Florida Law Review

Volume 31 | Issue 5 Article 2

October 1979

Constitutional Limitations on Florida's Financial Disclosure Laws

Elliot H. Henslovitz

Claudia B. Greenberg

CONSTITUTIONAL LIMITATIONS ON FLORIDA'S FINANCIAL DISCLOSURE LAWS

ELLIOT H. HENSLOVITZ*
CLAUDIA B. GREENBERG**

INTRODUCTION

On November 2, 1976, the Florida electorate favorably voted in an amendment to the Florida Constitution popularly known as the "Sunshine Amendment."[1] The amendment requires, in part, "full and public disclosure" of the financial interests of certain high level public officers. Intended to bolster public confidence in elected officials, the amendment lays the predicate for some of the most stringent financial disclosure laws in the country. However, the intrusive nature of the amendment's provisions brings it into direct conflict with the privacy interest of public officials.

The amendment's disclosure scheme was challenged in *Plante v. Gonzalez.*[2] The Fifth Circuit Court of Appeals decided the case amidst an atmosphere of near-complete confusion as to the appropriate constitutional test to be applied to financial disclosure laws. Since the Supreme Court of the United States has failed to directly address this issue,[3] the privacy limitations to be imposed on state financial disclosure laws remains unclear. The Fifth Circuit decision represents an attempt to fashion a standard which will accord due weight to the public interest as well as to the countervailing privacy interest of state officials.

This article critically analyzes the Fifth Circuit decision in *Plante* referring to both the individual's right to privacy and the public's right to know, and suggests an appropriate accommodation of the two conflicting interests. Analysis of Florida's current financial disclosure laws and the history of disclosure legislation in Florida suggests that the public interest in full disclosure is compelling. However, recent decisions of the United States Supreme Court strongly imply that the federal constitution protects individuals from the necessity of disclosing purely personal matters to the public. In examining

---

*B.A., A.A., 1966, Yeshiva University; J.D., 1979, University of Miami; Member of The Florida Bar.

**B.A., 1967, Emory University, M.A., 1968, University of Florida; J.D., 1979, University of Miami; Member of the Florida Bar.

1. *See* FLA. CONST. art. II, §8.

2. 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 99 S. Ct. 1047 (1979).

3. The United States Supreme Court has dismissed appeals on three state court decisions concerning financial disclosure laws prior to *Plante*. Stein v. Howlett, 52 Ill. 2d 570, 289 N.E.2d 409 (1972), *appeal dismissed*, 412 U.S. 925 (1973); Montgomery County v. Walsh, 274 Md. 502, 336 A.2d 97 (1975), *appeal dismissed*, 424 U.S. 901 (1976); Fritz v. Gorton, 83 Wash. 2d 275, 517 P.2d 911 (1974), *appeal dismissed*, 417 U.S. 902 (1974). The Court has also denied certiorari in Illinois State Employees Ass'n v. Walker, 57 Ill. 2d 512, 315 N.E.2d 9 (1974), *cert. denied sub nom.*, Trooper's Lodge No. 41 v. Walker, 419 U.S. 1058 (1974).

aspects of financial disclosure laws which are of special concern to the judiciary, the proper standard of review will become evident.

HISTORY OF FINANCIAL DISCLOSURE LEGISLATION IN FLORIDA

Initially concerned with campaign funding, efforts to prevent conflicts of interest among public office holders resulted in passage of an act prohibiting corporations from using money for political purposes.[4] The Florida legislature subsequently[5] attempted to limit the amount of money spent in campaigns.[6] However, the laws were repealed in 1949 when proven unworkable. Thereafter, candidates were merely required to report all campaign expenses.[7]

In an attempt to eliminate contributions from gambling interests,[8] the legislature revised the election code of 1951, thereby requiring complete publicity of all campaign expenditures and contributions.[9] The absence of effective enforcement and other various loopholes in the code resulted in criticism of the law.[10] The legislature prohibited public officials from engaging in activities which created conflicts of interest.[11] The Act provided that no officer or employee of a state agency, member of the legislature or legislative employee shall have any direct or indirect interest, financial or otherwise, in any business transaction or professional activity which is in substantial conflict with the proper discharge of his duties.[12] The enactment appeared merely a policy statement rather than an act with authoritative effect. While a code of ethics was enacted to guide appropriate standards of conduct, the Act made no provision for financial disclosure other than requiring disclosure when the official owned ten percent or more of business entities transacting business with the state.[13]

---

4. 1897 Fla. Laws, ch. 4538; *see* Roady, *Ten Years of Florida's "Who Gave It—Who Got It" Law*, 27 LAW & CONTEMP. PROB. 434, 435 (1962).

5. Roady, *supra* note 4, at 436.

6. 1913 Fla. Laws, ch. 6470.

7. Roady, *supra* note 4, at 436. Legislators found the limits ineffective. More money was actually spent than the law permitted.

8. Roady, *supra* note 4, at 436 n.9. This fear arose as a result of the Kefauver hearings in Miami and Tampa. An associate of the Capone gang had contributed large sums to a successful candidate for governor in the 1948 election.

9. 1951 Fla. Laws, ch. 26870. The press gave the voters full coverage of who gave it and who got it. Not surprisingly, at the time of the enactment, some people were opposed to being identified as contributors; they either feared reprisals or an adverse effect on their candidates. Roady, *supra* note 4, at 440.

10. Evidently, the candidates felt that no one checked for violations. A 1972 Miami Herald study reported that verified statements by some candidates indicated collection and spending more than was permitted. Moreover, some candidates had received then-prohibited contributions from the pari-mutuels. Other candidates failed to file entirely until several months after the election. Mansfield, *Florida: The Power of Incumbancy*, in CAMPAIGN MONEY: REFORM AND REALITY IN THE STATES 42 (H. Alexander ed. 1976).

11. 1967 Fla. Laws, ch. 469. In comparison to subsequent legislation, FLA. STAT. §112.3145 (1977), the impact of the statute was relatively mild. Plante v. Gonzalez, 575 F.2d 1119, 1122 (5th Cir. 1978).

12. 1967 Fla. Laws, ch. 469, §1.

13. *Id.* §3(2). Individuals subject to the Act could accept no gift that might reasonably

The Act proved ineffective, as "[p]olitical scandals rocked Florida in the seventies."[14] In 1974, during the height of Watergate, allegations of corruption and political scandals abounded in Florida.[15] Legislation was clearly needed to allay the public's pervasive fears concerning actual or potential conflicts of interest among Florida's public officials.[16] For the first time, public officials were required to file statements of financial interest,[17] and to super-

---

tend to influence them. Ten percent ownership, direct or indirect, of a business entity subject to state regulation or substantially reliant upon state business, had to be disclosed. The filer was thereby prohibited from using his access to confidential information to secure special privileges and personal gain. In addition, outside employment tending to influence the individual in his duties was prohibited. A catch-all clause prohibited personal and official investment in any enterprise which could create a substantial conflict. *Id.* §3.

In mitigation of these restrictions, however, the Act did not prevent the acceptance of employment or engaging in another gainful pursuit which did not interfere with his official duties. *Id.* §6. Violators could be dismissed from employment, removed from office or penalized as provided by law. *Id.* §7.

14. Plante v. Gonzalez, 575 F.2d 1119, 1122 (5th Cir. 1978).

15. Mansfield, *supra* note 10, at 40. Education Commissioner Christian was accused of taking $70,000 in bribes and kickbacks involving state contracts. He resigned before formal state House committee proceedings on the issue of impeachment were commenced. He was subsequently indicted for tax evasion and failure to report unlawful compensation. Christian, the first Florida cabinet officer ever accused of a felony, served 135 days of a six month sentence in federal prison. *Id.* at 40-41.

In this same time period, Senator Gurney became the first United States Senator in 50 years to be indicted for influence peddling. Gurney allegedly received $233,000 in unreported campaign contributions. Gurney too stepped down from office. *Id.* at 41.

Three weeks prior to the November, 1974 general election, Thomas O'Malley was indicted on felony charges for allegedly receiving $50,000 for using his influence. O'Malley was Florida's Treasurer and Insurance Commissioner. *Id.* State Comptroller Dickinson was also indicted after the 1974 election for alleged income tax evasion, extortion, and violation of federal banking regulations. The Supreme Court of Florida was not untouched. Justice Boyd, up for reelection in 1974, was mentioned in newspaper stories reciting that he and Justice Dekle had been influenced in a court decision in a utility tax case that could have had an adverse effect on Florida consumers to the extent of several million dollars. Similar charges against fellow Justice McCain led to hearings by the House Impeachment Committee. Dekle and McCain resigned, but Boyd was not impeached. Instead he submitted to a Judicial Qualification Committee determination of his competence to continue on the court. A finding of competence was made. However, the Committee termed the alleged outside influence an "illegal outside opinion." *Id.* at 41.

Naturally, this scandalous atmosphere produced frustrated and unhappy voters and came to national attention. *See* N.Y. Times, April 27, 1975, at 35, col. 1. In fact, fewer than 15% of Florida voters voted in the judicial races in which incumbent Boyd won easily. *Id.* at 53.

16. Apparently, during this same time period, public officials became somewhat financially dependent upon the institutions they regulated. Comptroller Dickinson, for example, relied heavily for campaign funds from people connected with the institutions he regulated: banks, small-loan companies, cemeteries. In October, 1974, Dickinson approved two charters for new banks whose directors included major campaign contributors and two individuals who helped raise funds for him. Mansfield, *supra* note 10, at 50. O'Malley also collected his campaign funds from those he regulated as Treasurer/Insurance Commissioner. *Id.* at 51.

Lobbyists were very effective in directing their contributions toward the individuals who eventually sat on committees which handled their particular industry legislation. *Id.* at 58.

17. Plante v. Gonzalez, 575 F.2d 1119, 1122 (5th Cir. 1972), *cert. denied*, 99 S. Ct. 1047 (1979).

vise compliance, the Commission on Ethics was created.[18] The Code of Conduct itself was strengthened.[19] While the original statute prohibited business transactions with an entity in which the official had a ten percent interest, this prohibition did not completely preclude him from having any interest, absent a substantial conflict. The revised code simply prohibits ownership of more than a ten percent interest in any business, with an exception created for business awarded via competitive bidding.[20]

In addition to specific changes, the language of the code reflects a shift of emphasis. The 1967 Act refers to potentially conflicting outside employment in the negative: nothing shall prevent outside employment or other pursuits as long as such pursuits do not interfere with the faithful discharge of official duties.[21] In contrast, the 1974 statute provides that the official shall not accept employment that will create a conflict of interest.[22] The 1974 version refuses to leave to the official's discretion the determination of whether outside pursuits interfere with his duties.

Nevertheless, the major impact of the new legislation was the financial disclosure provisions. The disclosure provisions of the 1974 Act[23] were again strengthened in 1975 to provide more extensive disclosure and broader coverage.[24] The current Act explicitly applies to local officers, state officers, specified employees and candidates for state and local office.[25] Local officers include persons elected in any political subdivision in the state and persons appointed to fill vacancies in elective office.[26] The term local officers also encompasses appointed members of boards, commissions, authorities, community college district boards, or councils of a political subdivision. Advisory bodies are exempt, with the exception of those with land-planning, zoning, or natural resource responsibilities.[27]

---

18. FLA. STAT. §112.320 (Supp. 1974); present version at FLA. STAT. §112.320 (1979). Opinions of the Commission are legally binding, FLA. STAT. §112.322(3)(b) (1977); OP. FLA. COMM'N ETHICS 79-37 (June 13, 1978).

19. See note 13 *supra* for an outline of the original code of conduct. The new code, FLA. STAT. §112.311 (Supp. 1974), flatly prohibits conflicts of interest. The individual subject to the Act is prohibited from owning a 10% or more interest in any business entity doing business with an agency of which he is an officer except in cases of competitive bidding. FLA. STAT. §112.313(2) (Supp. 1974). He may not accept other employment with any business entity subject to the regulation of, or doing business with a state agency of which he is an officer or employee. Nor shall he accept other employment which would create a conflict of interest. When the agency is a legislative body, however, and the regulatory power over the business entity resides in another agency, employment by the business entity is not prohibited nor constitutes a conflict. *Id.* .313(5).

20. FLA. STAT. §112.313(12)(b) (1977).

21. 1967 Fla. Laws, ch. 469, §6.

22. FLA. STAT. §112.313(7) (1977).

23. 1975 Fla. Laws, ch. 196.

24. FLA. STAT. §112.3145 (1977). For a comparison of the two acts see notes 41-45 *infra* and accompanying text.

25. FLA. STAT. §112.3145(1)(a)-(3)(c) (1977).

26. *Id.* .3145(1)(a) (1).

27. *Id.* .3145(1)(a)(2). The Commission on Ethics has rendered numerous advisory opinions with respect to this exemption which are legally binding. See note 18 *supra*.

Members of bodies who participate in the analysis of proposals and the preservation of

Because the statute is so explicit, any interested person should be able to determine its applicability,[28] but the actual mechanics of filing vary with the position. State officials and specified employees file with the Secretary of State; local officers file with the Clerk of the Circuit Court of the county in which they are principally employed or are residents.[29] The statements are available to the public.[30] While there has been a dearth of case law dealing with the coverage of the Act, the Commission on Ethics has been prolific in rendering advisory opinions. For the most part, the opinions are straightforward and clearly tied to the statute which apparently explains the lack of litigation.[31]

---

alternate solutions and which do not merely report public reaction to plan proposals (and, thus, serve merely as public representatives) are required to file. OP. FLA. COMM'N ETHICS 78-80 (Nov. 11, 1978). Consequently, those that are required to file include: (1) A county local government commission whose proposals were to be placed directly on the ballot without prior approval of another governmental body, OP. FLA. COMM'N ETHICS 78-88 (Nov. 15, 1978); (2) A Medical Examiner's Commission which submits nominees to the Governor for the appointment of district medical examiners and also promulgates rules and regulations, OP. FLA. COMM'N ETHICS 78-55 (Sept. 8, 1978); (3) A city charitable solicitations board authorized to hold license revocation or suspension hearings, OP. FLA. COMM'N ETHICS 78-46 (July 20, 1978); (4) A technical coordinating committee which actively participates in establishing plan proposals and specific projects designed to implement those plans. OP. FLA. COMM'N ETHICS 78-04 (Jan. 19, 1978), 78-69 (Oct. 20, 1978).

On the other hand, committees that do not directly participate in establishing plan proposals of specific projects and whose function is to report public response to plan proposals and submit recommendations, but have no other function or authority are considered exempt advisory bodies. *See, e.g.*, OP. FLA. COMM'N ETHICS 79-12 (Feb. 22, 1979), 79-05 (Feb. 22, 1979), 78-48 (July 20, 1978).

The statute is also inapplicable to the governing board of health systems. Florida Gulf Health Sys. Agency, Inc. v. Commission on Ethics, 354 So. 2d 932 (Fla. 2d D.C.A. 1978).

28. The Act goes on in great detail to specify other titles or positions which come within the meaning of the term "local officer": *inter alia*, the clerk of the circuit court, the fire chief, city building inspector, district school superintendent. FLA. STAT. §112.3145(1)(a)(3) (1977).

"Specified employee" includes public defenders, assistant state attorneys, and exempt career service employees of the governor or cabinet. Secretaries and clerical workers are exempt even if they are non-career service employees. *Id.* §112.3145(1)(b)(1), (2). Individuals with various specified appointed positions with any state department, commission, board or council must file. *Id.* §112.3145(1)(b)(3). State purchasing agents, business managers, and other similar positions which deal with the state fisc must file. *Id.* §112.3145(1)(b)(5).

"State officer," of course, includes all elected public officials and appointed members of statewide boards, commissions, authorities, or councils. United States Senators and Representatives are state officers. *Id.* §112.3145(1)(c)(1).

29. FLA. STAT. §112.3145(2)(c) (1977).

30. FLA. STAT. §112.3146 (1977).

31. In the area of exempt advisory bodies the statute is not as clear. See note 27 *supra*. Other instances of ambiguity are reflected in several advisory opinions: (1) Absent statutory guidance as to the meaning of "city attorney," the Commission deemed a member of a law firm, who was retained on a part-time basis at an hourly rate to represent a municipality, as a local officer to disclosure. OP. FLA. COMM'N ETHICS 77-171 (Nov. 10, 1977). (2) In one particular municipality, a "city administrator" did not come within the meaning of the term "local officer." The duties of this individual did not encompass administration and supervision of all city government departments. Since the actual job description did not involve substantial responsibilities and discretion, the "city administrator" was not required to file. OP. FLA. COMM'N ETHICS 77-135 (Aug. 29, 1977). (3) On the other hand, a county

The disclosure statement itself essentially requires five categories of information:[32]

(1) All sources of income exceeding five percent[33] of gross income received by the officer or for his use or benefit;
(2) All sources of income to a business entity exceeding ten percent of its gross income, if the official had a material interest[34] in the entity, and received an amount from the business entity which was both more than ten percent of his gross income and more than $1,500.00. (This is the secondary source provision.)
(3) The location and description of all Florida real estate excluding residences and vacation homes, in which the official has a more than five percent interest, and a general description of any intangible personal property which is more than ten percent of the official's total assets.[35]
(4) The source of any gifts in excess of $400.00 except gifts from family members or gifts received by bequest or devise;
(5) Every debt greater than the official's net worth.[36]

Although sources of income are required to be disclosed in descending order of value,[37] specific dollar amounts are not required.[38] Filing is mandatory for those subject to the Act. Originally, the registrant could submit a certified financial statement together with his federal income tax return in lieu of any financial disclosure.[39] However, this alternative was deleted from the 1975 version.

Important to the application of the statute is the meaning of the term "source." "Source" is statutorily defined to mean "the name, address, and description of the principal business activity of a person or business entity."[40] While the statute appears to require entity disclosures only, it is expansive enough to reach individual sources. A source, therefore, may be a person or business entity as long as it is a source of income. Accordingly, names of

---

engineer who is empowered to approve or deny permit applications is a county administrator required to file. OP. FLA. COMM'N ETHICS 77-113 (July 21, 1977). (4) An architect with the Bureau of Construction, Department of General Services did not come within the meaning of "specified employee." He had no authority to sign purchase orders, no personnel responsibilities, and did not receive in excess of $250.00 for consultations. OP. FLA. COMM'N ETHICS 77-104 (July 21, 1977). (5) In contrast, a highway patrol lieutenant was a "specified employee." He had authority to authorize purchase orders for automobile repairs up to $200.00. He was, therefore, deemed to have the power of a purchasing agent. OP. FLA. COMM'N ETHICS 77-103 (June 17, 1977).

32. Plante v. Gonzalez, 375 F.2d 1119, 1122 (5th Cir. 1978).

33. The original act had a 10% threshold. FLA. STAT. §112.3145(1)(a) (Supp. 1974).

34. "Material" is defined by FLA. STAT. §112.312(11) (1977) as direct or indirect ownership of more than 5% of the assets of a business entity. The 1974 Act had a 15% threshold. FLA. STAT. §112.3145(1)(a) (Supp. 1974).

35. The 1974 Act had a 15% threshold with respect to assets. FLA. STAT. §112.3145(1)(e) (Supp. 1974).

36. This was not required by the 1974 Act. *Id.*

37. FLA. STAT. §112.3145(1)(c)(3)(a) (1977).

38. OP. FLA. COMM'N ETHICS 74-27 (Oct. 21, 1974).

39. FLA. STAT. §112.3145(2) (Supp. 1974).

40. FLA. STAT. §112.312(16) (1977).

clients from whom a public officer has received a fee which meets the threshold requirements must be disclosed.[41]

Ostensibly it is not necessary to aggregate clients to achieve the ten percent threshold. For example, an accounting firm had a client with interests in various business entities which were also clients of the firm. While no single client's income exceeded ten percent of the gross income of the firm, the aggregate surpassed the threshold. Under such circumstances the Commission found the firm's income to be derived from several individual clients, rather than from the one client who had several interests.[42] Absent express legislative intent, the Commission refused to read the provision to require aggregation. Accordingly, the individual subject to the statute did not have to disclose either the name of the client who had interests in the various client-entities, or the several client-entities which collectively met the threshold amount.[43] This loophole enables some third parties to remain anonymous inasmuch as their interests are diluted among various entities.[44]

Another apparent loophole in the statute is the failure to require disclosure of assets held solely in the name of the public officer's spouse or child.[45] However, the statute has not been read as totally exemptive of the spouse's assets. An asset held by the public officer and spouse by the entireties with the right of survivorship,[46] whether real or personal property, goes into the threshold computation at full value as the asset of the public official.[47] The statute has been read to distinguish between entireties property and non-bank account property held jointly.[48] Jointly held property as an asset must be disclosed, but the figure used as the threshold amount is determined by the official's percentage ownership in the property.[49]

The disclosure requirements also apply to intangible personal property which meets the threshold amount of ten percent of total assets.[50] Therefore, stocks and bonds are included. To compute the threshold amount, the registrant adds all holdings which represent a financial interest in a single business entity. The certificates are aggregated, disregarding any distinction

41. OP. FLA. COMM'N ETHICS 76-164 (Sept. 13, 1976).

42. *Id.*

43. The Commission suggested, however, that voluntary disclosure of such clients as secondary sources of income would further the purpose of the statute by shedding light on a substantial economic interest which potentially could result in a conflict. OP. FLA. COMM'N ETHICS 78-06 (Jan. 19, 1978).

44. *Id.*

45. Assets which are owned directly or indirectly must be disclosed. Indirect ownership does not include ownership by a spouse or minor child. FLA. STAT. §112.3145(3)(c) (1977).

46. OP. FLA. COMM'N ETHICS 76-129 (July 26, 1976).

47. OP. FLA. COMM'N ETHICS 74-27 (Oct. 21, 1974); OP. FLA. COMM'N ETHICS 74-53 (Nov. 15, 1974). If both spouses are subject to the Act, each must list the asset at 100% of its value. OP. FLA. COMM'N ETHICS 74-53 (Nov. 15, 1974).

48. OP. FLA. COMM'N ETHICS 74-02 (Sept. 3, 1974).

49. *Id.*

50. FLA. STAT. §112.3145(3)(c) (1977). The 1974 Act required assets to be disclosed. FLA. STAT. §112.3145(1)(e) (Supp. 1974). The current Act is an apparent clarification of the term asset to include intangibles. *See* OP. FLA. COMM'N ETHICS 74-51 (Nov. 7, 1974) (stating that assets include stocks and bonds).

between various types of certificates held in a single entity. This method comports with the intent of the disclosure law to indicate significant ownership interest in particular business entities.[51]

Benefactors of gifts over $100.00 must also be disclosed in descending order of magnitude.[52] There have been inquiries addressed to the Ethics Commission regarding the interpretation of the gift provision. For example, one candidate appeared with counsel before the Florida Elections Commission regarding his alleged campaign violations.[53] After billing the candidate for his services, an attorney subsequently forgave payment. The issue became whether such forgiveness necessitated gift disclosure.[54] The Ethics Commission found that such services did not come within the meaning of the term gift for the purposes of disclosure.[55] The Commission further stated that whether such disclosure was required pursuant to Florida Statute section 111.011 was a question outside its jurisdiction.[56]

Receipt of gratuitous air transportation has been construed by the Commission as not constituting a gift within the meaning of the disclosure provisions.[57] A friend of a county commissioner provided free airplane transportation to out-of-town football games they attended together. The plane was provided through the friend's company which did regular business with the commissioner. The Ethics Commission decided that receipt of such transportation was not a gift within the meaning of the disclosure statute, because such transportation was a service rather than real or personal property.[58] As these two interpretations illustrate, services and tangible or intangible personal property provide other loopholes for evasion of disclosure which more explicit drafting might have avoided.

Some of the weaknesses in the seemingly comprehensive statute may be explained by reference to the political milieu at the time of its enactment. The original 1974 enactment found little favor. Local officials subject to the Act, such as appointed members of zoning boards, resigned or refused appointments rather than file. These officials argued that the law was an invasion of

---

51. OP. FLA. COMM'N ETHICS 75-59 (March 31, 1975).

52. FLA. STAT. §112.3145(3)(d) (1977).

53. OP. FLA. COMM'N ETHICS 78-40 (June 13, 1978).

54. *Id.*

55. *Id.*

56. Gift means real property or tangible or intangible personal property of material value to the recipient. FLA. STAT. §112.312(9) (1977). The Commission reasoned that intangible personal property as defined by FLA. STAT. §192.001(11)(b) (1977) (money, debts, ownership interests, and value based on that which property represents) did not include services. The receipt, therefore, of free legal services did not constitute a "gift." OP. FLA. COMM'N ETHICS 78-40 (June 13, 1978).

57. OP. FLA. COMM'N ETHICS 78-41 (July 20, 1978).

58. *Id.* The Commission suggested that other statutes might require disclosure, but such statutes were not within the Commission's jurisdiction to interpret. The Commission refers to FLA. STAT. §111.011 (1977) which deals with disclosure of campaign contributions. The Commission expressly stated that they did not address the applicability of FLA. STAT. §112.313(2) (prohibiting acceptance of gifts) or FLA. STAT. §112.313(4) (unauthorized compensation) to the facts.

privacy. The law was also criticized as requiring so little information as to be meaningless.[59]

In 1975, Governor Reuben Askew sought to strengthen the original Act. The current statute[60] emerged as the consequence of a power struggle between the Governor and Senate President Barron over various appointments with both parties developing appealing counterarguments.[61] Barron termed the Act an invasion of privacy. Askew asked the legislature to assure the public that they were serving their interest and not serving special interest groups.[62] The result was that the legislature passed a weaker law than that sought by Askew. However, the Governor signed the Act into law as a further step toward meaningful disclosure.[63]

While the right of privacy argument had not yet been addressed by Florida courts in the context of the financial disclosure statute, in a somewhat different context, one lower court did attempt to frame some of the parameters of the right of privacy. In *Wisher v. News-Press Publishing Co.*,[64] the Second District Court of Appeal held that confidential government employee personnel files were not open to public inspection within the meaning of the open government law requiring disclosure of public records.[65] The court pointed out that matters such as psychological profiles, records of health habits and indiscretions are likely to be a part of an employee's personnel file and that public access to such materials would "make a mockery" of the right to privacy "long recognized in this country."[66] Nevertheless, the *Wisher* court refrained from overtly balancing the employees' right to privacy against the public's right to governmental information under the Public Records Act. However, the case suggests that at some point the public's right to know must be circumscribed when the information involved has no direct bearing on a public employee's duties in office.[67]

The public's right to know was also evaluated in a second situation which while not involving financial disclosure by a public official is nonetheless instructive. *Miami Herald v. Collazo*[68] involved media access to the terms of a settlement agreement of a civil action against the City of Miami. At the request of the parties, the trial court had ordered that the terms of the settlement agreement, which imposed liability upon the city for the actions of

59. Mansfield, *supra* note 10, at 77. Mr. Mansfield argues that in spite of the fact that the law appears to require a lot of information, the law actually required most individuals to do little more than list one principal source of income such as a law firm or insurance agency. Newsmen could learn more from the clerk's manual issued by the legislature which printed information submitted voluntarily by lawmakers. *Id.* at 76.

60. FLA. STAT. §112.3145 (1977).

61. Mansfield, *supra* note 10, at 76.

62. *Id.*

63. *Id.* at 76-77.

64. 310 So. 2d 345 (Fla. 2d D.C.A. 1975).

65. *Id.* at 349.

66. *Id.* at 348.

67. *Id. See* FLA. STAT. §286.011 (1977) (Sunshine Law); FLA. STAT. §119.01 (1977) (Public Records Law). For a comprehensive survey of Florida's Open Government laws see FLORIDA OPEN GOVERNMENT LAWS MANUAL, June, 1978.

68. 329 So. 2d 333 (Fla. 3d D.C.A. 1976).

one of its police officers, not to be made public.[69] The Third District Court of Appeal reversed, holding that the press had a right of access to the settlement agreement.[70] The media's right to such information was found to be derivative of the public's right to know what transpires in court.[71] This right to know outweighed the City of Miami's interest in assuring that the terms of the agreement would not adversely affect other pending claims against the city.[72] In reaching its decision, the Third District found important the lack of any showing that public disclosure would result in a threat to the administration of justice.[73] The *Collazo* court made it clear that the public's right to receive information essential to the exercise of intelligent self-government would not be curtailed where competing interests were less than concrete.[74]

Read together, *Wisher* and *Collazo* suggest the importance as well as the limitations on the public's right to know, particularly when such rights clash with the right to privacy. The judicial reasoning found in those two cases could easily be applied to financial disclosure laws: the public has the right to all information bearing on the official duties of its employees; however, special precautions must be taken when the information is intimate, potentially embarrassing, and not directly reflective of an employee's performance in his official capacity. Neither case, however, offered a sufficiently comprehensive test to resolve close conflicts.

The constitutionality of Florida's financial disclosure statute was directly tested in *Goldtrap v. Askew*.[75] Goldtrap, an elected county commissioner, argued that the statute was overbroad both with respect to the classes of individuals required to file and the materials required to be filed.[76] Based on this alleged overbreadth, Goldtrap argued that the law was an unconstitutional invasion of privacy.[77]

The Supreme Court of Florida upheld the disclosure law without assigning any weight to the right to privacy asserted by Goldtrap.[78] In a confusing and superficial opinion, the court found no need to consider whether the federal right of privacy extended to the financial interests of elected public officials.[79] The court reasoned that where the state has a compelling interest in adopting a piece of legislation, it need only use "reasonable" means to achieve its goal, regardless of whether or not those means impinged upon a federally protected right.[80] Within the context of the constitutionality of financial disclosure legislation, the court stated that "the Legislature need only adopt a

69. *Id.* at 334-35.
70. *Id.* at 338-39.
71. *Id.* at 337.
72. *Id.* at 338.
73. *Id.*
74. *Id.*
75. 334 So. 2d 20 (Fla. 1976).
76. *Id.* at 21.
77. *Id.*
78. *Id.* at 23.
79. *Id.* at 22.
80. *Id.*

uniform code which requires disclosure of matters reasonably relevant to the duties of public office."[81]

The foregoing methodology employed by the Florida Supreme Court in *Goldtrap* finds no support in the approach used by the Supreme Court of the United States when a federally protected right has been raised.[82] Claims brought under the equal protection clause of the fourteenth amendment have traditionally been subjected to a two-tiered analysis.[83] Initially, the Court determines whether the right asserted is "fundamental."[84] If the Court finds a fundamental right at issue, it has applied a strict standard of scrutiny, requiring the state to show a "compelling" interest for its law which is the least restrictive intrusion upon the asserted right.[85] Where the right has been held to be less than fundamental, the state must merely show that the law is reasonable.[86]

The misapplication of the two-tiered approach by the Florida court in *Goldtrap* raises some of the problems in applying that approach to financial disclosure legislation. While the court in *Goldtrap* was certain that the reasons for adopting the law were compelling and that the law represented a reasonable effort by the state to implement a policy of ethics in government, the court balked on the issue of whether *Goldtrap* had a fundamental interest in keeping his personal finances confidential.[87] Apparently the court was reluctant to make the determination of whether a strict standard of scrutiny should apply to the disclosure statute. The court avoided any attempt at balancing and merely held that the law was reasonable and thus constitutional.[88] While the result in *Goldtrap* was probably correct in view of the limited disclosure required under the statute in question, the court's analysis reveals a hesitancy, or more likely an inability, to apply the two-tiered approach to financial disclosure issues. The court apparently sensed that the right to financial privacy may be deserving of a standard of protection tougher than mere rationality.[89]

THE SUNSHINE AMENDMENT

Governor Askew kept his vow to go over the heads of the Florida Legislature to achieve a stronger disclosure law. The Governor led a drive to amend the Florida Constitution by popular initiative.[90] Enough petition signatures

81. *Id.*

82. See text accompanying notes 169-176 *infra.*

83. The two-tiered standard of review was first enunciated in dictum in United States v. Carolene Products Co., 304 U.S. 144, 152 & n.4 (1938).

84. *See, e.g.,* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 173 (1972).

85. See text accompanying notes 186-187 *infra.*

86. The most frequently-cited declaration of this standard is in McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

87. 334 So. 2d at 22.

88. *Id.* at 22-23.

89. See text accompanying notes 188-192 *infra.*

90. Mansfield, *supra* note 10, at 77. FLA. CONST. art. XI, §3 provides for amendment to the constitution by initiative. The constitution of Florida has been amended 14 times since its revision in 1969. Nine proposed amendments were on the ballot in 1976. *See* Weber v. Smathers, 338 So. 2d 819, 824 (Fla. 1976) (Roberts, J., dissenting).

were obtained to put the proposal on the ballot[91] that the constitution be amended to include a section entitled "Ethics in Government." Now known as the "Sunshine Amendment,"[92] the proposal was adopted by a wide margin.[93]

Due to the circumstances surrounding the enactment of the Sunshine Amendment, there is no difficulty in ascertaining the intent of the framers. The court need only look to the intentions of the Governor who caused the petitions to be drafted and prepared.[94] The purpose of the amendment was to ensure that public officers and high ranking state employees do not enrich themselves at public expense. Moreover, the amendment was to increase the public's confidence that decisions by state agencies and boards would be based on the merits.[95]

The amendment's coverage is interesting in several respects. First, the amendment is narrower in scope than the disclosure statute. The amendment applies only to constitutional officers, persons holding statewide elective office[96] and other offices that may subsequently be determined by statute.[97] The

91. Weber v. Smathers, 338 So. 2d 819 (Fla. 1976). Secretary of State Bruce Smathers certified that enough electors had signed the petition to place the proposal on the ballot. A suit was brought to enjoin Smathers from performing the administrative acts necessary to put the amendment on the ballot. The plaintiff argued that the act embraced more than one subject and was therefore unconstitutional. The court held that the provisions of the proposed amendment were sufficiently related to withstand an attack that they embrace more than one subject. *Id.* at 822. The dissent argued, *inter alia,* that the amendment was unnecessary because Florida already had an adequate financial disclosure statute. *Id.* at 824 (Roberts, J., dissenting).

92. FLA. CONST. art. II, §8.

93. The vote was 1,765,626 for, 461,940 against. Plante v. Gonzalez, 575 F.2d 1119, 1122 (5th Cir. 1978).

94. *See* Williams v. Smith, 360 So. 2d 417, 419 (Fla. 1978).

95. *Id.* at 419. In an address to a joint session of the legislature on April 5, 1977, Askew said that his goal was to set meaningful workable standards for financial disclosure. He veiwed the constitution as a statement of broad principle, and the amendment to be a foundation and framework upon which statutes would build and amplify. He hoped that the legislature would further extend the amendment and recommended that the coverage of the amendment be expanded. *Id.* In keeping with the framers' intent, the amendment declares: "A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse." FLA. CONST. art. II, §8. To that end, all elected constitutional officers and candidates for those offices, and, as may be determined by the legislature, other public officers, candidates and employees must file full and public disclosure of their financial interest. *Id.* Persons holding statewide elective offices are also required to file. FLA. CONST. art. II, §8(h)(2). The category of persons holding statewide elective offices referred to in §8(h)(2) and not covered by §8(a), which refers to constitutional officers, apparently includes only the members of the Florida Public Service Commission. Plante v. Gonzalez, 575 F.2d 1119, 1123 n.5 (5th Cir. 1978) (*citing* Brief for Amicus Common Cause, at 2). It is at least arguable, that the amendment should also apply to United States Senators, who are also elected statewide, unless the term is interpreted to mean statewide elected state officers.

96. See note 94 *supra.*

97. The legislature made an attempt to extend the coverage of the Amendment pursuant to their grant of authority under the amendment. FLA. CONST. art. II, §8(a). In 1977, the legislature passed a law extending the disclosure provisions to municipal officers, appointed officials, and other public officers and employees. Surprisingly, the law was vetoed by the Governor. *See* Plante v. Gonzalez, 575 F.2d 1119, 1123 n.5 (5th Cir. 1978), *citing*

statutory disclosure scheme goes beyond this to extend disclosure to municipal and appointed officials.[98]

Second, the application of the amendment to the covered officials sometimes accomplishes anomalous results.[99] For example, a candidate or incumbent member of the United States House of Representatives appears not to come within the purview of the amendment because they are not elected statewide. While the amendment also applies to constitutional officers, the term "constitutional officers" has been interpreted by the Ethics Commission to mean only those persons who hold offices provided for by the Florida, not federal, Constitution.[100] Thus, United States Representatives would not have to file the disclosure under this provision. A United States Representative would, however, still be required to file the more limited statement of financial interest required by the statute.[101]

This interpretation precludes disclosure under the amendment for a most important state elected office. In contrast, at least some public officers who are not elected statewide, and have much less stature, do come within the reach of the amendment. For example, school board members are elected constitutional officers.[102] Consequently, they are required to file under the amendment.[103]

The amendment has been read broadly to apply to officers of charter and non-charter counties. Article VIII, Section 1(d) of the Florida Constitution specifies certain mandatory county officers for non-charter counties.[104] The Ethics Commission has advised that in passing the Sunshine Amendment, the public felt these position holders exercised powers so important to the welfare of the state that public disclosure would best secure and sustain the public trust.[105] Accordingly, the amendment should be interpreted to encompass those individuals in a charter county who exercise the same powers as those holding the constitutionally specified positions.[106] The Commission reasoned that certain charter county offices merely have replaced the offices that would have existed absent the county charter.[107] These charter county officers per-

Brief for Appellant at 3 n.3 which refers to Conference Committee Bill for Fla. S. 1454 Reg. Sess. (1977). This veto was surprising in light of the governor's exhortation to the legislature to expand the coverage of the amendment. See note 95 *supra.*

98. See note 31 *supra.*

99. *Id.*

100. OP. FLA. COMM'N ETHICS 78-51 (Sept. 8, 1978). The Commission argued that to construe the term "constitutional officers" to include offices provided for by the United States Constitution would have the absurd result of requiring federal officeholders from other states to file financial disclosure in Florida. *Id.* Obviously, the provision could have been just as easily construed to include Florida's federal constitutional officers only. The opinions of the Commission with respect to the Amendment are strictly advisory and not legally binding. OP. FLA. COMM'N ETHICS 78-37 (June 13, 1978).

101. FLA. STAT. §112.3145(1)(c) & (2) (b) (1977).

102. FLA. CONST. art. IX, §4.

103. OP. FLA. COMM'N ETHICS 77-92 (July 21, 1977).

104. These officers are a sheriff, tax collector, property appraiser, a supervisor of elections, and clerk of the circuit court.

105. OP. FLA. COMM'N ETHICS 77-91 (July 21, 1977).

106. *Id.*

107. *Id.*

form functions identical to non-charter county officers. In cases in which the functions are dissimilar, the charter officer is not subject to the amendment. He may, however, still be subject to the statutory financial disclosure law.[108]

While the coverage of the amendment is narrower than the statute, the disclosure provisions themselves are broader:

> Full and public disclosure of financial interests shall mean filing with the Secretary of State by July 1 of each year a sworn statement showing net worth and identifying each asset and liability in excess of $1,000 and its value together with one of the following:
> a. A copy of the person's most recent federal income tax return; or
> b. A sworn statement which identifies each separate source and amount of income which exceeds $1,000. The forms for such source disclosure and the rules under which they are to be filed shall be prescribed by the independent commission . . . , and such rules shall include disclosure of secondary sources of income.[109]

The basic differences between the statute and the amendment are (1) the $1,000 minimum threshold of the amendment as compared to the five percent of gross income or proprietary interest of the statute, (2) the amendment's requirement that the amount of the income or asset be disclosed as compared to the statute which does not require dollar amounts, (3) the amendment's requirement of a net worth statement which is not required by the statute, and (4) the amendment's allowing the filing of a federal income tax return as an alternative to the source disclosure requirement, whereas the statute provides no such alternative.[110]

The amendment leaves the issue of secondary source disclosure to be spelled out by the rules of the Ethics Commission.[111] The statute is much more explicit. In practice, however, the mechanics of both provisions are similar.[112] The major difference between the two provisions is the amend-

---

108. OP. FLA. COMM'N ETHICS 77-128 (Aug. 24, 1977). A County Comptroller as an elected officer was subject to statutory disclosure, but not the amendment. He performed some of the responsibilities formerly undertaken by the Clerk of the Circuit Court, a constitutionally regulated position. On the other hand, his position did not replace that of the Clerk's but was a separate, statutorily created position. *Id.*

109. FLA. CONST. art. II, §8(h)(1).

110. For the judiciary, in the event the alternative filing is chosen, a more complete disclosure of financial information is required to be filed with the Judicial Qualifications Commission (JQC). The statement remains confidential until requested by a party to a cause before the particular judge. The purpose behind this additional burden on the judiciary is to insure that complete financial information is available with the JQC. Further, the additional information will ensure that parties who are concerned about a judge's possible financial interest have a means of obtaining the information as it relates to a cause before the judge. *In re* Code of Judicial Conduct (Financial Disclosures), 348 So. 2d 891, 893-94 (Fla. 1977). Financial disclosure was recently extended to retired judges who are eligible for recall. *In re* Code of Judicial Conduct, 367 So. 2d 221 (Fla. 1979).

111. FLA. CONST. art. II, §8(h)(1)(b).

112. The rules prescribed by the Florida Commission on Ethics state:

"(2) A 'secondary source of income' shall mean any one customer, client, or other source of income which provides in excess of 10% of the total income of a business entity, as shown on that business entity's most recently filed income tax return, during

ment's lower threshold requirement. Both provisions require identification of secondary sources of income.[113] Consequently, one who files under either provision, to the extent threshold requirements are met, would not be able to avoid disclosing individual sources by channeling their funds through a conduit business entity and merely reporting the entity as the source.

One potential difficulty of the secondary source requirements is that third party clients whose identities must be disclosed have not been protected by rules exempting them from disclosure under certain circumstances.[114] On the other hand, the secondary source requirement appears essential to effectuate the purpose of the statute to apprise the public of real or potential conflicts of interest. In spite of the importance of such disclosure, the subject party can avoid it entirely by filing a federal income tax return. Statutory disclosure does not permit this alternative.[115] To this extent, the statute should be more effective in shedding light on potential conflicts.

Another similarity between the statute and the amendment is that neither requires disclosure of a spouse's income or assets held solely in the name of a spouse or child.[116] Full disclosure includes the filing of an officer's personal net worth, assets and liabilities. Assets which are owned by a member of the

---

the previous tax year in which a person subject to full and public disclosure of financial interests owns in excess of five percent (5%) of the business entity's total assets or capital stock and from which such person derived in excess of $1,000 income during the previous tax year."

8 FLA. ADMIN. CODE 34-8.05. The statute provides: "(b) All sources of income to a business entity in excess of 10 percent of the gross income of a business entity in which the reporting person held a material interest and from which he received an amount which was in excess of 10 percent of his gross income during the disclosure period and which exceeds $1,500." FLA. STAT. §112.3145(3)(b) (1977).

113. See note 41 *supra*. It is interesting to note that the *Plante* court did not discover the rules of the Florida Commission on Ethics: "The meaning of 'secondary source' is unclear . . . . The shape of the secondary source requirement is unclear. If precise regulations on this matter have been promulgated by the Florida Commission on Ethics, we have not found them." Plante v. Gonzalez, 575 F.2d at 1137.

Moreover, the senators, on Petition for Certiorari attempted to argue that the absence of a requirement for disclosing secondary sources of income was a major loophole of the amendment. "[T]otal avoidance of detection *under law* may be easily accomplished by . . . creating a professional corporation or other intermediate association from which only a reported *salary* is drawn and reported, but not the nature, name or amount of the secondary source of profit." Petition for Writ of Certiorari to the United States Supreme Court, Oct. Term, 1978, No. 78-844, at 31. *Id.*

114. In *Plante*, the Senators argued that the amendment required the disclosure of names of patients and clients who pay for non-governmental services from even part-time public officers. Brief of Appellant, at 23, 575 F.2d 1119 (5th Cir. 1978). The state argued that disclosure depended on the nature of the officer's employer: a legislator who was an attorney and worked for a law firm would list the income source as the law firm; a lawyer who was a sole practitioner would list all individual clients who paid more than $1,000 in fees. *Id.* at 1137. The state's argument is correct unless the lawyer who worked for the law firm also had a more than five percent interest in the firm and received over $1,000 of income from the firm. The statute operates in a similar manner except with higher threshold figures.

115. FLA. STAT. §112.3145(3) (1977).

116. *Id.*; FLA. CONST. art. II, §8.

official's family, but in which the official owns no property interest, need not be disclosed or included in the computation of the registrant's net worth.[117] The Ethics Commission has strictly interpreted the absence of this requirement.[118] Where an official paid the premiums on life insurance policies owned by the sole beneficiary-spouse, the cash surrender value of the policy was not required to be disclosed.[119] While the registrant could be said to have an interest in the policy, the policy is not considered an asset of the official,[120] because such an interest is not a legally recognized property interest pursuant to Florida law.[121]

Where the official does have a cognizable property right, disclosure is required. In one Commission opinion, an official established savings accounts in trust for his children in the registrant's name.[122] The official was authorized to withdraw the funds, but he argued that he would not make such a withdrawal except for the benefit of the children.[123] Under these circumstances, the official had created a "Totten trust" which was tentative and revocable at will.[124] Since he still had access to the accounts, the commission stated that the fund was subject to the amendment.[125]

Whether an official's interest in other types of trusts is a disclosable asset also turns on questions of state law. In one instance a will, probated in another state, bequeathed property to the official as part of a testamentary trust qualified under the laws of that state.[126] The nature of the official's interest in the trust was determined under the foreign jurisdiction's law. The commission held that if the interest in the trust was alienable under the laws of that state, it would constitute an asset within the meaning of the Sunshine Amendment.[127]

In contrast, where the public official expects to inherit by devise property owned by a parent, the official would not need to disclose that interest. The official arguably has a "financial interest" in his parent's property. However, the parent presently has ownership, custody and control over his assets; the official has neither the use of the assets nor access to them. Under such circumstances, it cannot be said that the registrant has a cognizable interest subject to disclosure.

While there have been several inquiries of the Commission for advice with respect to the meaning of the term "asset," apparently most registrants

117. OP. FLA. COMM'N ETHICS 77-158 (Oct. 24, 1977).
118. *Id.*
119. OP. FLA. COMM'N ETHICS 78-37 (June 13, 1978).
120. *Id.*
121. Fugassi v. Fugassi, 332 So. 2d 695 (Fla. 4th D.C.A. 1967). *Cited* in OP. FLA. COMM'N ETHICS 78-37 (June 13, 1978).
122. OP. FLA. COMM'N ETHICS 78-37 (June 13, 1978).
123. *Id.*
124. Matter of Totten, 179 N.Y. 112 (1904). *Cf.* Powers v. Provident Inst. for Savings, 124 Mass. 377 (1878) (minority view that the bank deposit trust is invalid as an attempted testamentary transfer thus creating no trust at all).
125. OP. FLA. COMM'N ETHICS 78-37 (June 13, 1978).
126. OP. FLA. COMM'N ETHICS 78-01 (Jan. 19, 1978).
127. *Id.*

have little trouble understanding the meaning of the term "income." The Commission follows the Internal Revenue Code to define gross income as "all income from whatever source derived."[128] In application, the term includes interest received on a mortgage if the amount exceeds $1,000.[129] Moreover, if the mortgage was acquired at less than face value, the amount of profit must also be listed.[130]

The mortgage held by the registrant as mortgagee must also be disclosed as an asset.[131] Furthermore, the Commission has recommended that the name of the mortgagor be disclosed.[132] In keeping with the intent of the amendment to provide the public with an opportunity to detect conflicts of interest, an asset must be sufficiently identified to permit the public to determine with what individuals or entities the official's financial interests lie. Sufficient identification would also require disclosing the mortgagor's names.

Because of the broad disclosure provisions of the Sunshine Amendment, five state senators[133] who had voted and complied with statutory financial disclosure requirements, challenged the validity of the amendment in federal court[134] as a privacy right violation. The District Court for the Northern District of Florida dismissed the complaint for failure to state a claim upon which relief can be granted.[135] The district court used a rationality standard to judge the amendment's disclosure scheme and concluded that "[i]t constitutes a reasoned effort to deal with the problems posed by governmental corruption and the loss of public confidence in the integrity of elected and appointed officials."[136] The senators appealed to the Fifth Circuit Court of Appeals in *Plante v. Gonzalez*[137] and raised a three pronged constitutional challenge. The senators argued that the public disclosure requirement bore

---

128. I.R.C. §61(a).

129. OP. FLA. COMM'N ETHICS 77-99 (July 21, 1977).

130. *Id.*

131. OP. FLA. COMM'N ETHICS 77-139 (Sept. 21, 1977).

132. *Id.*

133. Brief for Appellant at 2, 7, Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978). The Florida Commission on Ethics set August 1, 1977 as the deadline for the first filing under the Amendment. 575 F.2d at 1123. In anticipation of the Commission's deadline, the suit was filed on July 10, 1977. *Id.*; Brief for Appellant at 3, 575 F.2d 1119 (5th Cir. 1978). The Commission on Ethics set October 21, 1977 as the date for hearing the complaint against Senators Plante and Barron for noncompliance. The senators asked the Commission not to refer its probable cause finding to the Senate in deference to the Fifth Circuit's jurisdiction of the issue. Brief for Appellant at 4, 575 F.2d 1119 (5th Cir. 1978). The Commission ruled on February 15, 1978 that the Senators, by failing to file, had breached the public trust. However, in a suit brought by Plante to challenge the authority of the Commission to make such a finding, the court held for the Senator. Under article 3, §2 and §4, of the Florida Constitution, the Senate has the sole authority to find a senator guilty of a breach of public trust. Upon such breach, the Senator could be unseated or otherwise disciplined. The Commission, however, had no authority even to find probable cause. Plante v. Commission on Ethics, 356 So. 2d 1353 (Fla. 1st D.C.A. 1978).

134. 437 F. Supp. 536 (N.D. Fla. 1977).

135. *Id.* at 543.

136. *Id.* at 540.

137. 575 F.2d. 1119 (5th Cir. 1978).

no rational relationship to any legitimate state interest,[138] violated their federally protected right to privacy,[139] and unconstitutionally burdened their right to run for and hold public office.[140]

The senators' challenge in *Plante* presented a case of first impression for the lower federal bench.[141] At issue in *Plante,* as in *Goldtrap,*[142] was the proper weight to be accorded the right to financial privacy when balanced against the public's right to know.[143] Also at issue was the proper test to be applied in such a balance.[144] The district court concluded that the senators' interest in personal financial privacy did not rise to the level of a "fundamental constitutional right.[145] The court noted that this status applied "only to a narrowly drawn area surrounding family life and the types of highly personal choice intrinsic to family."[146] Since a non-fundamental right was involved, the court determined that the "rational basis" test should apply; a test typically employed in constitutional challenges to economic and social legislation.[147] Essentially the test is whether the challenged legislation bears a rational relationship to the achievement of a legitimate state interest.[148] Under this approach, the fact that less intrusive means are available to accomplish the legislative purpose is of no consequence. The state need only show that the challenged provision is not arbitrary, but serves the intended purpose in a rational manner.[149]

While conceding that the state interests were important ones, the senators took issue with the district court's view that only those rights that have been recognized as "fundamental" are to be accorded constitutional protection.[150] The senators argued that the right of privacy, as an evolving concept, includes interests which have not as yet been accorded fundamental status. The test, according to the senators, is whether the interest has been recognized as an essential common law freedom.[151] Those interests that have been recognized by the Supreme Court of the United States as fundamental or essential freedoms have received constitutional protection under the strict scrutiny

138. Brief for Appellants at 10-15, Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978).
139. *Id.* at 14-26.
140. Brief for Amicus Curia ACLU 8-10, Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978).
141. 575 F.2d at 1123-24. One federal court has ruled on similar issues. In O'Brien v. DiGrazia, 544 F.2d 543 (1st Cir. 1976), *cert. denied sub nom.,* O'Brien v. Jordan, 431 U.S. 914 (1977) the court upheld an order by the Boston police commissioner which required certain police officers to disclose their families' income sources, assets, expenditures, and copies of their state and federal income tax returns. Public disclosure, however, was not in issue in the case. See text accompanying notes 277-279 *infra.*
142. 334 So. 2d 20 (Fla. 1976).
143. 575 F.2d at 1135.
144. *Id.* at 1134.
145. 437 F. Supp. 536, 540 (N.D. Fla. 1977).
146. *Id.*
147. *Id.* at 541.
148. See notes 83 & 86 and accompanying text, *supra.*
149. 575 F. 2d at 1134.
150. Brief for Appellant at 18, Plante v. Gonzalez, 575 F.2d 1119 5th Cir. 1978).
151. *Id.* at 19.

standard and the "least restrictive means" test. Under this approach, typically applied to challenges under the first amendment,[152] the existence of less intrusive means of impinging upon a constitutionally-protected right would be relevant in determining the constitutionality of a state scheme.[153] The balance applied is whether the "state's interest in the added effectiveness of the chosen means [outweighs] the individual interest in the use of less drastic ones."[154] Under such an analysis, a court would be hard pressed to uphold the Sunshine Amendment's requirements of reporting exact dollar figures because the reporting of dollar ranges would apparently serve the same purpose less intrusively. Moreover, public disclosure is questionable because reporting financial matters to a neutral agency acting as a watchdog in the public interest could arguably satisfy the state's interest.[155]

The primary issue before the Fifth Circuit in *Plante* became whether the due process clause of the fourteenth amendment offers protection to privacy interests not traditionally regarded as fundamental but deemed arguably important. They analyzed the senators' privacy interests within the context of recent Supreme Court decisions[156] and held that the senators' interests in avoiding disclosure of their personal financial affairs is protected by the federal constitution.[157] However, the court then upheld the disclosure scheme through application of an apparent intermediate level of scrutiny — whether the scheme "significantly promotes" the state's interest in disclosure.[158] The availability to the legislature of less intrusive methods, such as requiring the reporting of dollar ranges rather than exact figures, was important to the court as it balanced the incremental harm from the added specificity against the incremental benefit that would be achieved by using ranges.[159]

The Fifth Circuit decision is a significant application and, perhaps, expansion of recent Supreme Court decisions on the right to privacy. The Court has not heretofore applied an intermediate level test to claims brought under the due process clause. An examination of the concepts of privacy and the constitutional right to privacy would appear to lead to the conclusion that a clear formulation of such a test is in order.

THE RIGHT TO PRIVACY: THE INTERESTS IN AUTONOMY AND CONFIDENTIALITY

The Federal Constitution guarantees no explicit right to privacy. However, the lack of specific language in the Constitution does not mean that the Framers took this right lightly. Rather, it indicates that the Framers ap-

152. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); NAACP v. Alabama, 357 U.S. 499 (1958).

153. *See* Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

154. *Id.* at 468.

155. See text accompanying notes 336-339 *infra*.

156. Nixon v. Administrator of Gen. Serv., 433 U.S. 425 (1977); Whalen v. Roe, 429 U.S. 589 (1977).

157. 575 F.2d at 1134.

158. *Id.*

159. *Id.* at 1136.

prehensively avoided drawing precise limits on what Justice Brandeis later termed "the most comprehensive of rights and the right most valued by civilized man."[160]

The concepts of privacy[161] and the right to privacy[162] have been subject to numerous definitions. Louis Brandeis and Samuel Warren in their renowned 1890 law review article,[163] advocating relief for persons whose private affairs are exploited by the press, characterized privacy as the more general "right 'to be let alone,' "[164] and the right to "an inviolate personality."[165] Brandeis' and Warren's championed right would protect the intangible as well as the tangible[166] "secur[ing] to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."[167] Any act, word, thought, emotion, or object, regardless of its objective value, which an individual desires to keep private would thus be included under the Brandeis-Warren "right to be let alone."[168]

While the Supreme Court has not interpreted the constitutional privacy right so broadly, it has applied a strict scrutiny standard to strike down state regulation of certain intimate and family related decisions.[169] In guaranteeing

160. Olmstead v. United States, 277 U.S. 438, 477 (1928) (Brandeis, J., dissenting).

Professor Gerety has pointed out that the very language used by Brandeis in his *Olmstead* dissent illustrates that the concept of privacy defies constitutional limitations: for "if privacy is indeed the most comprehensive of rights, is it not too vast and weighty a thing to invoke in specific settings for specific and narrowly defined purposes?" Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 234 (1977).

161. *See, e.g.*, A. WESTIN, PRIVACY & FREEDOM 7 (1st ed. 1967) ("Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated"); Gerety, *supra* note 160, at 236 (privacy is "autonomy or control over the intimacies of personal identity"); Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 281 (1974) ("[p]rivacy is control over when and by who the various parts of us can be sensed by others"); Van den Haag, *On Privacy*, XIII NOMOS 149 (1971) ("privacy is the exclusive access of a person (or other legal entity) to a realm of his own"); Gross, *Privacy and Autonomy*, XIII NOMOS 169 (1971) ("[p]rivacy [is] considered as the condition under which there is *control* over acquaintance with one's personal affairs by the one enjoying it . . .").

162. See text accompanying notes 179-185 *infra*.

163. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

164. *Id.* at 195. This expression was originally coined by Judge Cooley, see T. COOLEY, TORTS 29 (2d ed. 1888).

165. *Id.* at 205.

166. Warren & Brandeis, *supra* note 163, at 193.

167. *Id.* at 198. For a more thorough discussion of this article see Beany, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROB. 253 (1966); Kalven, *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 (1966); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); 124 U. PA. L. REV. 1385 (1976).

168. Warren and Brandeis thus recognized that an essential element of the right to privacy is the right to withhold information about oneself. A disclosure of an individual's monetary worth ordinarily would be no less a violation of his right to privacy than a disclosure of his personal diary. "Suppose a man has a collection of curiosities which he keeps private: it would hardly be contended that any person could publish a catalog of them." Warren & Brandeis, *supra* note 163, at 194.

169. Warren & Brandeis, *supra* note 163, at 203. The right has been applied to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 11 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942); contraception, Eisenstadt v. Baird, 405 U.S. 438, 443

"a right of personal privacy,"[170] the Court has shown a willingness "to pour into the due process clause fundamental values not readily traceable to constitutional text or history or structure."[171] The Court has recognized that the Constitution guarantees certain areas or zones of privacy and individual justices have discerned roots of the right to privacy in the first amendment,[172] the fourth and fifth amendments,[173] the penumbras of the Bill of Rights,[174] the ninth amendment,[175] and in the concept of liberty guaranteed by the first section of the fourteenth amendment.[176]

Unfortunately the broad constitutional framework for a right to privacy remains unclear.[177] As Professor Kurland has stated,[178] the concept of privacy offers little if it cannot protect the individual against intrusion on his freedom of action, choice, and thought.[179] The problem presented by the right to privacy is "to what extent these constitutional rights may or must be conditioned."[180]

In *Whalen v. Roe*,[181] the Supreme Court provided some guidelines for a more expansive definition of the federally protected right to privacy. In *Whalen*, the Court faced a challenge to a New York law requiring the recording, in a centralized computer file, of the names and addresses of all persons obtaining certain "harmful" drugs pursuant to a doctor's prescription.[182] In

---

(1972); family relationships, Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977); child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); and abortion, Roe v. Wade, 410 U.S. 113, 154 (1973). "In these areas, it has been held that there are limitations on the State's power to substantially regulate conduct." Paul v. Davis, 424 U.S. 643, 713 (1976).

170. Roe v. Wade, 410 U.S. 113, 152 (1973). *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

171. G. GUNTHER, CONSTITUTIONAL LAW, CASES AND MATERIALS 616 (6th ed. 1975).

172. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 564 (1969).

173. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350 (1967); Olmstead v. United States, 277 U.S. 438, 478 (1928); Boyd v. United States, 116 U.S. 616 (1886).

174. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

175. *Id.* at 486 (Goldberg, J., concurring).

176. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

177. Professor Gerety has referred to privacy as a "legal wall badly in need of mending." Gerety, *supra* note 160, at 233.

178. *See* Kurland, *The Private I*, The University of Chicago 7, 8 Autumn 1976 (magazine), *cited in* Whalen v. Roe, 429 U.S. 589, 599 n.24 (1977). Professor Kurland has provided some guidance, yet the concept of a constitutional right to privacy remains largely undefined. There are at least three facets that have been partially revealed, but their form and shape remain to be fully ascertained. The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience and belief from governmental compulsion. *Id.*

179. *Id.*

180. *Id.*

181. 429 U.S. 589 (1977).

182. *Id.* at 591.

upholding the law, a unanimous Court delineated two distinct privacy interests protected by the Constitution: the interest in avoiding disclosure of personal matters and the interest in making certain kinds of important decisions.[183] The latter interest has been called an "interest in autonomy;"[184] the former, as the "interest in avoiding disclosure or confidentiality."[185]

The autonomy interest in the right to privacy includes those matters of an intimate nature[186] which the Court has termed "fundamental," such as control over one's body and autonomy in familial matters.[187] While not specifically enunciated in the *Whalen* decision, the privacy interest asserted by the appellee patients and physicians in *Whalen* — the right to make independent decisions whether to take drugs vital to one's health — would clearly fall within the interest in autonomy. However, the Court found that the limited disclosure required by the New York law[188] would not, in and of itself, influence those important decisions.[189] The Court also found the New York law did not encroach upon appellees' constitutional right to confidentiality.[190] The law expressly prohibited public disclosure and there was no showing of any serious threat of broad dissemination of the disclosed medical information.[191]

The *Whalen* decision appears to call for a new type of analysis when an individual asserts his right to withhold personal information. A court should first inquire whether the acquisition and recording of that information will invade the individual's interest in personal autonomy. Secondly, the court should consider whether provision has been made for limiting the disclosure as much as possible. In dictum, the *Whalen* Court noted certain areas existed in which the government has a legitimate interest in acquiring 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

183. *Id.* at 599-600.

184. 575 F.2d 1119, 1128.

185. *Id.*

186. Professor Gerety asserts that "[i]ntimacy is the chief restricting concept of the definition of privacy . . . ." Gerety, *supra* note 160, at 281. Gerety's definition of privacy refers only to the autonomy aspects of privacy which he distinguishes from the interest in confidentiality. The latter interest, according to Gerety, is entitled to legal protection "but in varying degrees and from different quarters" than the interest in personal autonomy. *Id.* at 282.

187. See note 169 and accompanying text, *supra* (autonomy branch includes all the privacy rights previously termed "fundamental").

188. Disclosure under the New York law is limited to the State Department of Health. The physician and pharmacist are also required to retain copies of the information for five years. Public disclosure, however, is expressly prohibited. *See* N.Y. Pub. Health Laws §3300 *et seq.* (McKinney, Vol. 44 (1975-76 Supp.)).

189. *Id.* at 600.

190. *Id.*

191. 429 U.S. at 601-02. *See* 429 U.S. at 606 (Brennan, J., concurring).

> personal in character and potentially embarrassing or harmful if disclosed.[192]

However, the Court was quick to add that the government has a concomitant duty to prevent unwarranted disclosures of gathered information.[193]

A second case decided by the Supreme Court under the confidentiality theory of privacy is *Nixon v. Administrator of General Services*.[194] In *Nixon*, the Court confronted a challenge to the Presidential Recording and Materials Preservation Act.[195] The Act purported to cover the disposition of the 42 million pages of materials and 880 tape recordings accumulated by Mr. Nixon during his presidency. As implemented by the Administrator's regulations, the Act provided that professional archivists would examine all the materials and remove all personal material from the documents.[196] Among other things, Mr. Nixon claimed that the screening of these documents, which included "extremely private" materials, violated his federally protected right to privacy.[197]

The *Nixon* case provided the Court an opportunity to formulate an intermediate level scrutiny test for privacy interests not falling within the autonomy interest. However, as in *Whalen*, the Court never had to reach that question. Justice Brennan, writing for the majority, found the Act's screening method the least intrusive means of invading Mr. Nixon's privacy.[198] In reaching this conclusion, the Court considered important that the overwhelming bulk of the documents pertained to presidential materials, the archivists had an "unblemished" record for discretion, and the public could not obtain these materials by any other method.[199] The public's interest in preservation of the materials was therefore overriding.

The *Nixon* case is important since it develops the confidentiality element of the privacy right. First, the Court recognized that even the former President of the United States has a legitimate expectation of privacy in matters totally unrelated to his official duties.[200] Second, the Court's discontent with applying the rational basis test, as the trial court in *Plante* had done,[201] led to the Court's recognition that where a confidentiality interest is at issue, something more than a reasoned effort on the part of the legislature must be shown.[202] Finally, by noting that it was virtually impossible to accomplish the legislative purpose without the screening methods,[203] the Court, in effect, applied the

---

192. *Id.* at 605.
193. *Id.*
194. 433 U.S. 425 (1977).
195. 44 U.S.C. §2107 (1974).
196. 433 U.S. at 429.
197. *Id.* at 459-60.
198. *Id.* at 464.
199. *Id.* at 462.
200. *Id.* at 457.
201. 437 F. Supp. 536, 540 (N.D. Fla. 1977).
202. 433 U.S. at 460.
203. *Id.* at 465.

least restrictive means test and suggested that the confidentiality strand of privacy was deserving of some measure of scrutiny.[204]

THE CONSTITUTIONALITY OF FINANCIAL DISCLOSURE LAWS

In *Whalen* and in *Nixon*, the Supreme Court balanced the state's interest in limited disclosure against the individual's interest in confidentiality and found the state's interest paramount. In applying the principles of these two cases to financial disclosure laws, it becomes clear that the public officials' interest in confidentiality must be balanced against three important state concerns: The interest in maintaining an educated electorate; the interest in fostering confidence in public officials; and, the interest in discouraging corruption in government. These interests have often been merged under a broad "right to know" principle.[205]

The Public's "Right to Know"

Interpretation of a "right to know" principle within the first amendment guarantee of freedom of expression is problematic. Certainly the Framers of the Constitution recognized an informed public as crucial to the democratic system of government.[206] Also on a number of occasions, the Supreme Court has recognized a right to know protected by the Constitution.[207] Whether this recognition should be transformed into a constitutional rule of law has been the subject of heated debate.[208]

The doctrine of the right to know may have its most significant applica-

204. *Id.* at 464-65.

205. *See* Note, *The Constitutionality of Financial Disclosure Laws*, 59 CORNELL L. REV. 345, 354 (1974).

206. James Madison stated this sentiment in these words: "A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives." Letter of James Madison to W. T. Barry, August 4, 1882, 9 WRITINGS OF JAMES MADISON 103 (G. Hurst ed. 1910).

207. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Lamont v. Postmaster General, 381 U.S. 301 (1965). *Cf.* Nixon v. Administrator of Gen. Serv., 433 U.S. 425 (1977).

On other occasions, the Supreme Court has apparently ignored the right to know. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753 (1972); Zemel v. Rusk, 381 U.S. 1 (1965). *See generally* Emerson, *Legal Foundations of the Right to Know*, 1976 U. WASH. L.Q. 1, 3-4; Note *supra* note 205, at 355.

208. Professor Alexander Meikeljohn is the leading proponent of the notion that the right to know should be adopted as the sole, or at least the principal, basis for the constitutional protection afforded by the first amendment. Meikeljohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245. *Contra*, Heinkin, *The Right to Know and the Duty To Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 273 (1971) (the Constitution expresses no right to know).

Emerson advocates a right to know that is subject to certain limitations when it conflicts with other interests deserving protection. Emerson asserts that the right should be considered "as an integral part of the system of freedom of expression, embodied in the first amendment and entitled to support by legislation or other affirmative governmental action." Emerson, *supra* note 207, at 2. *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 674-76 (1978).

tion in the area of obtaining information.[209] Professor Emerson has stated that "the greatest contribution that could be made in [the development of first amendment protection of the right to know] would be explicit recognition by the courts that the constitutional right to know embraces the right of the public to obtain information about the government."[210] Obviously, information necessary and useful to the public in its role as sovereign must be made available. Democracy requires no less.

Great respect for this principle has been shown by courts in construing financial disclosure schemes. A number of courts have indicated the amorphous right to know as the crucial factor in upholding the constitutionality of disclosure laws.[211] Indeed, financial disclosure laws represent a growing recognition of the importance of an educated populace that is partner with the government in deterring corruption. However, as noted earlier,[212] disclosure laws also represent an infringement on the privacy rights of public officials.

The clash between the right to know and the right to privacy within the context of financial disclosure legislation is obvious. The proper method of reconciliation is not. However, an ad hoc balancing of the right to know against the public official's right to privacy is the least desirable approach.[213] The existence of no common unit of measurement to place upon the opposing sides of the scales makes the balancing method difficult to apply.[214] As Professor Gellhorn pointed out, a more basic problem exists in that the broad and vague phraseology of the " 'right to know' principle cannot decide cases."[215] Where a threat to an individual's right to privacy exists, the courts must look beyond the "right to know" slogan and analyze the real public interests involved.[216]

The state interest considered the most vital by the *Plante* court is the interest in maintaining an educated electorate.[217] Disclosure laws arguably improve the electoral process by providing the voting public with detailed information that will better enable them to evaluate their officials' performance in office. In discussing the campaign disclosure requirements in *Buckley v. Valeo*,[218] the Supreme Court exhibited their support of this "educational feature" of disclosure laws. "The sources of a candidate's financial support . . . [will] alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office."[219] The *Buckley* Court apparently rested its validation of the dis-

209. *See* Emerson, *supra* note 207, at 14; L. TRIBE, *supra* note 208, at 675.

210. Emerson, *supra* note 207, at 14.

211. See text accompanying notes 64-74 *supra*.

212. *Id.*

213. *See* Emerson, *supra* note 207, at 21.

214. *Id.*

215. Gellhorn, *The Right to Know: First Amendment Overbreadth*, 1976 U. WASH. L.Q. 25, 25.

216. *See id.* at 26. In *Plante*, the court termed the phrase, the right to know misleading and went on to discuss the state interests supporting disclosure. 575 F.2d at 1134-35.

217. 575 F.2d at 1137.

218. 424 U.S. 1 (1976) (per curiam).

219. *Id.* at 67.

closure laws on the public's interest in knowing to which individuals and groups a candidate will be attuned.[220]

The use of the educational feature as the rationale for validating pre-election disclosure laws has less of an application to laws requiring the disclosure of the financial interests of persons already in office. As the Supreme Court noted in *Buckley*, public interest in an elected official's financial ties is at its zenith during the campaign period.[221] Financial disclosure in the middle of an official's elected term would arguably not have the same voter impact as pre-election disclosure.

A second state interest allegedly vindicated by financial disclosure is the instilling and encouraging of public trust in the integrity of state government. At least one court has rejected this concern as irrelevant in a balancing of constitutional interests,[222] but the overriding trend of authority, and the better view, is that fostering confidence in government is a valid and important state interest.[223] Moreover, this interest, more than any other, mandates that disclosure be made public.

The third interest, that of discouraging corruption in government, is the essence of financial disclosure legislation.[224] Exposing the financial ties of public officials can certainly be expected to discourage those who would use their money for improper purposes. A public informed of its officials' investment holdings can exert an inhibitory effect upon potential governmental conflicts of interest.[225] While disclosure to an ethics commission might serve the same purpose "[s]unshine will make detection more likely."[226]

Balancing the Right to Know Against the Right to Confidentiality

Laws designed to reveal real or potential conflicts of interest would be of little use of the state could not disclose such information to the public.[227] Moreover, the state has an important interest in fostering confidence in the integrity of government which cannot be advanced by methods short of public

220. *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 181 (1976). *See also* L. TRIBE, *supra* note 208, §§13-30, at 809 n.6.

221. 424 U.S. at 68 n.82.

222. Lehrhaupt v. Flynn, 129 N.J. Super. 327, 323 A.2d 537 ,(Super. Ct. Ch. Div. 1974), *aff'd*, 140 N.J. Super. 250, 356 A.2d 35 (Super. Ct. App. Div. 1976), *aff'd*, 75 N.J. 459, 383 A.2d 428 (1978). The court stated: "Whatever assuages or placates popular opinion at the moment cannot justify legislation, unless that legislation is otherwise within the police power in reasonable furtherance of the public health, safety or welfare." 129 N.J. Super. at 333, 323 A.2d at 540. This decision has been criticized. *See* Staines, *A Model Act for Controlling Corruption Through Financial Disclosure and Standards of Conduct*, 51 NOTRE DAME LAW. 638, 662 (1976).

223. See text accompanying notes 133-136 *supra*.

224. See note 95 *supra* and accompanying text.

225. Justice Brandeis saw public disclosure as a powerful deterrent: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most effective policeman." L. BRANDEIS, OTHER PEOPLE'S MONEY 62 (National Home Library Foundation ed. 1933).

226. Plante v. Gonzalez, 575 F.2d at 1135.

227. See text accompanying notes 220-226 *supra*.

disclosure.[228] Although it has been suggested that states are not constitutionally required to tailor their disclosure schemes to information bearing directly on a public official's duties in office,[229] *Whalen* and *Nixon* suggest the contrary. If personal information is made available to an authorized government agency within the context of a valid governmental program, *Whalen* and *Nixon* suggest that the government has an affirmative duty to prevent unnecessary disclosure. When a competing state interest necessitating a certain amount of public disclosure is involved, the state should model its scheme to prevent the leakage of truly private information.[230]

Neither *Whalen* nor *Nixon* discussed the standard of review to be accorded disclosure schemes. Thus far the Supreme Court has failed to rule on the constitutionality of state financial disclosure laws.[231] State court decisions regarding financial disclosure schemes reflect the confusion as to the proper test to be applied to "important" privacy interests, such as the interest in avoiding disclosure of personal matters.[232] While the statutes are often dissimilar and the methodology of the courts is sometimes unclear, three major judicial concerns permeate the decisions and serve as a common denominator: (1) the coverage of the statute; (2) the specificity required; and (3) the secondary source requirement.

Coverage

The scope of financial disclosure schemes is the most litigated of these issues. The coverage, or overbreadth, problem has two overlapping concerns: (1) whether there is a correlation between the quanta and type of financial matters required to be disclosed and those matters which are reflective of an official's fitness for office (as opposed to purely personal matters); and, (2) whether the law requires the same disclosure of public officials with different levels of responsibility.

The seminal case on the overbreadth issue is *City of Carmel-By-The-Sea v. Young*.[233] In *Carmel*, the statute required disclosure by every public official and candidate, as well as their spouses and minor children, of all investments in excess of $10,000.[234] The Supreme Court of California, in the only decision

228. See text accompanying notes 222-223 *supra*.

229. *See* Note, *Fighting Conflicts of Interest in Officialdom: Constitutional and Practical Guidelines for State Financial Disclosure Laws*, 73 MICH. L. REV. 758, 777 (1975).

230. See text accompanying notes 346-349 *infra*.

231. The Court has dismissed, for want of a substantial federal question, appeals from three state court decisions upholding the recording and public disclosure statutes of those states: Stein v. Howlett, 52 Ill. 2d 570, 289 N.E.2d 409 (1972), *appeal dismissed*, 412 U.S. 925 (1973); Montgomery County v. Walsh, 274 Md. 486, 336 A.2d 97 (1975), *appeal dismissed*, 424 U.S. 901 (1976); Fritz v. Gorton, 83 Wash. 2d 275, 517 P.2d 911 (1974), *appeal dismissed*, 417 U.S. 902 (1974).

232. *See, e.g.*, Goldtrap v. Askew, 334 So. 2d 20 (Fla. 1976).

233. 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1, (1970). The opinion has been extensively discussed. *See, e.g.*, Comment, *Financial Disclosure by Public Officials and Public Employees in Light of* Carmel-By-the-Sea v. Young, 18 U.C.L.A. L. REV. 534 (1971); Case Note, 49 TEX. L. REV. 346 (1971); Case Note, 45 TUL. L. REV. 167 (1970); Recent Cases, 23 VAND. L. REV. 1359 (1970).

234. 2 Cal. 3d at 262, 466 P.2d at 227, 85 Cal. Rptr. at 3.

thus far that has recognized the right to financial privacy as a "fundamental" right,[235] applied a strict scrutiny standard and the least restrictive means test to the statutory scheme.[236] The coverage of the statute included all persons who held statewide and local office regardless of the nature and scope of their agency's activity. This statutory scope indicated to the court that the legislature made no effort to relate disclosure to financial dealings which were potential sources of conflict. The purpose could have been achieved by more narrowly drawn and precise legislation[237] limiting disclosure to only those transactions or holdings which have some correlation to official duties. The court found no overriding necessity to justify the statute's coverage to both the relevant and irrelevant.[238] The court viewed any contrary holding as resulting in paying too high a price because of the potential flight of competent officials from state office.[239]

The *Carmel* decision has received severe criticism as failing to appropriately balance the right to financial privacy and the public's right to know.[240] More recent state court decisions on the overbreadth issue have tipped the scale in the opposite direction. In *Stein v. Howlett*,[241] the Supreme Court of Illinois faced a challenge to the Illinois Governmental Ethics Act[242] which requires disclosure of economic interests by public officials and their spouses.[243] The plaintiff argued that the law required disclosure of professional business

235. *Id.* at 268, 466 P.2d at 231-32, 85 Cal. Rptr. at 7-8. Throughout the court's discussion of the importance of personal financial affairs, the court either relies on state law, or cites to no law at all to support the weight given to this interest. *Id.*

236. *Id.*

237. *Id.* at 270, 466 P.2d at 233, 85 Cal. Rptr. at 9.

238. *Id.* at 272, 466 P.2d at 234, 85 Cal. Rptr. at 10.

239. *Id.* at 272-73, 466 P.2d at 234-35, 85 Cal. Rptr. at 10-11.

240. For a thorough discussion and criticism of the case, see Comment, *supra* note 233. *Carmel* has been greatly criticized for an unwarranted extension of the right of privacy. *See, e.g.*, Case Note, 45 TUL. L. REV. 167, 172-73 (1970). Other commentators have criticized *Carmel* for the failure to recognize the people's right to know as a highly preferred right. *See, e.g.*, Case Note, 49 TEX. L. REV. 346, 352 (1971). Another commentator argues that it is impossible to tailor the statute to the numerous positions involved. On the other hand, the author apparently agrees with *Carmel's* least restrictive means approach. Therefore, the author suggests that basic principles should be established by state statute; the specific requirements and application thereof should be determined at lower levels of government to assure relevance of disclosure to the position involved. Recent Cases, *supra* note 233, at 1364.

241. 52 Ill. 2d 570, 289 N.E.2d 409 (1972), *appeal dismissed*, 412 U.S. 925 (1973).

242. Illinois Governmental Ethics Act §§1-101 to 7-101, ILL. ANN. STAT. ch. 127, §§601-101 to 608-101 (Smith-Hurd 1971); *see also* ILL. CONST. art. 13, §2.

243. The Act required disclosure by the official and his spouse (if constructively controlled assets or income by the filer). Illinois Governmental Ethics Act §4A-102, ILL. ANN. STAT. ch. 127, §604A-102 (Smith-Hurd 1971). The official was required, *inter alia*, to disclose the identity of professional service entities from which he received an income in excess of $1,200 per calendar year, *id.* §604A-102(a)(1); the nature of the services rendered, *id.* §604A-102(a)(2); whether the fees exceeded $5,000 per year, *id.* §604A-102(a)(2); and the identity of any capital asset providing $5,000 or more realized capital gain in the preceding calendar year, *id.* §604A-102(a)(3). The statute apparently does not require disclosure of individual secondary sources, but only the entity source of income. The official need not disclose specific dollar amounts.

connections which were totally unrelated to any activity that may give rise to a conflict of interest.[244] While agreeing with this contention, the court held that where the public interest is compelling, it is for the state and not the individual to determine what situation holds a potential for a conflict of interest.[245] The public's right to know outweighs the public officer's interest in a less restrictive law. By applying only half of the strict scrutiny standard, the *Stein* court concluded that the statute was not overbroad.[246]

In *Fritz v. Gordon*[247] and *Montgomery County v. Walsh*,[248] cases decided by the Supreme Courts of Washington and Maryland, both courts also stopped short of applying a standard of strict scrutiny to overbreadth challenges. Like *Stein*, both cases held that the state's interest in disclosure was compelling, but refused to test the statutes for less restrictive alternatives.[249] In *Fritz*, the challenged statute required disclosure by elected officials.[250] The Washington Supreme Court agreed with the plaintiff's contention that the disclosure statute implicated constitutionally protected rights and that extensive reporting may result from the disclosure of information not unequivocally related to the public office in question.[251] Nevertheless, the court held that the statute did not fail for overbreadth.[252] The court suggested that a prudential consideration influenced its decision. Any attempt to tailor disclosure to a particular office would prove too burdensome a task, and although there may be preferable alternatives to the disclosure law, the court's function does not include substitution of its judgment for that of the legislature.[253] Therefore, in sum the *Fritz* court fashioned an intermediate test of its own: whether the required disclosures are irrationally unrelated to legitimate purposes.[254]

A statute that required the same disclosure of officials from different levels of government and different jurisdictions[255] was before the Supreme Court of Michigan in *Advisory Opinion on Constitutionality of 1975 PA 227*.[256] The court avoided the task of individually balancing the right of privacy against the state's interest[257] and held the law invalid as overbroad

244. 52 Ill. 2d at 577, 289 N.E.2d at 413.

245. *Id.* at 578, 289 N.E.2d at 413.

246. In spite of *Stein's* lack of analysis, at least one commentator finds *Stein's* importance lies in the recognition of the public's right to know. Staines, *supra* note 222, at 659.

247. 83 Wash. 2d 275, 517 P.2d 911, *appeal dismissed*, 417 U.S. 902 (1974).

248. 274 Md. 502, 336 A.2d 97 (1975), *appeal dismissed*, 424 U.S. 901 (1976).

249. 274 Md. at 514-15, 336 A.2d at 105-06; 83 Wash. 2d at 294, 517 P.2d at 923.

250. WASH. REV. CODE §42.17.240 (1973). Where amounts were required, disclosure was by range rather than specific values. The threshold amounts began at less than $1,000. Stock may have been reported by number of shares rather than fair market value. *Id.* §42.17.240 (k)(2). Source disclosure was by entity rather than individuals. *Id.* §42.17.240(f), (g).

251. 83 Wash. 2d at 294-95, 517 P.2d at 923.

252. *Id.* at 300, 517 P.2d at 926.

253. *Id.*, 517 P.2d at 926.

254. *Id.*, 517 P.2d at 926.

255. MICH. COMP. LAWS ANN. §169.131, 169.132 (MICH. STAT. ANN. §4.1701(131), (132) (1976)).

256. 396 Mich. 465, 242 N.W.2d 3 (1976).

257. *Id.* at 508-09, 242 N.W.2d at 20-21. *See* Szymanski, *Constitutional Law (1976 Survey of Michigan Law)*, 23 WAYNE L. REV. 441, 455 (1977).

and as a violation of equal protection.[258] The court felt that different governmental officials are subjected to the possibility of different conflicts of interest and that the information required under the law should reflect the differences.[259] The single class was arbitrary, capricious and unreasonable, and therefore, a violation of the equal protection clause.[260]

In reaching its result, the Michigan Supreme Court applied the compelling state interest-least restrictive means test.[261] With respect to at least some officials, the act was narrowly tailored, in that dollar amounts were not required to be disclosed, and the identity of individual secondary sources was not required if the relationship was confidential, i.e., patients, clients.[262] However, the same disclosure provisions as applied to other officials was not necessarily related to achieving the state interests involved, and the court held that the legislation was overbroad as to those officials.[263]

Throughout the overbreadth cases, the courts commonly recognize that although the public interest in disclosure is compelling, when balanced with an official's right to privacy, something more than minimum rationality must be shown. The courts that have upheld the disclosure laws despite overbreadth challenges have applied a type of balancing of the privacy interest against the right to know and found the latter overriding. Courts that have struck down disclosure laws as overbroad have applied the least restrictive means test.

Specificity

The degree of specificity required by disclosure laws has been a matter of concern for the courts. It is clear that laws which require disclosure in general categories are more apt to pass constitutional muster than laws requiring disclosure in specific figures.[264] A court's concern with the intrusiveness of the law will necessarily overlap with its overbreadth analysis. For example, in *Fritz v. Gorton*,[265] the court made a point of noting that the Washington disclosure law does not require a "picayune itemization" of personal affairs but only requires a list of data and relationships which are designated general categories of varying monetary degrees.[266] Further, in *Klaus v. Minnesota State Ethics Commission*,[267] the Minnesota Supreme Court expansively stated that the specific amount of an individual's net worth or income is "traditionally personal and privileged" information.[268] While the *Klaus* court cited no

258. 396 Mich. at 508-09, 242 N.W.2d at 21.

259. *Id.* at 504, 242 N.W.2d at 19.

260. *Id.* at 508-09, 242 N.W.2d at 21.

261. *Id.* at 506-08, 242 N.W.2d at 20-21.

262. MICH. COMP. LAWS ANN. §169.132(b) (MICH. STAT. ANN. §4.1701(132)(b) (1976)).

263. 396 Mich. at 509, 242 N.W.2d at 21. One commentator argues that the court's reliance on overbreadth and novel application of the equal protection clause enabled it to avoid the painstaking task of individually balancing the right of privacy against the state's interest in disclosure in the case of each level of official. Szymanski, *supra* note 257, at 455.

264. See notes 265-268 and accompanying text, *infra*.

265. 83 Wash. 2d 275, 517 P.2d 911 (1974).

266. *Id.* at 299, 517 P.2d at 925.

267. 309 Minn. 430, 244 N.W.2d 672 (1976).

268. *Id.* at 437, 244 N.W.2d at 676.

authority for this broad statement, most courts apparently feel that range of value rather than dollar amount disclosure comports with appropriately controlled disclosure.

At least one state court, however, has taken a contrary view. In *Illinois State Employees Association v. Walker*,[269] the Supreme Court of Illinois confronted an executive order[270] which required specified state employees, their spouses, and the immediate members of their families to disclose sources and dollar amounts of income, assets, net worth, and portions of income tax returns pertinent to income transactions.[271] In balancing the state's interest in exact figures against the employees' privacy interests, the court conceded the burdensome nature of full financial disclosure. Nevertheless, the court felt that the state's interest in an efficient and ethical government so overriding that anything less than full disclosure would be ineffective to accomplish the state's goals. Accordingly, the court held that the disclosure of dollar amounts was justified.[272] It reasoned that exact value disclosure permits detection of more types of unethical conduct. Merely disclosing sources without the corresponding amounts provides useful but insufficient information.[273] The Illinois court did not, however, explain why or how the disclosure of specific dollar amounts could possibly lead to a greater detection of unethical conduct than disclosure of ranges of values.

Another intrustive aspect of the Illinois executive order considered by the court was the requirement of filing federal and state income tax returns for *confidential* use.[274] More specifically at issue was whether the employees should be required to disclose, albeit confidentially, itemized deductions for medical expenses, charitable deductions and similar items. The Illinois court held that these private items were not protected.[275] In the court's view, such information had already been disclosed by the employee to the federal government and was now merely being elicited by the employee's employer. Moreover, the court noted that there exists no constitutional right to privacy regarding income tax returns; thus the Illinois act does not result in any significant impairment of privacy.[276] However, the court's emphasis on the confidential character of this disclosure made it clear that it would have been much more difficult to uphold the executive order if the complete return were open to the public's inspection, as under the Florida Sunshine Amendment.[278] In this respect, the challenge in *Walker* closely resembles that encountered by the

269. 57 Ill. 2d 512, 315 N.E.2d 9, *cert. denied sub nom.*, Troopers Lodge No. 41 v. Walker, 419 U.S. 1058 (1974).

270. Executive Order No. 4(3)-(6), *reprinted in* Illinois State Employees Ass'n v. Walker, 57 Ill. 2d at 515-17, 315 N.E.2d at 11.

271. *Id.* (4)(a)-(d). The remaining portions of the returns are not open to public inspection. 57 Ill. 2d at 530, 315 N.E.2d at 11.

272. *Id.* at 526, 315 N.E.2d at 17.

273. *Id.* at 526-27, 315 N.E.2d at 17.

274. *Id.* at 530, 315 N.E.2d at 19.

275. *Id.* at 531, 315 N.E.2d at 19.

276. *Id.* at 531, 315 N.E.2d at 19.

277. *Id.* at 530-31, 315 N.E.2d at 19.

278. FLA. CONST. art. II, §8(h)(1)(a).

Supreme Court in *Whalen v. Roe*.[279] With their emphasis on keeping truly private information confidential, both cases bring into question some of the Sunshine Amendment's provisions.

The Secondary Source Requirement

Several courts have expressed concern about the privacy rights of secondary sources. In *Chamberlin v. Missouri*,[280] the plaintiffs, as candidates and attorneys, attacked a disclosure provision which had a greater threshold for corporate practitioners than for sole practitioners.[281] The court strained to read the provision to mean that the lower threshold applied to both types of practice, and that the term "source" referred to business entity. Further, at the higher threshold levels, the term required disclosure of the name of the client.[282] The court found the argument that such a provision harmed third parties merely speculative.[283] The statute would stand until an actual case corroborated the existence of harm and therefore an unconstitutional invasion of privacy.[284]

The Missouri Supreme Court later construed *Chamberlin* as not upholding the individual secondary source disclosure, but, rather that the *Chamberlin* court had merely postponed consideration of the issue. Later in *Labor's Educational & Political Club v. Danforth*,[285] an action for declaratory judgment, *Chamberlin* was restricted to its facts. The *Danforth* court held that there was no showing of an important governmental interest sufficient to necessitate such broad reporting requirements of source by individual name and address.[286] Therefore, the court found the statute an unconstitutional invasion of privacy of customers, clients, and patients.[287] The court arrived at its conclusion with analysis which is conspicuous by its absence.

In contrast, a very well reasoned opinion by the Alaska Supreme Court reached a different conclusion. In *Falcon v. Alaska Public Offices Commission*,[288] a physician serving as a school board member attacked disclosure legislation which seemed to require him to disclose the names of his patients from whom his professional corporation received income. The statute defined source of income as clients or customers of a professional corporation.[289] The issue for the court was whether this included a physician's patients.[290]

279. 429 U.S. 589 (1977). See notes 181-185 and accompanying text, *supra*.

280. 540 S.W.2d 876 (Mo. 1976) (en banc).

281. Mo. ANN. STAT. §130.035.1(5)(6) (1978). The monetary threshold for corporations was $500.00, the monetary threshold for sole practitioners was $100.00.

282. 540 S.W.2d at 879.

283. *Id.* at 881.

284. *Id.* The court also held that the specific identity of a client was not within the attorney-client privilege. The only exception was where so much information had already been disclosed that a disclosure of identity amounted to disclosure of confidential information. *Id.* at 880 (*citing* NLRB v. Honvey, 349 F.2d 900, 905 (4th Cir. 1965).

285. 561 S.W.2d 339 (Mo. 1977).

286. *Id.* at 349.

287. *Id.* at 350.

288. 570 P.2d 469 (Alas. 1977).

289. ALASKA STAT. §39.50.200(8) (1975).

290. 570 P.2d at 470.

The Alaska court held that the statute does require the disclosure of patient names.[291] Moreover, the court held that neither legal privilege nor ethical consideration barred such disclosure. However, such disclosure was determined to possibly invade the constitutionally protected zone of privacy.[292] First, the court reasoned that the relationship between a physician and a patient probably presents less danger with respect to conflicts of interest than the relationship between a business person and client. Nevertheless, the purpose of the statute was to expose all conflicts, and it is within the legislative prerogative to determine what types of conflicts to expose.[293] Second, the statute itself provides that the courts shall determine whether a legally privileged professional relationship precludes compliance with disclosure provisions.[294] Following state law, the court held that any such privilege applies only to information acquired by the physician needed to act for the patient.[295] The court dismissed the plaintiff's argument that ethical considerations precluded disclosure of patient names and found irrelevant physician fears of discipline for unethical practices.[296] The court reasoned that to hold otherwise would permit an elite professional group to exempt itself from the law by declaring such disclosures unethical.[297]

As to the privacy claim, the court agreed that the physician plaintiff had standing to assert the privacy rights of his patients. If the patients vindicated their own rights, they would automatically lose their anonymity. Furthermore, the court found sufficient adversity in the physician's claims. If the statute required disclosure, potential patients might be deterred from this particular physician's services. Accordingly, the plaintiff and others similarly situated would be compelled to choose between government service and private practice.[298]

The court recognized a federal right of privacy based on a broad reading of the due process clause of the fourteenth amendment and from emanations from other constitutional provisions. In addition, the state's own constitution assured a right of privacy.[299] Therefore, they concluded that the appropriate test was strict scrutiny under the language of the federal cases. However, Alaska law required that the level of justification necessary to support the legislation reflect the exact nature of the privacy claim.[300]

While interference with some relationships necessitates a high level of justification, the test that the Alaska court actually employed appears to be derived more from state law than federal law.[301] The *Falcon* court required a fair and substantial relationship between the means and a legitimate govern-

291. *Id.* at 480.
292. *Id.* at 474.
293. *Id.* at 473.
294. ALASKA STAT. §39.50.035 (1975).
295. 570 P.2d at 473. *See also*, ALAS. R. CIV. P. 43(h)(4).
296. 570 P.2d at 473-74.
297. *Id.*
298. *Id.* at 476.
299. ALASKA CONST. art. 1, §22.
300. 570 P.2d at 476.
301. *Id.* at 476-77.

ment purpose.[302] Such a standard appears more closely akin to an intermediate level of scrutiny in terms of federal tests, than a true least restrictive means approach.

The Alaska Supreme Court read *Whalen* as not requiring the conclusion that where the identity of patients may be linked with stigmatizing personal information, full public disclosure even for legitimate purposes may invade a right of privacy.[303] However, at the very least, they found that *Whalen* stands for the proposition that where applicable rules or regulations insure that such information will be available only to authorized personnel in the context of a valid governmental program, the legislation should withstand an attack on its constitutional validity.[304]

Applying the foregoing principles to the Alaska statute, the *Falcon* court held a minimal invasion of privacy exists in requiring the disclosure of persons who have paid more than $100.00 to a doctor during a calendar year.[305] Such disclosure merely shows that the individual went to a physician; it does not disclose the purpose of the visit. However, in some circumstances, a mere visit to a particular physician may implicate confidential or sensitive information. Therefore, the court defined "sensitive" to mean information a patient might wish to keep secret, exposure of which would cause the patient concern, embarrassment, and anxiety.[306]

The court further circumscribed the relevant factors requiring consideration in the situation where the physician's practice is very specialized so that the disclosure of a patient's identity would reveal the purpose of the visit. In this situation, the state's interest does not outweigh the privacy interest.[307] However, striking the balance in favor of the patient would be the exception rather than the rule, since a visit to a general practitioner would require disclosure.[308] In light of these principles, the court directed the legislature to promulgate regulations which would provide a method for exempting particular classes of patients or physicians.[309] The court also required a legitimate state purpose for the legislative means used to accomplish the regulation in light of the important privacy interest at stake.[310]

Disclosure by an official's spouse and the immediate members of his family is another typical requirement of state financial disclosure laws. Such provision was upheld by the Illinois Supreme Court when challenged as applied to public employees. In *Illinois State Employees Association v. Walker*,[311] the court noted to hold otherwise would permit a great danger of conflict of

302. 570 P.2d at 476 (*citing* Isakson v. Ricky, 550 P.2d 359, 363 (Alas. 1976) for the correct test).

303. *Id.* at 479.

304. *Id.* See text accompanying notes 181-193 *supra.*

305. 570 P.2d 479.

306. *Id.*

307. *Id.* Examples the court lists are psychiatry, abortion, veneral disease. *Id.* at 480.

308. *Id.* at 480.

309. *Id.*

310. *Id.* at 476.

311. 57 Ill. 2d 512, 315 N.E.2d 9, *cert. denied sub nom.*, Troopers Lodge No. 41 v. Walker, 419 U.S. 1058 (1974).

interest by the individual as well as the possibility of subverting the loyalty of an employee by giving gifts to the spouse.[312]

INTERMEDIATE LEVEL SCRUTINY AND *Plante v. Gonzalez*

In *Plante*, the Fifth Circuit made the first attempt to define the right to confidentiality within the context of a state financial disclosure scheme. The court initially approached the problem by bifurcating the right to privacy into the two distinct privacy interests, as delineated by Justice Stevens in *Whalen*, in order to determine whether the senators had any right to financial privacy.[313]

Whether the senators' right to privacy fell within the autonomy interest of the right to privacy posed little problem for the court. With the exception of the *Carmel* decision, it has been held that the right to avoid disclosure of one's personal financial affairs does not, on its own, fall within the zone of privacy recognized by the Supreme Court of the United States.[314] As discussed earlier,[315] the crucial decision-making which the Court has accorded constitutional protection has been restricted to family-linked concerns. As Judge Wisdom pointed out in *Plante*, financial disclosure laws do not directly remove any alternatives from the familial decision-making process.[316] Moreover, American society is accustomed to extensive intrusions of financial privacy by the state and federal governments.[317]

---

312. One court was fairly clear in its choice of methodology. Kenny v. Byrne, 144 N.J. Super. 243, 365 A.2d 211 (Super. Ct., App. Div. 1976), clearly applies a test of minimum rationality. At issue was an executive order. Exec. Order #15 (N.J. 1975). The court held that disclosure may be burdensome and embarassing but is legally insignificant when balanced against the right of the public to an honest and impartial government. They reasoned that since a broad comprehensive inquiry is necessary to accomplish the purpose, the order is not overbroad where the full objectives of the legislation cannot be accomplished by any other means. *Id.* It is interesting to note that New Jersey does not have a state statute regulating disclosure. However, N.J. STAT. ANN. 52:130-23, the Code of Ethics, permits agencies of state government to promulgate their own code of ethics with respect to their particular needs and problems. Perhaps this is one reason the court easily applied minimal scrutiny. It expects that regulations of various departments will tailor the requirements to fit the official's duties.

313. 575 F.2d at 1127-28.

314. See note 240 *supra*.

315. See note 169 *supra*.

316. 575 F.2d at 1130.

The senators tried to bring their case within the autonomy branch with the following assertion: "The nature of financial investments, their wisdom, worth or desirability, are matters decided by family councils for the family's benefit. Whether they should be exposed or protected from exposure is a matter of great family concern. Media publication of disclosed wealth can bring mischief, even kidnappers or other criminal attention to an office holder. Financial privacy is and ought to be protected from governmental intrusion . . . in the manner that marital and family privacy is protected." *Plante* complaint, ¶12, app. at 5 (quoted *id.* at 1128).

317. It is clear that Americans do not have a legitimate expectation of privacy from "traditional" governmental intrusion into their financial affairs. As the court noted in *Plante*: "Interference with business activities through licensing, taxing, and direct regulation is common. All these governmental actions impinge on the ability of the individual to order

Whether financial disclosure laws invade a public official's right to confidentiality requires a different type of analysis. For information to be of a confidential nature, it need not have any effect on the way intimate family decisions are made. As Professor Gerety points out: "Confidential information [in contrast with private information] need not be intimate information: it may involve such scarcely "intimate" matters as social security number, tax returns, or business records."[318] What makes this information "confidential" is the "implied or express trust that ought to be established in our favor by those who feel that they must record confidential information about us."[319] In *Whalen* and again in *Nixon*, the Supreme Court suggested that the Constitution may require the government to take special precautions to protect "confidential" personal matters from being publicly disclosed.[320]

Viewed in this light, an individual's personal financial affairs, even a public official's, is entitled to some degree of constitutional protection under the confidentiality strand of privacy. To a very large extent, Americans traditionally have protected their financial affairs from public scrutiny. Money is often the "yardstick by which [an individual's] success, achievement, worth or lack thereof is measured."[321] Therefore, revelation of an individual's personal debts may cause embarrassment, or revelation of the magnitude of his wealth can lead to burglary or kidnapping attempts, or to irritating solicitations.[322] In *Plante*, the court concluded that the senators' had a "substantial" interest in financial confidentiality.[323] The court appears to have derived from *Whalen* and *Nixon* a very broad constitutional right to confidentiality in personal matters. This basic premise that disclosure by itself is damaging, can be traced to the Warren and Brandeis article. "When a legitimate expectation of privacy exists, violation of privacy is harmful without any concrete consequential damages. Privacy of personal matters is an interest in and of itself, protected constitutionally . . . and at common law."[324]

The recognition of a constitutional right to financial confidentiality formed the beginning, not the end, of the *Plante* court's inquiry. Similar to other rights secured by the Constitution, privacy rights are not absolute. These rights are subject to displacement by the demands of sufficiently important state interests.[325]

While disclosure laws serve substantial, if not compelling, state interests,

---

his financial affairs. They do so directly." 575 F.2d at 1131. *See also* Note, *supra* note 229, 773 ("Financial privacy is not 'rooted in American traditions.' "). *Contra*, Brief of ACLU, *supra* note 140, at 8 ("there can be no dispute that historical reference supports the right of privacy in personal financial affairs as a fundamental one, deeprooted in our tradition.").

318. Gerety, *supra* note 160, at 289.

319. *Id.* at 290.

320. *See* 575 F.2d at 1133.

321. Brief of ACLU, *supra* note 140, at 7.

322. *See* 575 F.2d at 1135.

323. *Id.*

324. *Id. But cf.*, Paul v. Davis, 424 U.S. 693, 701 (1976) ("reputation alone, apart from some more tangible interests such as employment is [n]either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause.").

325. Petition for Certiorari, 43-44, Plante v. Gonzalez, 99 S. Ct. 1047 (1979).

the question remains as to how these interests are to be balanced against the public officials' interest in confidentiality. Professor Gerety has stated that "[p]rivate information and confidential information require legal protection, but in varying degrees and from different quarters."[326] The essence of the constitutional problem presented by financial disclosure laws is to determine the amount of legal protection confidential information is entitled to where the public has a substantial interest in obtaining access to that information.

The traditional balancing test commonly applied to due process claims determines the constitutionality of the law by a comparison of the interests it serves with those it hinders. The test would appear to ignore the fact that public officials have a legitimate privacy interest protected by the Constitution. "Something more than mere rationality must be shown."[327] Such an ad hoc balancing is at best difficult to apply,[328] and at worst allows the court to reach any conclusion desired.[329] However, subjecting financial disclosure laws to the same level of scrutiny applied to laws impinging upon fundamental rights would prove to be too great a burden. As the court noted in *Plante*, such scrutiny "would draw into question many common forms of regulation, involving disclosure to the public and disclosure to government bodies."[330] Requiring states to show a compelling state interest to validate financial disclosure laws would force courts to make the awkward choice of striking down numerous requirements such as public disclosure of exact dollar amounts and disclosure of secondary sources of income, or upholding these requirements by bending the strict scrutiny standard. A number of state courts have apparently done the latter.[331]

The Fifth Circuit in *Plante*, recognized that neither of the traditional tests can find appropriate application to financial disclosure laws.[332] However, the court did not adequately articulate an intermediate level test. A clear formulation of an intermediate test is necessary so courts may appropriately balance the important interest of the state and the individual in a consistent manner. Within the context of an equal protection challenge, the Supreme Court in *Craig v. Boren*[333] articulated the following intermediate level test: "To withstand Constitutional challenge . . . classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[334] Professor Laurence Tribe has identified five

326. *See* Gerety, *supra* note 160, at 281-82.

327. Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978).

328. See text accompanying notes 213-217 *supra*.

329. Emerson, *supra* note 207, at 21.

330. 575 F.2d at 1134 & n.24. Social security and income tax laws, for example, require mandatory disclosure of financial information to the government. Securities laws require public disclosure of some financial information concerning directors, officers, and major shareholders. Census forms require disclosure of some personal information. If these laws were subjected to strict scrutiny, it is doubtful whether they would be upheld in their entirety. *See* Note, *supra* note 229, at 773-75.

331. See text accompanying note 254 *supra*.

332. 575 F.2d at 1134-35.

333. 429 U.S. 190 (1976) (Oklahoma statute prohibiting the sale of 3.2% beer to males under the age of 21 and females under the age of 18 held a denial of equal protection).

334. *Id.* at 197 (emphasis added).

techniques applicable to intermediate review: (1) the objectives served by the challenged classification or limitation on liberty should be important but not necessarily compelling; (2) there should be a "close fit" ("substantial relationship") between the challenged scheme and these objectives; (3) the rationale for the scheme should express current values of the constituency, as opposed to a rationale drawn from the court's imagination or the scheme's history; (4) the scheme's objective should not be supplied by hindsight, but justification for the scheme should be found from the considerations that contributed to its enactment; and (5) the scheme should be flexible to allow rebuttal in individual cases even if not struck down altogether.[335]

Application of Intermediate Level Scrutiny to Florida's Sunshine Amendment

An application of *Craig's* intermediate standard and Professor Tribe's analysis to the Sunshine Amendment substantiates the result reached in *Plante*. Fostering confidence in government, deterring potential conflicts of interest, and alerting the voting public to the types of interests of government officials are undeniably important state concerns served best by public disclosure of an official's financial ties. The rationale for public disclosure, the interest in an honest and open government, expresses important public values.[336] The justification for the law is clear and there are no discernible efficient alternatives. Although not discussed by the *Plante* court, the secondary source requirement should also withstand an intermediate level test. Mere disclosure of an official's net worth and major assets would not adequately alert the public to that official's financial ties and conflicts of interest.[337] To avoid complete frustration of the purposes for financial disclosure laws, disclosures of an official's financial dealings with third parties is a necessity.

The constitutionality of requiring disclosure of specific dollar values, as opposed to ranges, under a standard of intermediate scrutiny is less obvious. Requiring specific dollar disclosure would probably not stand under a traditional least restrictive alternative test where the state interest in the chosen means is balanced against the individual's interest in the use of less drastic regulations.[338] While the incremental harm from such a requirement may be

335. L. TRIBE, *supra* note 208, at 1082-89.

336. See text accompanying notes 217-226 *supra*.

337. See text accompanying notes 112-113 *supra*. One wonders why the Sunshine Amendment does not require the disclosure of the income and assets of an official's spouse and children. This is a major loophole which can furnish some people with the opportunity to circumvent the law by masking their financial ties. Moreover, even in the ordinary case, where no attempt is made to cover a potential conflict of interest, it can be assumed that a public official would very likely be influenced by the financial interests of his immediate family.

338. In *Plante*, however, the court apparently applied a least restrictive alternative analysis and upheld the requirement: "[w]hile the incremental benefit may be slight, the incremental harm is even slighter." 575 F.2d at 1136.

A number of state courts are apparently of the view that the disclosure of exact dollar amounts is forbidden ground. In Klaus v. Minnesota State Ethics Comm'n, 309 Minn. 430,——, 244 N.W.2d 672, 676 (1976) the court stated that the exact dollar value of an official's assets

slight, under an intermediate level of scrutiny the result may be different. Arguably there exists a logical nexus between the exact dollar figure disclosure and the purposes of the Act. Disclosure of dollar figures directly apprises the public of an official's assets and liabilities. The public clearly gains from the increased specificity.[339] The availability of dollar range disclosure as a slightly less intrusive method should not be relevant in an intermediate test.

There are potential problems with the implementation of some of the Sunshine Amendment's requirements and exceptions to complete public disclosure should be made in appropriate cases. For example, the amendment's requirement of public disclosure of all liabilities in excess of $1,000 could conceivably require an official to disclose debts for such personal matters as visits to a psychiatrist, an abortion, or a vasectomy. The secondary source requirement may infringe the privacy interest of third parties when the official occupies a special legal or medical status.[340] When the official is a doctor, and particularly when he is a specialist, disclosure of his identity to third parties may reveal the nature of his treatment.[341] If the official is a lawyer, disclosure of the identity of his client may reveal a confidential communication.[342]

The amendment's alternative of filing a federal income tax statement also presents privacy problems. Disclosure of a complete federal income tax form could reveal the nature of various contributions made by the official to charitable, religious, political, or other associations.[343] Such a disclosure could thus abrogate an official's first amendment right to associational privacy, a right protected by "exacting scrutiny."[344]

---

is "traditionally personal and privileged" information. In County of Nevada v. MacMillen, 11 Cal. 3d 662, —, 114 Cal. Rptr. 345, 350, 522 P.2d 1345, 1350 (1974) and in *In re* Kading, 70 Wis. 2d 508, ——, 235 N.W. 409, 418 (1976) the court indicated that they were more confident in upholding their states' financial disclosure laws because exact dollar amounts are not required.

339. *See* Illinois State Employees Ass'n v. Walker, 57 Ill. 2d 512, 315 N.E.2d 9, *cert. denied sub nom.*, Troopers Lodge No. 41 v. Walker, 419 U.S. 1058 (1974) where the court stated that "[t]he inclusion of dollar amounts is justified because it allows for detection of many more types of unethical conduct." The court did not explain how.

340. See text accompanying notes 280-308 *supra*.

341. *See, e.g.*, Falcon v. Alaska Offices Comm'n, 570 P.2d 469, 480 (Alaska, 1977).

342. *See, e.g.*, Chamberlain v. Missouri Elections Comm'n, 540 S.W.2d 876, 880-81 (Mo. 1976), *citing* NLRB v. Harvey, 349 F.2d 900, 905 (1965) ("The privilege [of concealing the identity of a client] may be recognized when so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication.").

In *Chamberlain*, the court recognized that in certain situations exceptions of disclosure of a lawyer's clients may be necessary.

343. In *Plante*, the court was aware of this problem but did not decide upon it since it was not in issue in the case. 575 F.2d at 1133 n.20.

One wonders at the wisdom of allowing this alternative. On the one hand, the filing of a federal income tax statement could reveal traditionally private information. In this sense, it goes too far. On the other hand, by filing a federal income tax statement, an official may be able to avoid the revelation of some of his secondary sources of income. In this sense, it is a major loophole.

344. Buckley v. Valeo, 424 U.S. 1, 64 (1976).

The leading case for the first amendment right to associational privacy is NAACP v. Alabama, 357 U.S. 449 (1958) where the Court prevented a state court from forcing the

SUGGESTIONS FOR A MODEL ACT

An effective and constitutional financial disclosure law that will invade nobody's privacy rights is a virtual impossibility. The concept of disclosure, like that of privacy, knows no natural limits. Even a well-drafted disclosure statute will at some point overreach into the legitimate expectations of privacy of an official or his associates. Disclosure should be limited to those affairs of an individual that define his public, but not his private, person.[345] This states the problem, but offers no definitive solution.

A number of general guidelines have been delineated. First, and most basically, conflict of interests laws should mandate disclosure only by those officials "occupying positions of public trust providing both opportunity and temptation for official misconduct."[346] Disclosure laws should be written to reveal only such interests and relationships that are substantial enough to affect the public interest.[347] The emphasis should be upon large threshold requirements for the public disclosure of assets and liabilities. The lower the threshold requirement, the greater the chance of impinging upon an official's

---

production of lists of the rank-and-file members of the N.A.A.C.P. *See also* Shelton v. Tucker, 364 U.S. 479 (1960); Talley v. California, 362 U.S. 60 (1960); Bates v. City of Little Rock, 361 U.S. 516 (1960).

In more recent cases, the Court has shown increasing concern for the associational privacy that is invaded by disclosure of an individual's financial affairs. See California Bankers Ass'n v. Shultz, 416 U.S. 21, 78-79 (1974) where Justice Powell stated in concurrence: "Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy."

This language was quoted with approval by the majority of the Court in *Buckley* and the same sentiment was again expressed by Justice Powell in his concurring opinion in Nixon v. Administrator of Gen. Serv., 443 U.S. 425 (1977). This time, however, it was applied to public officials: "Even in the councils of government an individual 'has a legitimate expectation of privacy in his personal communications,' . . . and also that compelled disclosure of an individual's political associations, in and out of government, can be justified only by a compelling need that can not be met in a less restrictive way . . . ."

345. *See also* Kurland, *supra* note 178, at 34. "Publicity may be a healthy preventative of, or corrective for, governmental malfeasance, but only to the degree that it actually relates to possible malfeasance and not when it simply exposes the private affairs of an individual because he happens to be a government employee." *Id.*

346. Staines, *supra* note 222, at 672. *See also* Note, *supra* note 229, at 778-80, where the author states that the public interest in disclosure varies among the three principal categories of persons working for the state: elected officials, appointed officials, and public employees. Within each group the state's interest in disclosure varies "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." *Id.* at 779. Disclosure laws should reflect these differences by requiring a more limited disclosure by lesser state employees.

It is significant that two state courts have struck down disclosure laws that provide for equal treatment among state employees; *see, e.g.*, Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich. 465, 242 N.W.2d 3 (Mich. 1976); City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 85 Cal. Rptr. 1, 466 P.2d 225 (1970).

347. Staines, *supra* note 222, at 672 (referred to by the author as the "de minimis concept").

legitimate expectations of privacy.[348] Similarly, the secondary source requirement should mandate the public disclosure of only the official's major financial ties and should require the disclosure of the major assets of the official's spouse and children. Alternatives to disclosure of secondary sources such as Florida's optional filing of federal income tax returns should be avoided.

Last, and most importantly, disclosure laws should confer authority on a neutral agency, such as a State Ethics Commission, to oversee the filing process and allow exceptions to public disclosure in sensitive situations. Flexible disclosure laws should withstand constitutional challenges under an intermediate level test.

CONCLUSION

Financial disclosure laws should be drafted with a recognition of the conflicting interests of the public and the individual. Though the official's interest in financial confidentiality must inevitably be subordinated to the vital state interest in public disclosure, disclosure schemes should be carefully tailored to invade an official's privacy right only to the extent necessary to protect the public interest. In the final analysis, the public loses if an overly intrusive disclosure law dissuades qualified individuals from running for public office.

An intermediate level of scrutiny should be recognized as the appropriate test where a state law requires disclosure of an individual's personal information.[349] A clear formulation of an intermediate level test for due process claims by the Supreme Court would remove much of the confusion prevalent in disclosure cases.

---

348. *See, e.g.*, Labor's Educ. & Political Club v. Danforth, 561 S.W.2d 339, 350 (Mo. 1977) (statute requiring the reporting of the source, by individual name and address, of income and gifts to the candidate, his spouse, or his children, of over $100 or $500 over a twelve-month period, held an unconstitutional invasion of the privacy of candidates, their customers, clients and patients).

349. A recent case has accepted and applied *Plante's* intermediate level scrutiny to an employment questionnaire, Service Machine & Shipbuilding Corp. v. Edwards, 466 F. Supp. 1200 (W.D. La. 1979).