (or by a low-ranking official to whom hiring authority has been delegated) and may serve at the pleasure of the hiring official, e.g., Mich. Comp. Laws Ann. § 28.4 (1967) (civilian employee of state police), or may be protected by a state civil service system. E.g., Mich. Const. art. 11, § 6 (empowering state to create a civil service); Mich. Comp. Laws Ann. §§ 16.300-304 (1967) (creating civil service system).


Despite the Supreme Court’s dismissals of the appeals in the Illinois and Washin-
tween the societal interests advanced by the disclosure statutes and the individual interests infringed upon by them. By requiring disclosure, although in a noncriminal context, the newer conflict of interest legislation invades individual privacy and therefore may induce individuals not to seek public office. On the other hand, there clearly is a need for some kind of conflict of interest legislation. Recent scandals at national\textsuperscript{10} and state\textsuperscript{11} levels confirm the existence


The Supreme Court has found substantial federal questions and heard full arguments on issues that were considered insubstantial only a few years earlier. For example, Sunday closing laws were first found to present insubstantial federal questions, see Kidd v. Ohio, 358 U.S. 132 (1958), but subsequently became substantial. See Ulmer v. Ohio, 358 U.S. 131 (1958); Grochowiak v. Pennsylvania, 358 U.S. 47 (1958); Gundaker Cent. Motors, Inc. v. Gassert, 354 U.S. 935 (1957); Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 366 U.S. 617 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 595 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).

It has also been held that a summary affirmance without opinion does not preclude a later court from adjudicating a similar issue. Serrano v. Priest, 5 Cal. 3d 584, 615-16, 487 P.2d 1241, 1263-54, 99 Cal. Rptr. 601, 623-24 (1971). \textit{But cf.} Edelman v. Jordan, 415 U.S. 651 (1974), involving a citizen suit against the State of Illinois for retroactive benefits under a federal-state aid program for the aged, blind, and disabled. The state defended on the grounds that such a suit was in violation of the eleventh amendment. The Supreme Court, in overruling the district court's verdict for the plaintiff, stated: Three fairly recent District Court judgments requiring state directors of public aid to make the type of retroactive payment involved here have been summarily affirmed by this Court notwithstanding Eleventh Amendment contentions made by state officers ....

\ldots [T]hese three summary affirmances obviously are of precedential value in support of the contention that the Eleventh Amendment does not bar the relief awarded by the District Court in this case. Equally obviously, they are not of the same precedential value as would be an opinion of this Court treating the question on the merits.

10. For example, former Supreme Court Justice Abraham Fortas resigned in 1969 after it was disclosed that he had considered accepting a $20,000 annual retainer from the Wolsson Foundation. \textit{U.S. News & World Rep.}, May 26, 1971, at 31; \textit{National Review}, June 5, 1969, at 525. Former Vice-President Agnew was accused of taking construction contract kickbacks. \textit{N.Y. Times}, Aug. 8, 1974, at 1, col. 8 (late city ed.).

11. For example, former Lieutenant Governor Reinecke of California was convicted on a perjury charge. \textit{Newsweek}, Aug. 5, 1974, at 28.
of widespread abuses of political position for personal gain. Such incidents have contributed to the general decline in public confidence in government and have resulted in increased public concern. At least one state conflict of interest statute is a direct response to a state scandal. The disclosure statutes may be effective in preventing potential conflicts of interest, informing the public of the financial ties of elected and appointed officials and of persons seeking such offices, and increasing public confidence in government. Whether these state interests are sufficient to justify the consequent infringement of individual liberties, however, depends on the constitutional stature of those liberties. If the individual interests are fundamental rights, the strict scrutiny test applies, requiring that the state infringement be supported by a "compelling governmental interest." Furthermore, the statute must be narrowly drawn, so that there is no less onerous means of achieving the state purpose. If the individual interests are not fundamental rights, the statutes need only satisfy the minimal scrutiny test, which requires that legislation be rationally related to legitimate state purposes.

This note will examine the individual interests in running for office and in personal financial privacy in order to determine what level of scrutiny should be applied to disclosure statutes. After concluding that only minimal scrutiny should apply—a standard certainly met by the state's strong interests—it will be argued that nonconstitutional considerations bearing on the practicality of disclosure statutes nevertheless require a careful balancing of the state


19. Goeaert v. Cleary, 335 U.S. 404 (1948); Lindsay v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). Furthermore, where fundamental rights are not involved a statute will be held to have a rational relation to a legitimate state purpose "if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961).
interest in disclosure against the individual interests of each class of persons affected by the statutes. The discussion of the strength of the state's interest in disclosure with respect to each class will suggest legislative guidelines that achieve a practical balancing of state and individual interests.

At the outset, it should be noted that the fifth amendment right of an individual not to be compelled to testify against himself does not invalidate financial disclosure requirements, even if the privilege against self-incrimination could be invoked by an official whose disclosures would show that he has been engaged in a conflict of interest or other illegal activity. Moreover, it is arguable that the disclosures required by conflict of interest laws are within the exception to the fifth amendment privilege—known as the “required records” doctrine—for disclosures required to be made to the government for the enforcement of noncriminal regulatory statutes. The Supreme Court has been willing to apply the doctrine to enable the government to satisfy its need for information except where disclosure is sought from a “highly selective group inherently suspect of criminal activities.” The area of official conduct is not one “permeated with criminal statutes,” and thus may be distinguished from the areas involved in cases refusing to apply the doctrine. Even if the required records doctrine is not applicable, the fifth amendment objections can be eliminated by the grant of use immunity for the information disclosed. The use immunity would prevent utilization of the disclosures in prosecutions under the conflict of interest laws, but would not hinder the disclosure laws' principal purpose of informing the public and deterring public office holders from becoming enmeshed in potentially conflicting financial ties.

20. United States v. Sullivan, 274 U.S. 529 (1927) (upholding conviction for willful failure to file income tax return despite claim that some information required by tax return was potentially incriminating; defendant should have filed and asserted fifth amendment privilege as to specific items of disclosure). See generally Note, 59 CORNELL L. REV. 245, supra note 6, at 570-72.


Returning to the question of the appropriate standard of constitutional review for financial disclosure laws, the first issue to be faced is the status of the right to run for public office. If that right is fundamental, it could be argued that strict scrutiny must be applied to the disclosure statutes, at least to the extent that they apply to candidates for public office, elected officials, and political parties, because the burden of disclosure has a chilling effect on the exercise of the right. Although several recent cases dealing with state restrictions on the ability of an individual to run for office clearly have applied a more stringent standard than minimal security, they have failed to label the right fundamental.

_Bullock v. Carter_ 27 and _Lubin v. Panish_ 28 involved statutes that required candidates to pay substantial filing fees in order to be placed on the primary election ballot. 29 The statutes in _Storer v. Brown_ 30 and _American Party v. White_ 31 required certain candidates to present nominating petitions with a stated number of signatures in order to appear on the ballot. 32 The Supreme Court struck down the filing fee requirements in _Lubin_ and _Bullock_ but upheld the petition requirements in _American Party_. In _Storer_, the Court accepted the concept of a petition requirement but remanded for a determination whether the particular requirements involved in that case were unduly onerous. The _Storer_ Court also upheld a party disaffiliation provision, which required candidates to dissociate themselves from political parties entitled to participate in a primary a year in advance of the election in which the candidates desired to run as independents. 33

These cases might be read as applying an intermediate standard

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27. 405 U.S. 134 (1972).
29. Under the statute in _Bullock_, fees as high as $8,900 were assessed, and the plaintiffs faced assessments of $1,424.60, $6,300, and $1,000, respectively. 405 U.S. at 135-36. The statutes in _Lubin_ required fees as high as $982 of candidates for governor and a fee of $701.60 for the post sought by the plaintiff. 415 U.S. at 710.
32. The statute in _American Party_ requires parties receiving less than 200,000 votes cast for governor in the last general election but more than two per cent of the vote to nominate their candidates by convention. Those groups not qualified for primary or convention procedure could nominate by petitions with the signatures of at least one per cent of the vote in the last preceding gubernatorial election. 415 U.S. at 722-74. The statute in _Storer_ required the independent candidate to file nomination papers signed by no less than five per cent nor more than six per cent of the entire vote cast in the preceding general election in the area for which the candidate sought to run. The signatures had to be obtained in a 24-day period following the primary from persons who did not vote in the primary election. 415 U.S. at 723-27.
33. 415 U.S. at 726.
of judicial scrutiny. First, the Court did not consistently use traditional strict scrutiny language. For example, instead of using the traditional test that the state may not use a given means of advancing its interest when "the end can be more narrowly achieved," the Court in Lubin said only that the legislative means must not "unfairly or unnecessarily burden" the individual right, and in Bullock stated that the filing fee law must be found "reasonably necessary to the accomplishment of legitimate state objectives." Second, Justice Douglas' concurring opinion in Lubin and Justice Brennan's dissenting opinion in Storer indicated a concern that the majority in each of those cases was not applying strict scrutiny. Justice Douglas opined that Lubin was a traditional equal protection case in which the filing fee requirement limited an indigent person's exercise of a fundamental right. That Justice Douglas felt the need to write an opinion explicitly finding a fundamental right may indicate that the Court did not use strict scrutiny. However, the opinion may have been written solely for emphasis. Justice Brennan's dissent in Storer more clearly evidences his belief that the Court failed to apply the traditional strict scrutiny standard, at least to the extent that the state did not prove and was not required to prove that there was no less restrictive way that it could have accomplished its ends. The Court did not completely ignore the least restrictive alternative test, but it effectively rendered the test inoperative for the purpose of upholding the disaffiliation provision by shifting the burden of proof on the issue from the state, where it traditionally lies, to the challenging parties. However, the demand on the issue of the petition requirements did appear to call for the traditional least restrictive alternative test.

There is some language in these cases indicating that strict

35. See text at notes 15-18 supra.
37. 415 U.S. at 716.
38. 405 U.S. at 144.
39. 415 U.S. at 719.
40. 415 U.S. at 755.
41. 415 U.S. at 721-22 (Douglas, J., concurring).
44. Compare Storer, 415 U.S. at 756, with Storer, 415 U.S. at 760 (Brennan, J., dissenting).
45. See 415 U.S. at 740-46.
scrutiny was applied. In Storer, the Court described the individual's interest as being outweighed by a "compelling" state interest in the stability of the political system,⁴⁶ while in Bullock the Court stated that the Texas statute was to receive "close scrutiny"⁴⁷ according to the standard announced in Harper v. Virginia Board of Elections,⁴⁸ which applied strict scrutiny in an equal protection context to strike down a poll tax as an unconstitutional burden on the right to vote. In Lubin, the Court termed the state interest in discouraging frivolous candidacies, which underlay the filing fee requirement, "of the highest order."⁴⁹ In American Party, the Court found the limitations on access to the ballot to be "valid measures, reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways."⁵⁰ Thus, at least in American Party, the Court applied a strict scrutiny standard explicitly including the least restrictive alternative requirement.⁵¹ The four cases are consistent with strict scrutiny, although Storer indicates that the Court may not always rigorously apply the least restrictive alternative test.

If the cases involved strict scrutiny, however, it probably was not because of the Court's concern over the right to run for office, although some language in the opinions seems to focus on that right.⁵² Rather, in Bullock the Court explicitly based its holding on the right to vote⁵³—clearly a fundamental right—⁵⁴—noting that the right to run for public office has never been recognized as an independent fundamental right.⁵⁵ Limitations on access to the ballot affect the right to vote because "the voters can assert their preferences only through candidates or parties or both . . . ."⁵⁶ The two rights are intertwined,⁵⁷ but, except in American Party, the Court insisted on analyzing the impact of the challenged statutes on the right to vote.⁵⁸

⁴⁶. 415 U.S. at 736.
⁴⁷. 405 U.S. at 142.
⁴⁹. 415 U.S. at 715.
⁵⁰. 415 U.S. at 781.
⁵¹. Storer, 415 U.S. at 760-61 (Brennan, J., dissenting).
⁵². For example, in Lubin the Court stated that "[t]he right of a party or an individual to a place on the ballot is entitled to protection . . . ." 415 U.S. at 716, and in American Party the Court said that "[t]he Constitution requires that access to the electorate be real, not 'merely theoretical.'" 415 U.S. at 783, quoting Jenness v. Fortson, 403 U.S. 431, 439 (1971).
⁵³. 405 U.S. at 144.
⁵⁵. 405 U.S. at 142-43.
⁵⁶. Lubin, 415 U.S. at 716.
⁵⁷. Lubin, 415 U.S. at 716; Bullock, 405 U.S. at 143.
⁵⁸. See Storer, 415 U.S. at 729-30; Lubin, 415 U.S. at 716; Bullock, 405 U.S. at 144.
According to this analysis, a challenge to a financial disclosure statute would have to assert that the statute has a chilling effect on the right to run for office and therefore directly and significantly impairs voters' rights to vote for the candidate of their choice. Showing a burden on certain individuals' ability to run for public office probably would not be sufficient; to be successful, the argument would have to show that the burden fell on potential candidates in such a way as to exclude candidates representing certain views, thereby depriving some voters of the ability to "assert their preferences."\(^{59}\) A comparison of financial disclosure statutes with the statutes struck down in Bullock and Lubin and the statutes upheld in Storer and American Party suggests that such an argument would not be persuasive.

First, it is hard to see how disclosure statutes narrow the range of views represented on the ballot. The filing fee requirements in Bullock and Lubin discriminated against the indigent, a "traditionally disfavored" classification,\(^{60}\) and the Court apparently was willing to assume that wealthier candidates might not adequately represent the views of poor people. Like the petition statutes upheld in Storer and American Party, financial disclosure laws do not appear to involve a traditionally discriminatory classification. Disclosure of financial ties may in fact be a greater burden for the rich, who presumably have more ties to disclose, than they are for the poor.

Second, a reasonably drawn disclosure statute does not impose requirements that would be impossible for some candidates to meet, whereas the filing fee requirements in Bullock and Lubin posed absolute barriers to candidates who could not afford to pay the fees.\(^{61}\) Similarly, disclosure statutes are in this respect less of a restriction on the right to run for public office than the petition requirements upheld in Storer\(^ supra\) and American Party, which barred the candidacy of persons without serious support. Compliance with disclosure statutes might be impossible where the candidate or officeholder is required to disclose the financial affairs of his relatives or business associates and such related parties refuse to give him the information,\(^{63}\) but a well-drafted statute could avoid this problem by provid-

59. Lubin, 415 U.S. at 716.
61. Lubin, 415 U.S. at 717-18; Bullock, 405 U.S. at 137, 146.
62. The remand in Storer was for the purpose of deciding whether the details of the petition requirements foreclosed ballot access to serious, minority party candidates. See text following note 32 supra.
ing for waiver of the disclosure requirement to the extent the
candidate or official shows that his good-faith efforts to get the re-
quired information were unavailing. 64

Finally, the state’s interest in preventing the election of candi-
dates prone to conflicts of interest, which underlies the disclosure
statutes, seems similar to the compelling interest in preventing
ballot flooding by candidates without substantial support, which
underlay the petition requirements upheld in Storer and American
Party. Both interests concern the stability of the political system.
Thus, even if the right to run for public office is fundamental, and
even if the right to vote is somehow involved, the state’s interest in
disclosure statutes probably is strong enough to justify the resultant
infringement on these rights.

Moreover, financial disclosure laws are better suited to accom-
plishing their underlying purposes than the statutes struck down in
Bullock and Lubin. The substantial filing fee requirements involved
in Bullock and Lubin were poor methods of weeding out spurious
candidates because ability to pay a fee is not a very good test of the
seriousness of a candidacy. As the Court pointed out in Lubin, any
wealthy merchant could pay the filing fee and run for office for the
sole purpose of advertising, while serious but indigent candidates
were excluded. 65 In contrast, disclosure statutes enable the public
to know about the financial ties of public officials and candidates or
nominees for public office. The electorate then can vote for can-
didates who are not likely to be involved in conflicts of interest, try to
influence the appointment of trustworthy nominees, and bring
prosecutions against, or urge the public prosecutor to charge, officials
who do act in conflict of interest. The disclosure required by such
statutes contributes to the prevention of conflicts of interest by ind-
cucing officials and candidates to divest themselves of potentially
embarrassing financial ties. 66 The preventive and remedial aspects of
the laws contribute to increasing public confidence in government.

64. Similarly, a waiver provision would be needed if disclosure requirements were
so detailed that they conflicted with the ethical injunctions of confidentiality in
disclosure of the consideration given or services performed in exchange for compensa-
tion received from any business entity by a candidate or officeholder or by any business
entity in which such a person holds at least a 10 per cent interest). For example, even
a general statement that legal services were performed for a particular client might
violate the lawyer-client privilege “if the identification of the client conveys informa-
tion which ordinarily would be conceded to be part of the usual privileged communica-
tion between attorney and client . . . .” Baird v. Koerner, 219 F.2d 629, 632 (9th Cir.
1954).

65. 415 U.S. at 717.

66. During his confirmation hearings, Vice-President Nelson Rockefeller offered to
put all of his securities into blind trusts and to ask the trustees of two trusts of which
he is a beneficiary to treat him as if the trusts were blind. U.S. News & World Rep.,
Thus, while there may be arguments about the proper scope of disclosure statutes, the concept of requiring disclosure of the financial affairs of public officials and candidates is probably a sufficiently narrow and effective means of achieving the state's interests to qualify as the least restrictive infringement on the rights to vote and to run for public office.

The other argument for subjecting the financial disclosure statutes to strict scrutiny is based on the right of privacy. This right, unlike the right to run for office, could be asserted by all persons affected by the statutes: candidates, officeholders, and public employees and their spouses, children, other relatives, and associates. While the Court has not passed on whether there is a right to personal financial privacy, its decisions regarding other aspects of the right of privacy do lend some support to an argument that the right extends to personal finances.

In *Griswold v. Connecticut*, the Supreme Court relied on the right of privacy to strike down a Connecticut statute forbidding the use of contraceptives. Without delimiting the scope of the zone of privacy, the opinion of the Court found that the marital relationship lay within that zone. Three concurring justices identified "the rights to marital privacy and to marry and raise a family" as being within the protected zone, although they noted that "the Court's holding . . . in no way interferes with a state's proper regulation of sexual promiscuity and misconduct."

In *Roe v. Wade*, the Court struck down a state statute substantially restricting a woman's ability to obtain a nontherapeutic abortion as an overbroad infringement on the woman's fundamental right of privacy. Because the plaintiff was unmarried, the Court's decision extended the right of privacy beyond the marital relationship. *Roe* did not dramatically extend the *Griswold* holding, however, because a woman's ability to have an abortion may bear on her decision to have sexual relations. Several other Supreme Court cases have recognized the right of privacy in the area of sexual relations and decisions regarding the bearing of children. The Court has strayed

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67. See text at notes 128-43 infra.
68. 381 U.S. 479 (1965).
69. 381 U.S. at 485. A concurring opinion stated that "[t]he Connecticut statutes . . . dealt with a particularly important and sensitive area of privacy . . . ." 381 U.S. at 495 (Goldberg, J).
70. 381 U.S. at 495.
71. 381 U.S. at 499.
72. 410 U.S. 113 (1975).
73. 410 U.S. at 164. The decision spawned a proposal to amend the Constitution to restrict abortions. *New Republic*, May 18, 1974, at 5.
74. 410 U.S. at 120.
75. See Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (striking down mandatory maternity leave rules for pregnant teachers in public schools because the right
somewhat from this area by extending the right of privacy to protect possession of obscene material in the home. It has been suggested that the right of privacy may extend to private homosexual or extra-marital heterosexual behavior; nontraditional family relationships; the use of marijuana in one's home; hair length; some types of information sought by police, governmental officials, and social welfare agencies; and loyalty oaths, freedom to travel, religious freedom, and other related first amendment rights.

While the zone of privacy recognized by the Supreme Court to date does not appear at first blush to extend to personal financial affairs, the California Supreme Court made such an extension in City of Carmel-by-the-Sea v. Young. The court there held that the financial disclosure portion of the California conflict of interest statute impermissibly infringed on the personal privacy right. The statute required all elected officials and candidates for public office and certain other public officials and public employees to file annual dis-
closure statements "describing the nature and extent of [their] investments, including the ownership of shares in any corporation . . . or financial interest in any business entity, which is subject to regulation by any state or local public agency, if such investment is in excess of ten thousand dollars . . . at the time of the statement."

The statements were made public records.

The California court relied on the reasoning employed in Griswold to find the right of privacy in the "penumbras" of several articles of the Bill of Rights, but its analysis rested on the assertion that "the right of privacy concerns . . . one's own peace of mind . . . ," an idea it derived from a common-law invasion of privacy case. It found personal financial affairs to be within the zone of privacy because privacy in these matters is essential to peace of mind.

The court also was concerned that publication of an individual's assets might bring about invasions of privacy in the form of unwanted solicitation by salesmen, lawsuits filed for the purpose of harassing the individual into settlement, and general exposure to criminals. In addition, the court relied on People v. Edwards, its own decision interpreting the fourth amendment to prohibit the search of outside trashcans that are "adjunct[s] to the domestic economy, " because they constitute the "primary supporting pillar of that economy."

The California court's analysis in City of Carmel-by-the-Sea seems weak and fails to show how extending privacy to personal

87. 2 Cal. 3d at 265, 466 P.2d at 231, 85 Cal. Rptr. at 7.
88. 2 Cal. 3d at 265, 466 P.2d at 231-32, 85 Cal. Rptr. at 7-8.
89. 2 Cal. 3d at 270, 466 P.2d at 235, 85 Cal. Rptr. at 9.
91. 71 Cal. 2d at 1104, 458 P.2d at 718, 80 Cal. Rptr. at 638.
92. 2 Cal. 3d at 265, 466 P.2d at 231, 85 Cal. Rptr. at 7.
financial affairs is consistent with the limited scope of the right recognized in *Griswold*. First, reliance on the common law of invasion of privacy is misplaced in a constitutional argument. Second, it has been suggested that the danger of other invasions of privacy due to public disclosure is exaggerated. Third, the court's explanation of its reliance on *Edwards* rests on its questionable equation of two different meanings of the term "domestic economy," the first being a description of the physical activities characteristic of a home and the second a term for the financial affairs of the home. The court does not otherwise explain how the fourth amendment restriction on physical invasions of the home by the police supports the argument that the government cannot require an individual to divulge information about financial activities, many of which take place outside the home.

The argument in favor of extending the right of privacy probably can be stated more persuasively. For example, one may argue that the fourth amendment is relevant because financial disclosure laws are a method of gathering information that the state could not send police into the home to seize without probable cause. The weakness of this argument lies in the fact that much financial information could be gathered from sources outside the home, such as employers, banks, and stock exchanges or corporate share registers. Furthermore, the fourth amendment right is subject to "reasonable" infringements by the government, a limitation that has been interpreted so broadly in the noncriminal context as to limit the right for practical purposes to a protection against physical invasions of an individual's household by agents of the state.

One may also argue along the lines of *Roe v. Wade* that personal financial privacy is a fundamental right because it is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." A comparison of the treatment of personal financial affairs with the treatment of sexual, marital, and family affairs, which have already been recognized as lying within

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96. Compare the definition of "economy" as "the system of arrangement or mode of operation or functioning of anything." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 ("economy" 3a), with its definition as "the management of a person's household or private affairs." Id. at 720 ("economy" 2d).
the zone of privacy, may bolster the argument. Both types of activities are basic to American society: The individual and his or her family are the basic social and economic units of society. The reasons for protecting the privacy of personal financial affairs are similar to some of the policies underlying the right of sexual, marital, and family privacy. In both cases people instinctively feel that these areas are private. Also, a certain measure of privacy seems necessary to foster the social and economic functions of these units. The prying eyes of government officials and neighbors might discourage marriage and the bearing and rearing of children. Similarly, individual financial enterprise may be discouraged or competitively disadvantaged by exposure to public scorn, envy, or curiosity.

Recognition of privacy as a common-law right also shows the great value American society places on it. Many writers have found deep philosophical and sociological underpinnings to the right of privacy, and the right has been held to protect a variety of personal affairs from unwarranted publicity. In the area of personal finan-

100. Although the American public does not seem to be hesitant to respond to survey questions, questions about money and income encounter more resistance than questions about other subjects. A. WESTIN, PRIVACY AND FREEDOM 53 (1st ed. 1967).


Later commentators have argued that the definition of privacy as the “right to be let alone” is too negative. It has been suggested that the right of privacy is “an effort to define some reasonable rules for governing the behavior of active people whose . . . interactions are part of a highly complex interdependent society[,] . . . an affirmation of the importance of certain aspects of the individual person and his desired freedom from unreasonable intrusive conduct by others,” Beany, supra, at 254, or an effort to define an individual’s “control over when and by whom the (physical) parts of us (as identifiable persons) can be seen or heard (in person or by the use of photographs, recordings, T.V., etc), touched, smelled, or tasted by others,” PARKER, A Definition of Privacy, 27 RUTGERS L. REV. 275, 283-84 (1974), or an effort to define “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.” A. WESTIN, supra note 100, at 7.


103. See, e.g., Steding v. Battistoni, 3 Conn. Cir. 76, 208 A.2d 559 (1964) (unauthorized filing of suit in plaintiff’s name); Bazemore v. Savannah Hosp., 171 Ga. 257, 155 S.E. 194 (1930) (unauthorized publishing of pictures of newborn deformed child); Pavesich
cial matters, it has been held to prevent a creditor from harassing a debtor by publicizing the fact of the debt. 104

While the government has legitimate interests in restricting the privacy of financial affairs, these restrictions do not necessarily contradict the proposition that the right of personal financial privacy is of fundamental value to American society, because the state restricts marital privacy in similar ways. For example, the state licenses marriages 105 and many businesses. 106 The tax laws require disclosure of marital status and of income. 107 Some state divorce statutes require disclosure of the details of the breakdown of a divorcing couple’s marriage, 108 just as the Bankruptcy Act requires disclosure of the details of the breakdown of a business filing for bankruptcy. 109

Despite these arguments, the fact that American society is accustomed to extensive invasions of financial privacy suggests that financial privacy is not “rooted in American traditions.” As the dissent in City of Carmel-by-the-Sea points out, “compulsory disclosure for purposes of licensing and regulation has been held to be constitutional in a wide variety of economic enterprises.” 110 Social security and income taxes, for example, could not be collected without compulsory disclosure of income to the government. The securities laws require that some financial information concerning directors,


Damages for the tort of invasion of privacy—like damages for libel or slander per se—are awarded without the need to prove special damages. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 201-02, 50 S.E. 68, 73 (1905). See also W. PROSSER, LAW OF TORTS § 117 (4th ed. 1971). Recently, however, the Supreme Court restored the requirement that “actual damages” be proved in suits against the press by private persons in cases in which “liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).


105. See, e.g., N.Y. DOMESTIC RELATIONS LAW § 13 (McKinney 1964).


108. See, e.g., DEL. CODE ANN. tit. 13, § 1522 (1953); IDAHO CODE § 32-603 (Supp. 1974).


110. 2 Cal. 3d at 231, 466 P.2d at 241, 85 Cal. Rptr. at 17 (Mosk, J., dissenting).

111. Under the regulations implementing the social security tax, employers must disclose to the federal government the names, addresses, and remuneration paid to all employees and the amounts withheld. 26 C.F.R. §§ 31.6001, 6011 (1974).
officers, and major shareholders of corporations be made public.\textsuperscript{112} Furthermore, the common-law right of privacy is limited to the truly private aspects of an individual’s life, and is lost to the extent that an individual becomes the subject of legitimate public attention. For example, by becoming a candidate for public office a person’s life ceases to be private in those particulars that relate to his fitness for public office.\textsuperscript{113} It has been held that the first amendment limits the use of state and federal libel and invasion of privacy statutes to inhibit the media’s freedom to publish information about public figures,\textsuperscript{114} news,\textsuperscript{115} and other information of public interest.\textsuperscript{116}

Finally, a consideration of the multifold consequences for many other statutes that would result from the recognition of personal financial privacy as a fundamental right argues strongly against such a recognition. Extending the right of privacy in this manner would require tax, social security, census, and licensing statutes, for instance, to undergo strict scrutiny, traditionally a very demanding standard.\textsuperscript{117} Although there probably are compelling state interests underlying the central requirements of these statutes, a court applying the “least restrictive means” standard would be hard pressed to uphold the statutes in their entirety.\textsuperscript{118} For example, the state probably has a compelling interest in acquiring some of the information


\textsuperscript{117} Strict scrutiny almost always has led to invalidation of the challenged statute. \textit{E.g.}, Roe v. Wade, 410 U.S. 113 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); McLaughlin v. Florida, 379 U.S. 184 (1964). See Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting): “Some lines must be drawn. To challenge such lines by the ‘compelling state interest’ standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.” \textit{But cf.} Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

\textsuperscript{118} The Court seemed unwilling to do so in \textit{Storer v. Brown}. \textit{See} text at notes 42-45 supra. \textit{But see} text at notes 50-51 supra.
that must be disclosed on census forms,119 such as the name, relationship, sex, race, age, and marital status of each member of every household.120 However, it is not clear that disclosure of all of the many additional items of financial information required by the census forms—such as the market value of each person's house,121 the nature or his or her work,122 the amount earned,123 the identity of his or her employer,124 the amount of rent paid,125 the amount of each home's average gas bill,126 or the number of cars owned by each household127—is justified by a compelling state interest. Nor is it clear that requiring disclosure of all persons, or even a randomly chosen group of people, is the least restrictive means of obtaining the necessary statistical data; solicitation of voluntary disclosure might be sufficient.128 The state may have legitimate interests in obtaining the additional information for social research and program planning,129 but recognition of financial privacy as a fundamental right would force courts to make an awkward choice of striking down many of the census requirements or upholding them by bending the strict scrutiny standard.

The argument raised in City of Carmel-by-the-Sea that disclosure may lead to physical invasion of the home by importunate salesmen or criminals alerted to the details of a person's financial status130

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119. The Secretary of Commerce has virtually unlimited discretion to determine the scope of the questions to be asked on census forms. 15 U.S.C. § 5 (1970). Failure to answer or giving false answers is punishable by a fine and imprisonment. 5 U.S.C. § 221 (1970). It has been held that the census questionnaire is not an unreasonable "search and seizure" because "[t]he authority to gather reliable statistical data reasonably related to government purposes and functions is a necessity if modern government is to legislate intelligently and effectively. . . . The questions contained in the household questionnaire related to important federal concerns, such as housing, labor, and health, and were not unduly broad or sweeping in their scope." United States v. Rickenbacker, 309 F.2d 462, 463 (2d Cir. 1962), cert. denied, 371 U.S. 962 (1963), cited with approval in Wyman v. James, 400 U.S. 309, 321 (1971). See generally Fernandez, The Census, 42 S. CAL. L. REV. 245 (1969).


121. Id. at 3, No. H12.
122. Id. at 6, No. 29a.
123. Id. at 7, No. 40.
124. Id. at 7, No. 53.
125. Id. at 3, No. H13.
126. Id. at 5, No. H14(b).
127. Id. at 5, No. H23.

128. Dependence on voluntary disclosure might skew the statistical data, however, because voluntary respondents might tend to come from a certain segment of the population. It might be possible to overcome this problem through follow-up interviews.

130. See text at note 89 supra.
must also be answered. As several commentators on that case have pointed out, this danger seems exaggerated. Furthermore, such invasions would not themselves be state action, especially in light of the existence of legal remedies for trespass, robbery, and coercion. A similar objection would be that the required disclosure might relate to clearly protected areas of privacy. For instance, the laws conceivably could mandate disclosure of debts for abortions or vasectomies. This problem probably would arise infrequently, however. Many disclosure statutes do not require the disclosure of debts and those that do usually do not cover personal debts because of substantial limitations on the size of the debts that must be reported. In any case, a well-drafted statute could avoid the problem by authorizing an independent body to allow nondisclosure of such matters.

The constitutional right of privacy has been thrust into prominence by the Griswold and Wade decisions. In light of the contemporary concern over governmental intrusion into personal affairs, it is appealing to extend privacy to shield the individual from the new intrusions of financial disclosure laws. But uneasiness over such intrusions should not necessarily imply that the disclosure laws infringe upon a fundamental right. The uneasiness may stem from the novelty of the laws rather than from concern over the inviolability of personal financial privacy. It is true that some requirements of present disclosure laws may be unwise, but the Constitution merely

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131. See note 95 supra and accompanying text.

132. Although the privacy cases concern only government regulation of protected activities, and not disclosure of information, disclosure that deters or "chills" the exercise of protected activities arguably would also be prohibited. Cf. Watkins v. United States, 354 U.S. 175, 197 (1957). See also note 26 supra.


134. E.g., WASH. REV. CODE § 42.17.240(1)(c) (1974) (requires disclosure of debts only if over $500).

135. Cf. text at notes 63-64 supra.


provides minimum standards for the exercise of governmental power. It does not require wise laws. Although the fundamental right of privacy should not be extended to personal financial affairs, the arguments discussed above in favor of extending the right demonstrate that financial privacy does have some value in American society. By requiring disclosure, the new conflict of interest statutes may so burden the acceptance of public office or public employment that few qualified individuals will be willing to put themselves forward for government positions. A legislature therefore would be wise to tailor its disclosure statute as unobtrusively as possible, even if not constitutionally required to do so. The common-law right of privacy, a rough measure of society's concern for privacy, excepted only matters that directly affected a candidate's fitness for office or an official's performance or conduct in office. A disclosure statute that reflects the common-law principle of a direct connection between the disclosure required and the state interest served will be less likely to deter qualified individuals from public service than a broad-ranging statute. Thus, the test that should guide the legislature is much the same as the test that would apply if a fundamental right were infringed: The level of disclosure required of each category of persons covered by the statute should be tailored to fit the degree of the state's interest in disclosure.

Variations in the level of disclosure could be made (1) in the number and type of items that must be disclosed, and (2) in the degree to which the disclosures are made available to the public. Variations of the first kind do not appear justifiable. If the state has any legitimate interest in disclosure, that interest extends to disclosure of all of a person's major financial ties. Variations in the degree to which disclosure is made public, however, would mitigate the invasions of privacy created by the disclosure requirements without

138. See text at notes 99-104 supra.
139. See text following note 112 supra.
140. The principal items that should be disclosed are major assets and investments, such as real estate and stock holdings, salaries, and other sources of income, gifts, and debts. See, e.g., ILL. REV. STAT. ch. 127, § 604A-102 (1973) (requiring disclosure of professional income and other income if from a business doing business within state or from a unit of government; capital assets including real estate but stock ownership only if company does business within state; the identity of (but not amount of income derived from) compensated lobbyists); KAN. STAT. ANN. §§ 75-4301 to -4302 (Supp. 1974) (requiring disclosure of ownership of legal or equitable interest exceeding 5 per cent or $5,000, whichever is less, in any business, and all gifts or income of any form exceeding $1,000). It is questionable whether the state's interest extends to the reporting of exact dollar amounts. Reporting within $100 or $1000 categories may be sufficient. Nor is it likely that the state has a very significant interest in items below a certain dollar level.
defeating the state interests involved. Such variations could be achieved by allowing confidential disclosure to be made to an ethics committee in some situations.141 The committee could serve as a watchdog for the public interest, making public or forwarding to the appropriate authorities any information disclosed to it that reveals conflicts of interest.142 The committee could also be charged with hearing and investigating citizen complaints and bringing charges when there is reasonable cause to believe that an official or public employee has failed to make proper disclosure.143 In order to carry out these functions, the committee should be independent of all other governmental entities.144 This dual-level system would allow some differentiation by which disclosure requirements could be tailored to the state's widely varying interests in disclosure by each group of public officials. There are three principal categories of persons working for the state: elected officials, appointed officials, and public employees.145

The state has some interest in disclosure by each of these groups, as well as by candidates for elective office, nominees for public office,

141. Cf. Comment, supra note 14, at 993-94, proposing a model statute. The author suggests that public disclosure be required of "state-level elected officers, officials appointed directly by the Governor, and all . . . state employees [paid over $11,000 per year, and] elected and high-bracket officials of county and city governments of more than 400,000 population." Id. at 998 (footnotes omitted). All other officials would be required to make confidential disclosure at most. This plan thus would frustrate to some extent the purpose of the disclosure requirement by preventing the public from having the benefit of financial disclosure by candidates for elective office in small and medium-sized towns. The plan further deviates from the guidelines proposed hereinafter by requiring the same level of disclosure from the officeholder or public employee as from parties related to or associated with him, see text at notes 152-53 infra, and by employing an income cut-off for public employees. See text at note 150 infra.


142. The creation of such a committee would entail the disadvantages of additional fiscal and bureaucratic burdens. However, the committee's function could be expanded by giving it the power to grant waivers of disclosure requirements in cases of hardship, see text at notes 66, 135 supra, and to render confidential advisory opinions to persons covered by any of the conflict of interest statutes regarding what items must be disclosed or what situations involve a conflict of interest.


144. For example, the committee could be composed primarily of persons not involved in government service and having occupations that are not substantially regulated by the state and that do not involve substantial business with state or local governments.

145. For the distinction between appointed officials and public employees, see note 7 supra.
and applicants for public employment. The state's interest in disclosure varies among these groups, however, and within each group according to the role the public plays in the selection of the persons covered, the type of supervision to which those persons are subject, the degree of policy-making power or discretion over spending those persons have, and the size of such spending programs. For example, the first two factors would justify requiring a less public form of disclosure from public employees than from candidates and elected officials. In the case of candidates and elected officials, public disclosure enables the electorate to make informed choices. In the case of public employees, the interest in public disclosure is much weaker because the public plays no direct role in the employees' selection, but limited disclosure to hiring and supervisory authorities—either directly or through an ethics committee—is clearly warranted. It might be argued that public disclosure is needed even here in order to enable the public to exert pressure on a lax bureaucracy, but the existence of a truly independent ethics committee could serve the watchdog function without necessitating such a major incursion into the privacy of public employees. In addition, public scrutiny is less important in the case of public employees because the public employee is subject to more systematic supervision than the elected official, who is subject only to the unfocused scrutiny of an electorate composed of diverse and conflicting interests. The public employee is directly responsible to a specific person or governmental unit, and his actions are scrutinized in periodic audits of his department.  

The state's interest in disclosure by appointed officials depends on these same factors. For appointed officials whose appointment must be ratified by the legislature, the state has an interest in public disclosure because the legislature needs such disclosure in order to make an informed vote on ratification, and the public needs full disclosure—as it does with regard to all matters before the legislature—in order to make its opinions known to its representatives. Where the legislature has no direct role in the appointment process, the public's indirect role in influencing the person or body holding the appointive power may not justify full public disclosure, especially where the appointee is subject to fairly systematic supervision.

Where a public official has little power over policy decisions or

146. See, e.g., Mich. Comp. Laws Ann. § 21.66 (1967) (auditor general required to report to governor quarterly on receipts and disbursements of “each and every state institution or officer”). Elected officials—such as the Secretary of State—who head departments administering spending programs would also be scrutinized by such audits, but most elected officials (e.g., legislators) would not be so scrutinized.

147. See note 7 supra.

148. See note 7 supra.
spending programs, the state's interest in disclosure is very weak, because the official cannot become involved in a significant conflict of interest. Generally, the official on the state level has greater power than the local official. The state's interest in disclosure is correspondingly stronger in the former case. However, an official of a large municipality may control very substantial sums of money. Some states use income level as a way of determining which officials and employees are important enough to warrant requiring disclosure, but this device seems ill-fitted to that purpose. Such a test might well require disclosure by a highly paid university professor who has little policy-making authority.

As many state disclosure laws recognize, the state may have a legitimate interest in disclosure of the financial affairs of family members and close associates of public officials and employees. In the absence of disclosure by such parties, a candidate or officeholder, for example, might be able to avoid disclosing an interest in a corporation without entirely relinquishing actual control by giving the stock to his spouse or minor children. In addition, it is likely that financial ties of closely related parties, including business partners, in effect constitute financial ties of the officeholder because of the community of interests involved. The state's interest in disclosure by related parties depends on its interest in disclosure by the principal party, although it is rarely as strong. The state interest also depends on the closeness of the relation, because it probably can be assumed that people in close kinship are most likely to be influenced by each other's interests even where they do not legally share their interests. Finally, the degree of legal or emotional control the official or employee can be expected to exert over the related

149. Where the size or importance of the local spending programs so warrant, the city or county might impose its own financial disclosure requirements. New York City, for example, has presented for the mayor's signature an ordinance requiring elected officials (including the mayor, city council members, and borough presidents), candidates for political office, and all public employees with income greater than $25,000 to file a statement of all sources of income over $1,000, gifts of over $500, debts owed of over $500, and investments or real estate holdings of over $20,000. Spouses are also required to file. The statements are public, and there is a criminal penalty for failure to comply with the requirement. N.Y. Times, Dec. 18, 1974, at 1, 28, cols. 6, 4 (late city ed.).


152. See generally Comment, supra note 14, at 937.
party is important. For example, spouses and minor children perhaps are more likely to be used to mask financial ties than parents, adult children, brothers and sisters, or business partners, because the officeholder probably can wield more sure control over spouses and minor children through emotional or legal ties.\footnote{153. Under the Uniform Gift to Minors Act the minor can be given "indefeasibly vested legal title to the security, money or life insurance given." Uniform Gift to Minors Act § 3, but the custodian, who may be the parent, has full legal power to sell, invest, or dispose of the property. Uniform Gift to Minors Act § 4. See, e.g., Mich. Comp. Laws Ann. §§ 554.453-454 (1967). The spouse's separate property, however, is entirely under his or her control. See, e.g., Cal. Civ. Code §§ 5107-08 (West 1970); Mich. Comp. Laws Ann. § 557.1 (1967).}

These guidelines are necessarily quite general, and a legislature must be accorded substantial discretion in making fine judgments concerning the degree of disclosure to be required of each class of persons. While some disclosure requirements undoubtedly will serve to deter official abuse of conflict of interest situations, legislatures should exercise restraint lest the burden of disclosure discourage qualified citizens from entering public service. Whether or not they are constitutional, disclosure statutes will be workable only if they strike a balance between public and individual interests.