McGeorge Law Review

Volume 8 | Issue 2 Article 17

1-1-1977

Disclosure and Individual Rights: Influencing the Legislative Process under the Political Reform Act of 1974

Stephen T. Landuyt
University of the Pacific; McGeorge School of Law

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Concern over the deleterious effect that unchecked lobbying activities can have on the legislative process has been met with a varied regulatory response from the federal and state governments.[1] The varying degrees of control exerted over lobbying activities by the state and federal legislatures indicates,[2] at least in part, the difficulty present in regulating and restricting activities that lie so near the heart of a democratic government.[3] This difficulty stems from the inherent conflict that results when the individual's rights of free expression and redress of grievances fail to form a smooth interface with the state's interest in the purity of its governmental function. The interest asserted by the state is the interest of each citizen since it is the citizen's representative body that is being protected from the abuse of influence exerted by lobbyists or special interest groups. Thus, the individual's interest as a represented citizen may conflict with the exercise of his first amendment rights.

The Political Reform Act of 1974[4] [hereinafter referred to as the Political Reform Act or the Act] contains California's most recent legislation regulating lobbying activities. To date, the California courts have not been faced with determining the constitutionality of the Political Reform Act's balance of the state's interest in open government and protection of the individual's first amendment rights. The Political Reform Act has significantly extended regulatory controls over activities intended to influence legislative decision-making. This extension requires a consideration of the Act's effect on individual rights of expression, petition, association and privacy.

The Political Reform Act uses public disclosure as the primary method of regulating political activity.[5] Public disclosure, in many circumstances, has

1. *See generally* E. LANE, LOBBYING AND THE LAW (1964) [hereinafter cited as LANE].
2. LANE, *supra* note 1, at 47-106.
3. "Clearly, the right to speak on political questions and the allied right to petition, both of which are protected by the First and Fourteenth Amendments, are basic under the traditional American view of constitutional government." Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs*, 47 MICH. L. REV. 181, 211 (1948).
4. CAL. GOV'T CODE §§81000-91014.
5. *See* CAL. GOV'T CODE §§86107, 86109 (reports), 81008 (all reports filed pursuant to the Political Reform Act become public records). *Cf.* Hynes v. Mayor of Oradell, 425 U.S. 610, 625-30 (1976) (discussion of required registration resulting in disclosure).

the effect of chilling the exercise of first amendment rights.[6] Influencing legislative or administrative action involves the exercise of the rights of expression, petition and in some cases the right of association. Because disclosure has an inhibitory effect on the exercise of these rights, it is necessary to analyze the constitutional propriety of the Political Reform Act's disclosure requirements. The Act requires disclosure by three different individuals; these are the lobbyist, the employer of a lobbyist, and any other person attempting to influence legislative decisions by engaging in certain activities. The last of these, the person who attempts to influence legislative decisions but is not a lobbyist or employer, is the subject of this comment. This person, for the purpose of the comment, will be referred to as an Influencer to distinguish him from the lobbyist and the employer.

In discussing the regulation of the Influencer, the following format will be used. First, the lobbying regulations of the Political Reform Act will be explained for purposes of identifying the Influencer and the position held by him in the Act's regulatory scheme. Second, the constitutional test applicable to indirect infringements of first amendment rights will be discussed. It will be determined that the Act regulates speech and not conduct, thus necessitating the application of a balancing test to determine whether the state has a sufficient interest to require disclosure. Third, the state's interests in regulation of lobbying activities and the first amendment rights of the Influencer will be delineated. These rights and interests will then be balanced to determine whether the Act's disclosure requirements are a permissible regulation of the Influencer. Finally, the Influencer's right to privacy under the California Constitution will be discussed in reference to both the Act's required disclosure of financial transactions and maintenance of disclosed information in a public record.

REGULATION OF LOBBYING IN CALIFORNIA

It was not until 1949 that the California Legislature enacted regulations governing lobbyists, or legislative advocates as they were then termed.[7] The

6. The California Supreme Court stated recently:

> In a line of cases stretching over the past two decades, the United States Supreme Court has repeatedly recognized that to compel an individual to disclose his political ideas or affiliations to the government is to deter the exercise of First Amendment rights.

White v. Davis, 13 Cal. 3d 757, 767-68, 533 P.2d 222, 229, 120 Cal. Rptr. 94, 100 (1975). *See also* Buckley v. Valeo, 424 U.S. 1, 68 (1975). For a general discussion of the chilling effect, see Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 809 (1969).

7. The 1949 regulations were contained in CAL. GOV'T CODE §§9900-9908, amended to add §§9909-9911 in 1950. CAL. GOV'T CODE §§9900-9911 were repealed with the passage of the Political Reform Act of 1974, June 4, 1974.

The California Constitution previously contained the provision:

> Any person who seeks to influence the vote of a member of, the legislature by bribery, promise of reward, intimidation, or other dishonest means shall be guilty of lobbying, which is hereby declared to be a felony.

CAL. CONST. art. IV, §35 (repealed Nov. 8, 1966). The term lobbying has been used, in the past, to refer to illegal activity intended to influence legislative decisions. This, however, is no longer the commonly understood meaning of lobbying. A similar provision, but without the reference

California regulations were patterned after the Federal Regulation of Lobbying Act[8] and, unfortunately, shared that Act's defects. Among these defects were the lack of a clear definition of lobbying activity and the failure to provide for an effective enforcement procedure.[9] The California Legislature amended the state's regulations on a number of occasions, but failed to make any substantive changes.[10] In response to this legislative inaction and the heightened public concern over exposing abuses within the governmental process, the California voters, by initiative,[11] passed the Political Reform Act of 1974 and a comprehensive reform of the state's political process became law.

A. The Political Reform Act of 1974

The Political Reform Act of 1974 contains a comprehensive package of political reform legislation touching many political activities within the state.[12] Chapter 6 of the Act specifically covers lobbying activities and has resulted in a major revision of California's lobbying regulations.[13] Chapter 6 both tightens controls that were present in the old law and extends control to activities that had previously gone unchecked.

A major procedural change is the creation of the Fair Political Practices Commission[14] [hereinafter referred to as the FPPC] which has the primary responsibility for carrying out the purposes of the Act.[15] Specifically, the

to lobbying, is now found in CAL. CONST. art. IV, §15. CAL. PEN. CODE §85 also makes bribery of a legislative official a statutory crime.

8. 2 U.S.C. §§261-270 (1958) (originally enacted as Fed. Reg. of Lobbying Act of 1946, 60 Stat. 839 (1946)).

9. *See, e.g.*, Futor, *An Analysis of the Federal Lobbying Act*, 10 FED. BAR. J. 366 (1949); Kennedy, *Congressional Lobbies: A Chronic Problem Re-examined*, 45 GEO. L.J. 535 (1957); Comment, *Public Disclosure of Lobbyists Activities*, 38 FORDHAM L. REV. 524 (1970); Note, *Federal Regulation of Lobbying Activities—Constitutionality and Future Application*, 49 NW. U.L. REV. 807 (1954); Comment, *Improving the Legislative Process*, 56 YALE L.J. 304 (1947); Note, *The Federal Lobbying Act of 1946*, 47 COLUM. L. REV. 98 (1947).

10. *See* CAL. GOV'T CODE §§9900-9911, *as amended*, CAL. STATS. 1949, Ex. Sess., c. 4, at 243; CAL. STATS. 1968, c. 312, at 680; CAL. STATS. 1969, c. 122, at 257; CAL. STATS. 1969, c. 606, at 1242; CAL. STATS. 1970, c. 801, at 1517-21. *See generally* REPORTS OF ASSEMBLY INTERIM COMMITTEE ON LEGISLATIVE REPRESENTATION, vol. II, no. 1, in 2 APPENDIX TO JOURNAL OF THE CALIFORNIA ASSEMBLY 1 (1957 Reg. Sess.); REPORTS OF ASSEMBLY INTERIM COMMITTEE ON LEGISLATIVE REPRESENTATION, vol. II, no. 2, in 1 APPENDIX TO JOURNAL OF THE CALIFORNIA ASSEMBLY 1 (1961 Reg. Sess.); REPORTS OF ASSEMBLY INTERIM COMMITTEE ON LEGISLATIVE REPRESENTATION, vol. II, no. 3, in 1 APPENDIX TO JOURNAL OF THE CALIFORNIA ASSEMBLY 1 (1963 Reg. Sess.).

11. The Political Reform Act of 1974 was passed by 68.9 percent of the statewide vote on June 4, 1974. STATE OF CALIFORNIA, STATEMENT OF VOTE, PRIMARY ELECTION JUNE 4, 1974 at 40 (1974) (compiled by Edmund G. Brown, Jr., Secretary of State).

12. For a discussion of other provisions of the Political Reform Act of 1974, see Comment, *Proposition 9 and Conflicts of Interest: Scrambling to Close the Barn Door*, 7 PAC. L.J. 847 (1976); Comment, *Expenditure Limitations In Campaigns For Statewide Office In California*, 6 PAC. L.J. 631 (1975).

13. CAL. GOV'T CODE §§86100-86300.

14. CAL. GOV'T CODE §§83100-83122. Under the previous regulations, a joint committee of the legislature was established to receive the lobbyist reports. This joint committee, however, did not otherwise exercise the powers of a regulatory commission. CAL. GOV'T CODE §§9900(d), 9904, 9906, 9909 (repealed by Initiative Measure, June 4, 1974).

15. CAL. GOV'T CODE §83111.

FPPC has the authority to give advisory opinions,[16] enact rules to further the purposes of the Act,[17] investigate possible violations,[18] and act as the primary civil prosecutor.[19] Substantively Chapter 6, while requiring lobbyists and their employers to meet stricter reporting requirements, extends control over activities and individuals previously unregulated. The major substantive changes include the following. First, lobbying activities directed at the quasi-legislative functions of state agencies are now included in the regulations.[20] Second, a person who is not a lobbyist and who uses only personal funds for influencing purposes is now subject to regulation, if the statutory requirements for reporting are otherwise met.[21] Last, more information relating to lobbying efforts must now be reported by lobbyists,[22] employers and others influencing legislative action.[23] It should also be noted that indirect as well as direct influencing activities must be reported.[24]

B. Chapter 6 and the Regulation of Lobbying Activity

A major difficulty in drafting lobbying legislation is the determination of what activities constitute lobbying. The term "lobbying," while having a popular connotation, has no single definition under the regulations of various states.[25] Black's Law Dictionary defines lobbying as personal solicitation of legislators by one who either misrepresents the interests he is promoting or is paid to use means not addressed to the legislator's judgment alone.[26] This definition excludes from lobbying the collection of facts, the preparation of arguments, and the submission of these facts and arguments to the legislator.[27] The dictionary definition would not include the individual

16. CAL. GOV'T CODE §83114.
17. CAL. GOV'T CODE §83112.
18. CAL. GOV'T CODE §83115. Under the previous regulations, enforcement was left to the "appropriate law enforcement officers." CAL. GOV'T CODE §9909(7) (repealed by Initiative Measure, June 4, 1974).
19. CAL. GOV'T CODE §91001(b).
20. *See* CAL. GOV'T CODE §§82039, 86100-86107 (lobbyist), 82045, 86108-86109 (employer and Influencer). For the definition of quasi-legislative administrative action, see CAL. GOV'T CODE §82002; 2 CAL. ADMIN. CODE §18202. *Cf.* 2 F.P.P.C. OPS. 54 (No. 75-042, April 22, 1976); 1 F.P.P.C. OPS. 46 (No. 75-031, July 2, 1975) (discussion of quasi-legislative administrative action).
Under the old law, only influencing efforts directed at the state legislature and the Governor were regulated. CAL. GOV'T CODE §§9905-9906 (repealed by Initiative Measure June 4, 1974).
21. See text accompanying notes 43-63 *infra*. The previous regulations were determined to be inapplicable to a person if funds were neither solicited nor collected for the purpose of influencing. Thus, persons using only personal funds for influencing activities were not required to file reports. OP. LEG. COUNSEL, 1 JOURNAL OF CALIFORNIA ASSEMBLY 4692, 4693 (1959 Reg. Sess.).
22. *See* CAL. GOV'T CODE §86107.
23. *See* CAL. GOV'T CODE §86109.
24. *See* CAL. GOV'T CODE §82045(e). This section contains the provisions regulating indirect lobbying activities. Similar provisions under the old law were found at CAL. GOV'T CODE §9905(b) (repealed by Initiative Measure, June 4, 1974).
25. *See* LANE, *supra* note 1, at 47-106. Lane has categorized the lobbying regulations of the various states into five basic types. The five types of regulations define lobbying as: corrupt or illegal solicitation, claimed influence (*i.e.*, beyond argumentation on the merits), appeals to unreason, the promotion of private pecuniary interest or any type of influence directed at legislators. *See id.* at 47-57.
26. BLACK'S LAW DICTIONARY 1086 (4th ed. 1968).
27. *Id.*

promotion of interests or beliefs when directed to the merits of the individual's position alone.[28] When, however, a person is *employed* to promote another's interest, or an individual uses means not limited to an appeal to the reason and judgement of the legislator, he is engaging in lobbying.[29] An examination of Chapter 6 of the Political Reform Act reveals that the Act regulates activities not included within the common definition of lobbying. Chapter 6 has gone beyond requiring that only lobbying activity be reported, and has extended regulation to include influencing activity.[30]

Chapter 6 regulates the influencing activities of three types of individuals. These include the lobbyist,[31] the employer of a lobbyist[32] [hereinafter referred to as employer] and the Influencer.[33] It is important to later analysis of the Influencer disclosure provisions to understand the position of the Influencer in relation to the entire regulatory environment of Chapter 6. This will require a brief discussion of the Chapter 6 provisions regulating the lobbyist and employer as well as the Influencer.

Under Chapter 6 a lobbyist is a person who receives compensation to directly influence legislative or administrative action.[34] The lobbyist is paid to advocate the views of another before legislative or administrative bodies for the purpose of influencing decisions to favor the employer's interests. The FPPC has defined a lobbyist in terms of the minimum amount of time spent on, and compensation received for, lobbying activities.[35] A person who receives no compensation for attempting to influence is not a lobbyist under the Act.[36] Once a person employed to influence legislative decisions has exceeded the time or compensation minimums, however, he is subject to the lobbyist provisions of Chapter 6. A lobbyist is required to register[37] and

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28. *See id.*
29. *See id.*
30. See text accompanying notes 49-52 *infra*.
31. CAL. GOV'T CODE §82039. For text of this subsection, see note 34 *infra*.
32. CAL. GOV'T CODE §86108(a). For text of this subsection, see note 40 *infra*.
33. CAL. GOV'T CODE §86108(b). For text of this subsection, see text accompanying note 44 *infra*.
34. CAL. GOV'T CODE §82039 defines a lobbyist as:

> any person who is employed or contracts for economic consideration, other than reimbursement for reasonable travel expenses, to communicate directly or through his agents with any elective state official, agency official or legislative official for the purpose of influencing legislative or administrative action, if a substantial or regular portion of the activities for which he receives consideration is for the purpose of influencing legislative or administrative action. No person is a lobbyist by reason of activities described in Section 86300.

A person who directly supervises and gives orders to a lobbyist becomes a lobbyist and the other person becomes his agent. *Id.*; 2 CAL. ADMIN. CODE §18239(c). *See* 1 F.P.P.C. OPS. 50, 52 (No. 75-035, July 2, 1975).

For opinions discussing the requirements for lobbyists, *see, e.g.*, 2 F.P.P.C. OPS. 84, 90 (No. 75-099, July 6, 1976); 2 F.P.P.C. OPS. 54, 55-56 (No. 75-042, April 22, 1976); 1 F.P.P.C. OPS. 64 (No. 75-054, July 2, 1975); 1 F.P.P.C. OPS. 59, 60 (No. 75-040, July 2, 1975); 1 F.P.P.C. OPS. 50, 52-53 (No. 75-035, July 2, 1975); 1 F.P.P.C. OPS. 10, 11-12 (No. 75-006, May 1, 1975).

CAL. GOV'T CODE §86300 excludes certain persons from the requirements of Chapter 6, See note 45 *infra*.

35. 2 CAL. ADMIN. CODE §18239.
36. *See* 1 F.P.P.C. OPS. 195, 195-96 (No. 75-156, Dec. 3, 1975); 1 F.P.P.C. OPS. 140, 142 (No. 75-003, Oct. 23, 1975).
37. CAL. GOV'T CODE §86100.

to report receipts, expenditures and financial transactions with specified state officials.[38] Further, the lobbyist is prohibited from making a contribution to a state candidate and from giving a gift of more than ten dollars in any one month to specified state officials.[39]

The employer of a lobbyist is a person who hires or contracts for the services of a lobbyist.[40] Any individual or association paying a lobbyist to represent special interests and influence legislative or administrative actions is an employer under Chapter 6 and is required to report all payments made to lobbyists as well as payments made independently to influence legislative or administrative action.[41] In addition to payments made to influence legislative decisions, the employer is required to report transactions of $1,000 or more between himself and a state official or the state official's business, and to report contributions made to a candidate for a state office.[42] Beyond these reporting requirements, the employer is not required to register and is not subject to any prohibitions under Chapter 6.

The Influencer disclosure provisions in Chapter 6 are, for the most part, distinct from the lobbyist or employer provisions.[43] Chapter 6 defines an Influencer as follows:

> Any person who directly or indirectly makes payments to influ-

38. CAL. GOV'T CODE §86107.

39. *See* CAL. GOV'T CODE §§86200-86205. The prohibition against a lobbyist making a contribution, CAL. GOV'T CODE §86202, also prohibits a lobbyist from *arranging a contribution.* The FPPC has interpreted "arrange" to include a lobbyist advising his employer to make a contribution. 1 F.P.P.C. OPS. 86 (No. 75-098, July 3, 1975). This interpretation was challenged in Institute of Gov't Advocates v. Younger, No. C 1100 52 (L.A. Super. Ct. Feb. 19, 1975) resulting in an injunction against enforcement by the FPPC. The FPPC, however, has appealed this ruling. Institute of Gov't Advocates v. Younger, No. 48818 (Ct. App., 2d App. Dist., filed Aug. 16, 1976). For FPPC opinion concerning contributions, *see, e.g.,* 1 F.P.P.C. OPS. 28, 29-30 (No. 75-004, June 18, 1975) (discusses contribution prohibitions). A lobbyist is not prohibited from participating in campaign activities unrelated to contributions. *Id.* at 34 n.6; *see* 2 F.P.P.C. OPS. 127 (No. 75-175, Aug. 3, 1976); 2 F.P.P.C. OPS. 70, 71-72 (No. 75-187, June 1, 1976); 1 F.P.P.C. OPS. 62 (No. 75-053, July 2, 1975). For FPPC opinions discussing gifts, *see, e.g.,* 1 F.P.P.C. OPS. 107 (No. 75-067, Aug. 7, 1975); 1 F.P.P.C. OPS. 99 (No. 75-047, Aug. 7, 1975); 1 F.P.P.C. OPS. 97 (No. 75-046, Aug. 7, 1975); 1 F.P.P.C. OPS. 82 (No. 75-014, July 3, 1975); 1 F.P.P.C. OPS. 42 (No. 75-028, No. 75-030, July 2, 1975); 1 F.P.P.C. OPS. 37 (No. 75-023, June 18, 1975). "The prohibition on gifts from lobbyists to officials is intended to prevent the official from feeling under a personal obligation to the lobbyist which might consciously or subconsciously effect the official's decisions." 1 F.P.P.C. OPS. 82, 84 (No. 75-014, July 3, 1975).

40. CAL. GOV'T CODE §86108(a). An employer is "[a]ny person who employs or contracts for the services of one or more lobbyists, whether independently or jointly with other persons . . . ." *Id.* For an opinion discussing employers, *see, e.g.,* 2 F.P.P.C. OPS. 65 (No. 75-172, June 1, 1976).

41. CAL. GOV'T CODE §§86109(c), 82045.

42. CAL. GOV'T CODE §86109(d), (e), (f).

43. While the Chapter 6 reporting requirements applicable to the employer and Influencer are identical, the activities bringing these persons under the Chapter's control are quite different. The employer is subject to the Chapter because he has hired a lobbyist. The Influencer comes under the control of the Chapter because he has made "payments to influence legislative or administrative action." CAL. GOV'T CODE §82045. An employer who makes these same payments, unrelated to the activities of the lobbyist he has employed, has arguably become both an employer and an Influencer. The employer, however, is already required to report payments made to influence legislative or administrative action under CAL. GOV'T CODE §86108(b). Therefore, the employer must report the same types of influencing activities as the Influencer. The approach taken in this comment will be to consider the employer and the Influencer as two different individuals, while at the same time recognizing that the employer may participate in the same activities engaged in by the Influencer.

> ence legislative or administrative action of two hundred fifty dollars ($250) or more in value in any month, unless all of the payments are of the type described in Section 82045(c).[44]

An Influencer may be an individual spending his own funds to advocate personal interests and beliefs since the Act broadly defines "person" to include both *individuals* and *organizations*.[45] Both a private citizen and a large company or association may be Influencers. Further, an Influencer may be an ad hoc community group as well as an association consisting of companies or other associations. The critical factor in determining whether one is an Influencer is the activity in which the person is engaged and not the person's character or identity; the person must make a "payment to influence legislative or administrative action."[46] The payment may be a direct payment or it may be an indirect payment by the Influencer to another.[47] Of the four types of payments applying to the Influencer, two are made exclusively for direct or indirect influencing activities.[48] The first is a

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44. CAL. GOV'T CODE §86108(b). For FPPC opinions discussing this subsection, *see, e.g.*, 2 F.P.P.C. OPS. 105 (No. 75-169, July 6, 1976); 1 F.P.P.C. OPS. 165 (No. 75-063, Nov. 4, 1975); 1 F.P.P.C. OPS. 140, 143-44 (No. 75-003, Oct. 23, 1975); 1 F.P.P.C. OPS. 59, 61 (No. 75-040, July 2, 1975).

45. CAL. GOV'T CODE §82047 defines a person as:

> an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and any other organization or group of persons acting in concert.

See 1 F.P.P.C. OPS. 1 (No. 75-044, Feb. 21, 1975). The FPPC decided that local government agencies are "persons" under Chapter 6 and may become Influencers. *Id.* at 8-9.

The Act specifically excludes certain persons from the requirements of Chapter 6. State elected officials, state employees acting in their official capacities, the press, and persons representing a bona fide religion are all exempt from complaince with Chapter 6 in certain cases. CAL. GOV'T CODE §86300.

46. CAL. GOV'T CODE §82045 provides:

> "Payment to influence legislative or administrative action" means any of the following types of payment:
>
> (a) Direct or indirect payment to a lobbyist whether for salary, fee, compensation for expenses, or any other purpose, by a person employing or contracting for the services of the lobbyist separately or jointly with other persons;
>
> (b) Payment in support or assistance of a lobbyist or his activities, including but not limited to the direct payment of expenses incurred at the request or suggestion of the lobbyist;
>
> (c) Payment which directly or indirectly benefits any elective state official, legislative official or agency official or a member of the immediate family of any such official;
>
> (d) Payment, including compensation, payment or reimbursement for the services, time or expenses of an employee, for or in connection with direct communication with any elective state official, legislative official or agency official;
>
> (e) Payment for or in connection with soliciting or urging other persons to enter into direct communication with any elective state official, legislative official or agency official.

The FPPC has stated that these "activities may be termed lobbying activities under the Political Reform Act." 1 F.P.P.C. OPS. 59, 61 (No. 75-040, July 2, 1975).

47. To avoid possible confusion, the reader should be aware that the terms direct and indirect are used to characterize two very different events. First, the manner in which a *payment* is made may be either direct or indirect. CAL. GOV'T CODE §86108(b). Second, the *influencing activity* itself may either be direct influencing, CAL. GOV'T CODE §82045(d), or it may take the form of indirect or grass roots influencing, CAL. GOV'T CODE §82045(e).

48. The four types of payments that concern Influencers are those found in CAL. GOV'T CODE §82045 (b), (c), (d), and (e). The first two types involve payments either in support of the activities of a lobbyist, CAL. GOV'T CODE §82045(b), or payments for the benefit of an official, CAL. GOV'T CODE §82045(c), and are concerned with activities extending beyond independent efforts solely for purposes of communication by an Influencer. For a discussion of these payments, see text accompanying notes 150-152 *infra*.

payment made "for or in connection with" direct communication with a state official.[49] This activity may be termed *direct* influencing if the payment is made to prepare, facilitate or carry out direct communication with a state official.[50] This activity may be similar to traditional lobbying; however, in this situation the Influencer or his agent, and not a lobbyist, is the person engaged in such activity. The second type of payment concerns *indirect* or grass roots influencing. This is defined as a payment made "for or in connection with soliciting or urging others to enter into direct communication" with an official.[51] Such payments can be made for activities ranging from large scale publicity campaigns to taking an ad in a newspaper or printing handbills urging readers to enter into direct communication with a state official. While direct communication with a legislator to influence legislative action may clearly be considered lobbying, indirect activities are also intended to influence legislative decisions. Although a media campaign directed at the community to generate pressure on the legislature has not been traditionally thought of as lobbying, this activity may have greater effect on legislative decision-making than traditional one-on-one lobbying. If such an activity has the result of distorting the legislative perception of actual public interest in a matter, it makes little difference that the influence exerted was not a direct communication by the Influencer. This type of activity may have the effect of improperly influencing legislative decisions.[52]

The direct and indirect payments described above are aggregated with payments made in support of a lobbyist, and payments benefiting an official, to calculate the $250 threshold amount that subjects an individual to the disclosure requirements of Chapter 6.[53] Thus, the actual payment made to engage in either direct or indirect influencing may be much less than $250, yet the person may be subject to the provisions of Chapter 6 if other types of payments are also made.

Like the employer, the Influencer is not subject to the prohibitions

49. A state official includes agency officials, elected state officers, and legislative officials. An *agency official* is defined as:

> any member, officer, employee or consultant of any state agency who as part of his official responsibilities participates in any administrative action in other than a purely clerical, secretarial or ministerial capacity.

CAL. GOV'T CODE §82004. An *elective state office* is defined as:

> the office of Governor, Lieutenant Governor, Attorney General, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, member of the Legislature and member of the State Board of Equalization.

CAL. GOV'T CODE §82024. A *legislative official* is defined as:

> any employee or consultant of the Legislature whose duties are not solely secretarial, clerical or manual.

CAL. GOV'T CODE §82038.

50. CAL. GOV'T CODE §82045(d).

51. CAL. GOV'T CODE §82045(e). For text of this subsection see note 46 *supra*.

52. Some commentators consider indirect lobbying efforts to be as potentially harmful as direct lobbying activities. *See* Nutting, *Freedom of Silence: Intrusions in Political Affairs*, 47 MICH. L. REV. 181, 209-13 (1948).

53. 2 CAL. ADMIN. CODE §18621.

imposed on the lobbyist.[54] The Influencer is required only to file a report of activities and expenditures.[55] Since the report becomes a public record,[56] the identity of the Influencer is disclosed, and if the Influencer is an industry,

54. "Persons" who qualify under Section 86108 [employers and Influencers] are not in any manner prohibited from communicating with state officials or attempting to influence legislative or administrative action. "Lobbyists" under the Political Reform Act are prohibited from certain activities by Sections 86202, 86203, and 86205, but neither these nor any other substantive regulations are imposed on persons qualifying under Section 86108. The only provisions affecting such persons are those requiring disclosure of expenditures and other information relative to lobbying activities.
1 F.P.P.C. OPS. , 7 (No. 75-044, Feb. 21, 1975).

55. CAL. GOV'T CODE §86109 provides:
Every person described in Section 86108 shall file periodic reports containing:
(a) The name, business address and telephone number of the person making the report;
(b) Information sufficient to identify the nature and interests of the filer, including;
(1) If the filer is an individual, the name and address of his employer, if any, or his principal place of business if he is self-employed, and a description of the business activity in which he or his employer is engaged;
(2) If the filer is a business entity, a description of the business activity in which it is engaged;
(3) If the filer is an industry, trade or professional association, a description of the industry, trade or profession which it represents including a specific description of any portion or faction of the industry, trade or profession which the association exclusively or primarily represents and, if the association has no more than fifty members, the names of the members; and
(4) If the filer is not an individual, business entity or industry, trade or professional association, a statement of the person's nature and purposes, including a description of any industry, trade, profession or other group with a common economic interest which the person principally represents or from which its membership or financial support is principally derived.
The information required by this subsection (b) need be stated only in the first report filed during a calendar year, except to reflect changes in the information previously reported.
(c) The total amount of payments to influence legislative and administrative action during the period, and the name and address of each person to whom such payments in an aggregate value of twenty-five dollars ($25) or more have been made during the period by the filer, together with the date, amount, and a description of consideration received for each such expenditure, and the name of the beneficiary of each expenditure if other than the filer or the payee.
(d) The name and official position of each elective state official, legislative official and agency official, the name of each state candidate, and the name of each member of the immediate family of such official or candidate with whom the filer has engaged in an exchange of money, goods, services or anything of value and the nature and date of each such exchange and the monetary values exchanged, if the fair market value of either side of the exchange exceeded one thousand dollars ($1,000);
(e) The name and address of any business entity in which the person making the report knows or has reason to know that an elective state official, legislative official, agency official or state candidate is a proprietor, partner, director, officer, manager, or has more than a fifty percent ownership interest, with whom the person making the report has engaged in an exchange or exchanges of money, goods, services or anything of value and the nature and date of each such exchange and the monetary value exchanged, if the total value of such exchanges is one thousand dollars ($1,000) or more in a calendar year;
(f) The date and amount of each contribution made by the filer and the name of the recipient of each contribution;
(g) A specific description of legislative or administrative action which the person making the report has attempted to influence;
(h) The name of each lobbyist employed or retained by the person making the report, together with the total amount paid to each lobbyist and the portion of that amount which was paid for specified purposes, including salary, fees, general expenses and any special expenses;
(i) Any other information required by the Commission consistent with the purposes and provisions of this chapter.

56. *See* CAL. GOV'T CODE §81008.

trade or professional association, it may have to disclose its membership.[57] Otherwise, any identification of an Influencer will be made in the report by that Influencer.[58] Chapter 6 requires that the report identify the legislative or administrative action that is being influenced and the payments made in that effort.[59] Finally, the report must contain a description of any contribution the Influencer has made to a political candidate[60] as well as any private transaction of $1,000 or more between the Influencer and a state official or such official's private business in a period of one year.[61]

Chapter 6, in simplistic terms, has defined a lobbyist as a person paid to influence legislative decisions, the employer as one using the services of a lobbyist, and the Influencer as a distinct class of persons that individually spend money to influence the legislative process. Influencers can have diverse characteristics since their activities may take the form of long range influencing efforts or may be single occurrences. The Influencer's activities may be very dissimilar to those of the lobbyist and employer or the Influencer may engage in activities that are indistinguishable from the type of special interest advocacy that is associated with the employer and lobbyist. An Influencer, for example, may be an association or a company using its employees to compile data in support of legislation in which it has an interest. This information will be presented directly to the legislature, again by the association or company employees. The association or company, by spreading the time spent on influencing activities among a number of employees, can avoid having any one employee exceed the time and compensation thresholds for a lobbyist and thus, while engaging in a large influencing effort, avoid the reporting requirements for lobbyists and employers.[62] The association or company, without being identified, could also engage in indirect efforts through a "front" organization that supports legislation in which the association or company has an interest. Without reporting requirements for Influencers, these types of lobbying pressures would go undetected.

On the other hand, an Influencer may be an individual advocating his own interests and beliefs, and his reasons for seeking legislative action may be

57. CAL. GOV'T CODE §86109(b)(3). For text of this subsection, see note 55 *supra*.
58. CAL. GOV'T CODE §86109(b)(4). For text of this subsection, see note 55 *supra*.
59. CAL. GOV'T CODE §86109(c), (g). For text of this subsection, see note 55 *supra*.
60. CAL. GOV'T CODE §86109(f). For text of this subsection, see note 55 *supra*.
The FPPC has limited the scope of transactions that must be reported by the Influencer by excluding transactions where the Influencer offers goods or services on identical terms to the public at large. This section also applies to the lobbyist and employer. 2 CAL. ADMIN. CODE §18650. A further limitation excludes from the reporting requirements transactions with an agency official where the Influencer lobbyist or employer have not attempted to influence the agency of that official. 2 CAL. ADMIN. CODE §18600.
61. CAL. GOV'T CODE §86109 (d), (e). For text of this subsection, see note 55 *supra*.
A transaction can take many forms. For example, if an Influencer was liable to a state official for damages due to an auto accident, a reportable transaction would occur if the Influencer was an active participant in the settlement of the claim. *See* 1 F.P.P.C. OPS. 13, 14-15 (No. 75-015, May 1, 1975).
62. CAL. GOV'T CODE §§86107 (lobbyists), 86109 (employers).

purely personal. The individual may engage in direct communication with legislative officials, making expenditures for purposes of collecting information and communicating with these officials, or his advocacy may be directed at the community, urging communication with the state government. In either case, the individual could easily spend the threshold amount and become subject to reporting requirements as an Influencer.

To deny the importance of exposing the influence exerted by the association or company in the first example, simply because no lobbyist participated, is unrealistic.[63] In the second example where the individual is advocating personal interests, however, it is important to look closely at the effect that a state disclosure law will have upon the exercise of an individual's first amendment rights in influencing legislative matters. Regulation of all persons attempting to influence the legislative process will certainly have a greater effect in preventing abuses of influence than would a more limited disclosure requirement but such a regulation may also have the effect of deterring some persons from advocating their beliefs to state officials.

As has been discussed, the definition of an Influencer subjects a wide range of individuals and associations to Chapter 6 disclosure requirements. To discuss the constitutional issues raised by these disclosure requirements, a division will be made among the various types of Influencers. First, individuals that act as Influencers will be discussed, with consideration given to both their direct and indirect attempts to influence. Second, associations or groups acting as Influencers will be examined insofar as individual members are required to meet reporting requirements when they engage in influencing efforts through such groups. Before the disclosure requirements of each of these Influencer groups can be subjected to constitutional analysis, however, it is necessary to examine the applicable constitutional principles.

CONSTITUTIONAL ANALYSIS OF THE CHAPTER 6 INFLUENCER REGULATIONS

The United States Supreme Court has noted that "[c]ompetition in ideas and governmental policies is at the core . . . of the First Amendment freedoms."[64] Since an Influencer must disclose information regarding activities engaged in to support or oppose legislative action, the disclosure requirements imposed by Chapter 6 operate in an area protected by the first

63. A check, by the author, of reports filed with the Secretary of State by persons filing as Influencers revealed that most were professional, trade or industrial associations either concerned with specific current legislation, or conducting ongoing influencing efforts without using the services of a lobbyist. In many cases, considerable sums were spent in these efforts. Many of these persons had originally filed as employers or lobbyists until they realized that they did not meet the Chapter's criteria requiring such filing. See notes 34-42 *supra*. The dearth of reports by non-professional Influencers, either associations or individuals, may indicate a general unawareness of this requirement on the part of persons who do not, as a matter of course, engage in influencing activities.

64. Williams v. Rhodes, 393 U.S. 23, 32 (1968).

amendment.[65] The first amendment freedoms protected from abridgment by the federal government are protected from similar abridgment by the states via the due process clause of the fourteenth amendment.[66] While the California courts could be more protective of these rights under the California Constitution,[67] to date this has not been that court's policy in the first amendment area.[68]

The specific first amendment rights that may be infringed by Chapter 6 disclosure requirements are the right of free expression, the right to petition the government, and the judicially implied right of association.[69] It should be clearly understood that Chapter 6 does not prohibit or restrict the exercise of these rights and, therefore, is not a direct restraint on first amendment rights. Rather, Chapter 6 requires an Influencer to disclose his identity and report certain financial transactions when he has made payments of or over the $250 amount.[70] It is the *effect* of disclosure upon the exercise of first amendment rights that raises constitutional questions. Where first amendment freedoms are involved "the Constitution's protection is not limited to direct interference with fundamental rights."[71] The United States Supreme Court has stated that:

> [i]n the domain of these indispensible liberties, whether speech . . . or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action.[72]

While disclosure requirements, such as those in Chapter 6, do not prohibit expression or association, public disclosure may have an indirect effect on the exercise of these rights that requires constitutional analysis.[73]

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65. *See* U.S. CONST. amend. I, which in relevant part provides: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

66. *See* De Jonge v. Oregon, 299 U.S. 353 (1937); Near v. Minnesota, 283 U.S. 697 (1931).

67. The California Constitution provides:

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

CAL. CONST. art. 1 §2.

> The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

CAL. CONST. art. 1 §3. The California Supreme Court has said of the state constitution that, "A protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press." Wilson v. Superior Court, 13 Cal. 3d 652, 658, 532 P.2d 116, 120, 119 Cal. Rptr. 468, 472 (1975).

68. For a discussion of the California court's reliance on United States Supreme Court interpretations of the first amendment, see Comment, *Rediscovering the California Declaration of Rights,* 26 HASTINGS L.J. 481, 493-96 (1974). For an opinion that suggests this dependence is unwarranted, see Diamond v. Bland, 11 Cal. 3d 331, 336-38, 521 P.2d 460, 464-65, 113 Cal. Rptr. 468, 472-73 (1974) (Mosk, J., dissenting).

69. *See, e.g.,* Elrod v. Burns, 427 U.S. 347, 357-60 (1976); Buckley v. Valeo, 424 U.S. 1, 11 (1976); NAACP v. Alabama *ex. rel.* Patterson, 357 U.S. 449, 460 (1958); Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); United Public Workers, CIO v. Mitchell, 330 U.S. 75 (1947).

70. See text accompanying note 44 *supra.*

71. Healy v. James, 408 U.S. 169, 183 (1972).

72. NAACP v. Alabama *ex. rel.* Patterson, 357 U.S. 449, 461 (1958).

73. The Court noted that strict constitutional scrutiny "is necessary even if any deterrent

Courts, even when upholding disclosure requirements, have recognized that compelled disclosure has the effect of chilling or deterring speech.[74] This is particularly true when the speaker has aligned himself with groups or ideas that are currently unacceptable or unpopular in the community; thus disclosure exposes the speaker to possible harassment and retailiation from persons in the community opposing such beliefs. It has been noted that "identification [of the speaker] and fear of reprisal might deter perfectly peaceful discussion of public matters of importance."[75] The right to free expression necessarily includes the right of the speaker to remain anonymous to permit him to express his unpopular view without fear of reprisal from the community.[76] Beyond identification of an individual speaker, it also has been recognized that public disclosure of an individual's affliation with an unpopular group, either as a member or contributor, can have the effect of impairing that individual's right of association.[77] "Inviolability of privacy in group associations may in many circumstances be indispensible for preservation of freedoms of association, particularly where a group expresses dissident beliefs."[78] Because the first amendment protects not only political expression but also political association, privacy in association has been regarded as an important adjunct to associational rights.[79] Further, association has an important function in facilitating advocacy by permitting the pooling of funds to engage in political expression.[80] Thus, association

effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." 424 U.S. at 65. *See* NAACP v. Alabama *ex. rel.* Patterson, 357 U.S. 449, 461 (1958).

74. *See* 424 U.S. at 64; Canon v. Justice Court, 61 Cal. 2d 446, 454, 393 P.2d 428, 432, 39 Cal. Rptr. 228, 232 (1964). The California Supreme Court, in a later case stated that "[i]t bears emphasis that the disclosure requirement in *Canon did* abridge freedom of speech [citation], but under the *particular* facts, the infringement was minimal and justified by a sufficient state interest." Huntley v. PUC, 69 Cal. 2d 67, 75, 442 P.2d 685, 690, 69 Cal. Rptr. 605, 610 (1968). *See also* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 90 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); Barenblatt v. United States, 360 U.S. 109 (1959); Beilan v. Board of Pub. Educ., 357 U.S. 399 (1958); Sweezy v. New Hampshire, 354 U.S. 234 (1957); American Communications Ass'n, CIO v. Douds, 339 U.S. 382 (1950).

75. Talley v. California, 362 U.S. 60, 65 (1960). In *Talley*, the United States Supreme Court invalidated, on the basis of overbreadth, an ordinance that required all handbills to identify the writer. The ordinance was intended to prevent fraud, false advertising and libel; however, because the identification applied to *all* handbills, the court found that the state's interest had not been narrowly achieved without unnecessarily inhibiting the exercise of free expression. *Id.* at 63-65. *But see* Clark's dissent in which he denies that there is a right to anonymous speech. *Id.* at 70. The decision is regarded as having enumerated a *right* to anonymous speech. Huntley v. PUC, 69 Cal. 2d 67, 73, 442 P.2d 685, 689, 69 Cal. Rptr. 605, 609 (1968); Eisen v. Regents of the University of California, 269 Cal. App. 2d 696, 701, 75 Cal. Rptr. 45, 49 (1969). For a general discussion of the right to anonymity, see Comment, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil,* 70 YALE. L.J. 1084 (1961).

76. *See, e.g.*, Talley v. California, 362 U.S. 60 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975); Huntley v. PUC, 69 Cal. 2d 67, 442 P.2d 685, 69 Cal. Rptr. 605 (1968).

77. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

78. *Id.* at 462.

79. *See id.*

80. The United States Supreme Court has noted that "virtually every means of communicating ideas in today's mass society requires the expenditure of money." Buckley v. Valeo, 424 U.S. 1, 19 (1976). Further, an association's right to join together "is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective'." *Id.* at 65-66.

and privacy of association are protected to enable individuals to effectively engage in political speech.[81]

These rights, expression, petition, association and their supporting "rights" of anonymity and associational privacy, are not absolute;[82] the state may demonstrate an interest sufficiently great to permit abridgment of these rights.[83] Chapter 6 must be carefully analyzed to determine whether the potential chilling effect of its disclosure requirements will withstand constitutional challenge.[84] This necessarily requires a discussion of the proper constitutional test to apply to these disclosure regulations.

A. Spending Money to Communicate: Speech or Conduct

A regulation of speech requires strict constitutional scrutiny.[85] When speech and conduct are combined, however, a state regulation that concerns the conduct alone is subject to a less rigorous test. In *United States v. O'Brien*,[86] the United States Supreme Court held that where both speech and conduct are present, the state can permissibly regulate the conduct element, although it incidently affects the speech element, if the regulation serves an important state interest that is unrelated to the suppression of speech.[87] In order to apply the proper constitutional test to the disclosure regulations of Chapter 6, it is necessary to determine whether expenditures of money for communication purposes contain sufficient elements of conduct to warrant use of the less strict *O'Brien* test.

To apply the *O'Brien* test to Chapter 6, spending money to influence legislative or administrative action must be characterized as both speech and conduct. The Influencer, by spending money to influence, either directly or in the form of a contribution to an association, has communicated his beliefs to others. The spending of money to influence legislative action is an exercise of the rights to political speech, petition and association. Spending money, however, is also conduct insofar as it is a physical act that does not in all cases involve a communication.[88] The United States Supreme Court

81. Buckley v. Valeo, 424 U.S. 1, 65-66 (1976).
82. American Communications Ass'n, CIO v. Douds, 339 U.S. 382, 399 (1950).
83. 424 U.S. at 44-45.
84. The fact that Chapter 6 was passed as an initiative measure does not affect the application of the constitutional analysis. In reference to this issue, the California Supreme Court has stated:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principals to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Weaver v. Jordan, 64 Cal. 2d 235, 241, 411 P.2d 289, 293-94, 49 Cal. Rptr. 537, 541-42 (1966), *quoting* West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).
85. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 362 (1976); Buckley v. Valeo, 424 U.S. 1, 64 (1976).
86. 391 U.S. 367 (1968).
87. *Id.* at 376-77, 382; 424 U.S. at 16.
88. For example, an expenditure made to purchase a commodity or service does not

addressed this question in *Buckley v. Valeo*,[89] stating that:

> [T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or reduce the exacting scrutiny required by the First Amendment.[90]

The Court went on to describe the physical act of spending money as a "neutral element" in a communication and not a separate conduct element that could be regulated by the state.[91] Since an expenditure made for the purpose of communication did not contain a sufficient conduct element that could be regulated, *O'Brien* did not apply.

The above reasoning would appear to be equally applicable to the disclosure requirements in Chapter 6. Chapter 6 requires disclosure of expenditures that are made for the purpose of communicating with a legislative or an administrative official, or the public. Since the act of spending money for communication is a "neutral element," not conduct, the less demanding *O'Brien* test is inappropriate to a constitutional anaysis of Chapter 6 disclosure requirements. Rather, Chapter 6 disclosure requirements must be subjected to strict constitutional scrutiny.

Assuming, however, that an expenditure to communicate *can* be characterized as speech plus conduct to permit the application of *O'Brien*, that test would still not be satisfied since the regulation of conduct is not unrelated to the suppression of speech.[92] The disclosure requirements contained in Chapter 6 are based on a determination that the communication involved may have a harmful effect upon legislative decisions.[93] Thus the state's interest is directly related to the communication itself. Since speech is being regulated, the *O'Brien* test is not satisfied and strict scrutiny of Chapter 6 disclosure requirements is necessary.

B. Indirect Infringement of First Amendment Rights

As discussed previously, Chapter 6 of the Political Reform Act, by requiring disclosure when an Influencer exercises first amendment rights, has the effect of chilling or deterring speech and must therefore be subjected to constitutional scrutiny.[94] A balancing test is applied to determine whether

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usually involve communication. Communication, however, is involved when an expenditure is made to send a telegram or to place an ad in a newspaper. *See* 424 U.S. at 17.

89. 424 U.S. 1 (1976). For a contrary analysis, see Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

90. 424 U.S. at 16-17, 65 n.76.

91. *Id.* at 16, 65 n.76. The Court stated that "*O'Brien* is inapposite, for money is a neutral element not always associated with speech but a necessary and integral part of many, perhaps most, forms of communication." *Id.* at 65 n.76.

92. See text accompanying note 87 *supra*. *See also* Elrod v. Burns, 427 U.S. 347, 363-64 n.17 (1976); 424 U.S. at 17, 65 n.76.

93. Implicit in the state's desire to expose and eliminate improper influences directed at legislative decisions, is the assumption that some forms of communication may be harmful. See text accompanying note 109 *infra*. *Cf.* 424 U.S. at 17, 65 n.76.

94. See text accompanying notes at 75-81 *supra*.

a state regulation may stand in light of the regulation's indirect infringement of first amendment rights.[95] This test is used to determine whether the state's interest is *compelling*[96] or *sufficiently substantial*[97] to subordinate individual rights. One constitutional scholar has described the test as follows:

> The formula is that the court must, in each case, balance the *individual* and *social* interest in freedom of expression against the social interest sought by the regulation which restricts expression.[98]

If the state's interest after this weighing process is found to be greater than the burden imposed on individual rights, the Court has required that the regulation bear a "relevant correlation"[99] or a "substantial relation"[100] to that interest. In other words, the regulation must bear more than a "rational relationship" to the interest furthered.[101] Finally, the state must achieve its purpose by the least drastic means.[102] This last requirement insures that the means used to achieve a legitimate state interest will not intrude upon the exercise of fundamental liberties to a greater extent than is necessary.[103] If the state regulation has application that extends beyond that interest or has the effect of unnecessarily deterring permissible activity, the entire regulation will be void due to overbreadth.[104]

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95. *See, e.g.*, 424 U.S. at 68; Konigsberg v. State Bar, 366 U.S. 36, 50-51 (1961); Talley v. California, 362 U.S. 60, 66 (1960)(Harlan, J., concurring); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); NAACP v. Alabama *ex. rel.* Patterson, 357 U.S. 449, 463-64 (1960); American Communications Ass'n, CIO v. Douds, 339 U.S. 382, 399 (1950); White v. Davis, 13 Cal. 3d 757, 771-72 n.7, 533 P.2d 222, 232 n. 7, 120 Cal. Rptr. 94, 104 n.7 (1975); City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 269, 466 P.2d 225, 232, 85 Cal. Rptr. 1, 8 (1970). *But see* United States v. Robel, 389 U.S. 258, 268 n.20 (1967).

For a discussion of balancing, *see generally* Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 7-14 (1974); Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 U.C.L.A. L. REV. 428, 442-44 (1967); Robison, *Protection of Associations from Compulsory Disclosure of Membership*, 58 COLUM. L. REV. 614, 623-24 (1958).

96. NAACP v. Alabama *ex. rel.* Patterson, 357 U.S. 449, 463 (1960). The compelling state interest test was explained by the Court as follows:

> In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

Schneider v. State, 308 U.S. 147, 161 (1939).

97. *See* Gibson v. Florida Legis. Investigation Comm., 372 U.S. 539, 545 (1963).

98. Emerson, *Towards a General Theory of the First Amendment*, 72 YALE L.J. 877, 912 (1963)(emphasis added).

99. Bates v. City of Little Rock, 361 U.S. 516, 525 (1960).

100. Gibson v. Florida Legis. Investigation Comm., 372 U.S. 539, 546 (1963).

101. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963).

102. *See, e.g.*, Schneider v. Smith, 390 U.S. 17, 24 (1968); United States v. Robel, 389 U.S. 258, 268 (1967); NAACP v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

103. Less drastic means has been explained by the Court to mean that "[i]f the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." Kusper v. Pontikes, 414 U.S. 51, 59 (1973). *See also* Elrod v. Burns, 427 U.S. 347, 363 (1976); Buckley v. Valeo, 424 U.S. 1, 20 (1976).

104. The Court has said that there is a

> pervasive threat inherent in [the] very existence [of a statute] which does not aim

To date, neither the United States nor California Supreme Courts has had the occasion to apply compelling state interest and overbreadth analysis to disclosure regulations specifically concerning legislative advocacy.[105] Therefore, this analysis will be applied to the disclosure requirements imposed on the Influencer by Chapter 6. The interest of the state will be balanced against the burden on individual rights to determine if the state has a compelling interest in the disclosure regulations and, further, whether those regulations achieve the state's purpose by the least drastic means. Essential to this analysis, however, is a clear delineation between the state's interest in regulating the Influencer and the infringement on the Influencer's individual rights.

1. The State's Interest in Regulating Lobbying Activities

The state clearly has an interest in maintaining the purity[106] of its governmental functions.[107] By passing the Political Reform Act of 1974, the people of California expressed their desire to have stricter controls and additional disclosure requirements placed on lobbying activities to inhibit and uncover

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> specifically at evils within the allowable area of state control but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech.

Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

For an analysis of the development of the constitutional doctrine of overbreadth, see Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

105. *See generally* United States v. Harriss, 347 U.S. 612 (1954); United States v. Rumely, 345 U.S. 41 (1953). The California Supreme Court has stated that a statute requiring every person who writes, prints, or distributes literature designed to defeat or injure a candidate to include in such literature his name and address, does not unconstitutionally interfere with the freedom of speech. Canon v. Justice Court, 61 Cal. 2d 446, 459-60, 393 P.2d 428, 436, 39 Cal. Rptr. 228, 236 (1964). The court, however, found the statute to be unconstitutionally discriminatory. The purpose of the statute was to "deter scurrilous hit and run smear attacks . . . in the course of political campaigns." *Id.* at 453, 393 P.2d at 432, 39 Cal. Rptr. at 232. To this end, the court found the statute to be proper on first amendment grounds because it "impinges upon full freedom of expression only during a limited period of time," the period preceding elections, and because "the [statute] only applies to attacks on candidates, not to writings which are a *communication of views about issues.*" *Id.* at 452, 393 P.2d at 431, 39 Cal. Rptr. at 231 (emphasis added). In a later disclosure case, the court emphasized that the disclosure requirement upheld in *Canon* was limited to a specific type of communication, and then, for only a specified time. Huntley v. PUC, 69 Cal. 2d 67, 75, 442 P.2d 685, 690, 69 Cal. Rptr. 605, 610 (1968). The disclosure required by Chapter 6 is not limited to a certain period of time nor is it limited to only expenditures and activities that may improperly influence legislative action. Rather, Chapter 6 contains an expansive disclosure requirement that applies to *all* situations where expenditures of at least $250 are made to influence legislative action. See text accompanying notes 43-63 *supra*. Therefore, the balance struck by the court in *Canon* does not foreclose analysis of the disclosure requirements found in Chapter 6.

106. "Purity" is a term used by Professor Emerson in discussing laws intended to protect government from corrupting influences. *See* Emerson, *Towards a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

107. *See* Burroughs v. United States, 290 U.S. 534 (1934). The Court, in upholding the constitutionality of the Corrupt Practices Act stated:

> Congress, undoubtedly, possesses that power [to protect the political process], as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or corruption.

Id. at 545. *See also* Buckley v. Valeo, 424 U.S. 1 (1976); CSC v. Letter Carriers, 413 U.S. 548 (1973); Williams v. Rhodes, 393 U.S. 23 (1968); United Pub. Workers v. Mitchell, 330 U.S. 70 (1949).

improper influences directed at the legislative process.[108] Improper influences may take two general forms. First, expenditures may be made to distort the legislator's impression of public support for or opposition to a legislative proposal. The ballot pamphlet statement presented to the voters emphasized that the Act was specifically concerned with identifying well-financed lobbying efforts backed by special interests that *distort the people's representation* in legislative decisions.[109] A well-financed special interest, actively advocating its position, may give legislators the impression that there is widespread support for, or opposition to, a particular measure when in fact actual public support or opposition is quite small. Second, expenditures may be made to curry the favor of a legislative official. This may take the form of gifts or payments made to benefit a legislator or as part of a financial relationship with a legislator. All of these expenditures may have the effect of making a legislator more responsive to the interests of the person making the expenditure. The influence exerted therefore would extend beyond consideration of the merits of the position advocated. Thus, the intended thrust of Chapter 6 is at the exposure of those who use money to *improperly influence* legislative action.[110] To facilitate exposure, Chapter 6 requires disclosure of various expenditures and financial relationships that may have an improper influence on legislative decisions.

Disclosure promotes the state interest of exposing and inhibiting improper

108. *See* CAL. GOV'T CODE §81001 (c), (e), (f) (legislative findings) which states:

> (c) Costs of conducting election campaigns have increased greatly in recent years, and candidates have been forced to finance their campaigns by seeking large contributions from lobbyists and organizations who thereby gain disproportionate influence over governmental decisions;
>
> (e) Lobbyists often make their contributions to incumbents who cannot be effectively challenged because of election laws and abusive practices which give the incumbent an unfair advantage;
>
> (f) The wealthy individuals and organizations which make large campaign contributions frequently extend their influence by employing lobbyists and spending large amounts to influence legislative and administrative actions . . . .

See CAL. GOV'T CODE §81002(c)(legislative intent) which states:

> (c) The activities of lobbyists should be regulated and their finances disclosed in order that improper influences will not be directed at public officials . . . .

109. Koupal, Spohn & Walsh, *Arguments in Favor of Proposition 9*, CALIF. SEC. OF STATE, CALIFORNIA VOTERS PAMPHLET PRIMARY ELECTION JUNE 4, 1974 at 36. The problem to be solved by the Political Reform Act was characterized as follows:

> Big money unduly influences politics: big money from wealthy individuals and wealthy organizations. In politics, these powerful interests—whatever their party—usually have one goal: special favors from government. In California, corporations receive large tax breaks from the state. Companies contracting with local government often contribute to the campaigns of local officials. From city councils to the state legislature, oil companies, land developers, and other powerful interests sit down with our elected officials to write new laws. And the cost of state and local government continues to climb.

Id. Part of the solution, referring to lobbyist regulations, was to "[p]rohibit lobbyists from giving campaign contributions and expensive gifts to politicians." *Id.*

As to the propriety of using the ballot pamphlet statement to construe an initiative measure, see White v. Davis, 13 Cal. 3d 757, 775 n.11, 533 P.2d 222, 234 n.11, 120 Cal. Rptr. 94, 106 n.11 (1975).

110. The FPPC has stated that:

> [P]rovisions of the Political Reform Act are premised on the idea that a lobbyist is an advocate and that persons who lobby should succeed or fail on the merits of the position and the persuasiveness of the arguments.

1 F.P.P.C. OPS. 86, 87 (No. 75-098, July 3, 1975).

influences directed at the legislative function in two important ways. First, the disclosure required by Chapter 6 informs the public of who is spending money to enlist the support of legislative officials.[111] Presumably, such disclosure will provide the public with the knowledge necessary to determine the quality of representation that they receive and will enable interested citizens to demonstrate their opposition to or support for particular legislative proposals. Second, disclosure identifies to the legislators the sources of those pressures intended to influence their decisions. This interest was recognized by the court in *United States v. Harriss*[112] when it stated:

> Full realization of the American ideal of government by elected representatives depends in no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.[113]

It would seem fair to characterize the state's interests served by the disclosure requirements as the exposure and prevention of improper influence upon legislative functions by the use of money.[114] Disclosure identifies

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111. The FPPC has also stated:

> One purpose of disclosure by lobbyists and their employers, as well as by others who spend large sums to influence legislative or administrative action, is to inform the public of the resources being spent to influence government.

1 F.P.P.C. OPS. 1, 8 (No. 75-044, Feb. 21, 1975).

112. 347 U.S. 612 (1954).

113. *Id.* at 625. Well-financed special interest groups are able to inundate the legislature with misinformation by direct communication, publicity campaigns, or utilizing the third-party technique. In this latter activity, a special interest group will use other groups or individuals to communicate with the legislature or publicize the interest group's message to create the appearance that there is wide spread support for the interest group's position. Eastern R.R. Pres. Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 140 (1961).

114. This statement is not intended to characterize the use of money as improper in all cases. Rather, it is specifically intended to include those situations where money is used for purposes beyond the communication of ideas alone.

The United States Supreme Court, in dealing with restrictions and disclosure requirements applicable to contributions and expenditures for election campaigns, recognized a state interest in preventing the appearance of corruption. *See* Buckley v. Valeo, 424 U.S. 1, 27, 67 (1976). This state interest was also asserted by the FPPC to prohibit lobbyists from arranging contributions. *See* Appellant's Opening Brief at 29-30, Institute of Gov't Advocates v. Younger, No. 48818 (Ct. App., 2d App. Dist., filed Aug. 16, 1976). Arguably this state interest is inapplicable when asserted against the Influencer since disclosure may in fact restrict his right to assert political beliefs. *Cf.* Buckley v. Valeo, 424 U.S. 1, 27 n.29 (1976). If, however, this interest was applicable to the Influencer, the same analysis discussed in reference to the state's interests would be used. See text accompanying notes 95-104 *supra*.

The FPPC has noted that money can be used for purposes, beyond communication, of improperly influencing government by offering inducements or pressuring officials. The Commission noted that:

> The acquisition of adequate information is essential to sound legislative and administrative action. It is not the purpose of the Political Reform Act to interfere in any way in the free flow of information to officials. Only financial *pressures* and *inducements* are sought to be limited and disclosed. See Section 81001(b).

1 F.P.P.C. OPS. 16, 18 (No. 75-026, May 1, 1975) (emphasis added).

CAL. GOV'T CODE §81001(b) provides:

> Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them . . . .

The FPPC, in comments to its regulations, has differentiated between uses of money that have the potential for creating undue or improper influences, and uses where this evil is not present. The FPPC limited the duties of the Influencer, employer and lobbyist under Chapter 6

the source of influencing efforts, providing legislators with the information needed to properly represent their constituency's interests. In addition, disclosure informs the public of the influences being leveled at their representatives. This information then permits the public to indicate their dissatisfaction with their representatives either by direct communication to the representative or at the polls by electing another representative. The state's interests in disclosure, however, must be balanced against the inhibitory effect that disclosure may have upon the exercise of first amendment rights. Thus, it will be necessary to determine what rights are affected by the disclosure regulations of Chapter 6.

2. Individual Rights and Social Interests Affected by Chapter 6 Disclosure Requirements

The regulations in Chapter 6 are applicable when an Influencer makes expenditures in the attempt to influence legislative or administrative action by advocating his position either individually or by associating with others.[115] Further, Chapter 6 applies to advocacy directed at either the legislative official or the public. Three first amendment rights are involved in these activities, those of expression, petition and association. Of the three, petition has received the least judicial explication. The right to petition the government, however, lies at the very heart of a representative government.[116] Direct contact with the legislator to make one's views known is clearly an exercise of the right to petition.[117] An individual who is interested in proposed environmental legislation, for example, is petitioning the government when he writes, calls, or speaks directly with legislators voting on the proposal. In addition, a publicity campaign designed to generate public support for a particular position involves the exercise of the

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by excluding from regulation any such duties (*e.g.*, reporting) that would otherwise extend to any agency official whose agency the particular person has not attempted to influence.

> The purpose of the prohibitions and disclosure requirements as applied to agency officials is to assure that no *undue economic influences* will be brought to bear on such officials when they undertake administrative actions.

Comment to 2 CAL. ADMIN. CODE §18600 (emphasis added).

The FPPC has excluded from regulation by Chapter 6 certain otherwise reportable transactions between an Influencer, lobbyist or employer, and a state official:

> Certain types of routine transactions, however, in which a business sells goods or services at a standard price and on standard terms to the general public, are not susceptible to being used for special influence purposes. Reporting of such transactions would not further any purposes of the Act . . . .

Comment to 2 CAL. ADMIN. CODE §18650.

115. See text accompanying notes 43-63 *supra*.

116. The United States Supreme Court has noted that:

> The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.

United States v. Cruikshank, 92 U.S. 542, 552 (1876). The right to petition, however, includes more than merely the redress of grievances. An individual seeking a personal benefit from the government is also exercising the right to petition. *See* Rice, *The Constitutional Right of Association,* 16 HASTINGS L.J. 491, 500-03 (1965).

117. *See* Eastern R.R. Pres. Conf. v. Noerr Motor Frieght, Inc., 365 U.S. 127, 138-39 (1961).

right to petition.[118] Thus, the individual in the above example may direct his influencing efforts at the public by informing them of the proposed legislation, encouraging their support and enlisting their efforts to make such support known to the legislative body concerned.

Certainly the right to petition government is not an inferior right, and it has been characterized as one of the "cognate" rights of the first amendment, different in scope yet inseparable from the rest.[119] The California courts have recognized the importance of access to elected officials, noting that "[c]rucial though voting is as a method of participation in representative government, access to elected officials is also an important means of democratic expression—and one that is not limited to those who cast ballots."[120] Legislative and judicial caution has been traditionally exercised with respect to the regulation of political activities and citizen's access to legislative officials.[121] Although petition has not been a highly visible right in constitutional discussion, the petition right serves to keep elected representatives in touch with the people and deserves to be rigorously protected.[122]

The importance of free expression to the democratic process has been consistently expressed by the courts[123] and commentators.[124] The United

118. *Id.* at 140-41.

119. Thomas v. Collins, 323 U.S. 516, 530 (1945).

120. *See* Calderon v. City of Los Angeles, 4 Cal. 3d 251, 259, 481 P.2d 489, 494, 93 Cal. Rptr. 361, 366 (1971)(citations omitted). The opinion went on to note:

> One form of such access is embodied in the First Amendment's guarantee of "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." There is nothing in that amendment to limit its protection to registered voters.

Id. at n.8.

121. The United States Supreme Court has stated:

> Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation.

Eastern R.R. Pres. Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 141 (1961).

122. The United States Supreme Court has stated:

> In a representative democracy such as this, [the legislative and executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.

Id. at 137.

The California Supreme Court has characterized the right to petition as follows:

> The petition for redress of grievances epitomizes the use of freedom of expression to keep elected officials responsive to the electorate, thereby forestalling the violence which may be practiced by desperate and disillusioned citizens. This is undoubtedly why it receives explicit First Amendment protection in addition to the protection afforded to freedom of expression generally.

Los Angeles Teachers Union Local 1021 v. Los Angeles Bd. of Educ., 71 Cal. 2d 551, 559, 455 P.2d 827, 832, 78 Cal. Rptr. 723, 728 (1969).

123. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 14 (1976), *quoting* Roth v. United States, 354 U.S. 476, 484 (1957) where the Court, referring to political expression and the election process, specifically stated:

> The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

124. *See, e.g.*, Emerson, *Towards a General Theory of the First Amendment,* 72 YALE L.J. 877 (1963).

> The crucial point, however, is not that freedom of expression is politically useful, but

States Supreme Court has stated that "debate on public issues should be uninhibited, robust, and wide open . . . ."[125] Free expression serves two distinct interests in a democratic government. First, the speaker has the right to actively participate in self-government and express his personal desires.[126] Second, democratic government depends upon the wealth of ideas generated by free expression to guide and develop governmental policy.[127] Thus, the speaker's right to add his ideas to the market place benefits those who receive and use the ideas generated.[128] The public then has a right to be informed about political matters by an adequate flow of information. The expression of ideas is not limited merely to academic discourse; the right to expression includes the right to vigorously advocate personal interests to the public and legislative officials.[129]

Since there is an interest in having wide dissemination of diverse viewpoints,[130] it is often necessary to protect persons from public and private retaliation for expressing or aligning themselves with groups promoting unpopular or minority viewpoints.[131] The expression of unpopular or minor-

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> that it is indispensable to the operation of a democratic form of government. . . . [I]t follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment.

Id. at 883.

125. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

126. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); Mills v. Alabama, 384 U.S. 214 (1966).

127. *E.g.*, Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1971); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389-90 (1969).

In Buckley v. Valeo, 424 U.S. 1, 71 (1976), the Court noted:

> The public interest also suffers [when disclosure deters the exercise of first amendment rights] if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena.

128. In Mills v. Alabama, 384 U.S. 214, 218 (1966), the Court observed:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.

129. The United States Supreme Court has stated that "it is a prized American privilege to speak one's mind . . . on all public institutions." Bridges v. California, 314 U.S. 252, 270 (1941). Further, "abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." NAACP v. Button, 371 U.S. 415, 429 (1963). *See* Buckley v. Valeo, 424 U.S. 1, 48 (1976).

130. The United States Supreme Court has said that:

> The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that set us apart from totalitarian regimes.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949). The Court further noted that the failure to protect free speech "would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." *Id.* at 4-5.

The California Supreme Court has noted that:

> [T]he freedoms of speech and press protected by the First Amendment rest on "the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ."

Weaver v. Jordan, 64 Cal. 2d 235, 245, 411 P.2d 289, 296, 49 Cal. Rptr. 537, 544 (1966), *quoting* Associated Press v. United States, 326 U.S. 1, 20 (1945).

131. The California Supreme Court has stated that "[i]t must be remembered that the right of freedom of speech is primarily intended to protect minority views." Huntley v. PUC, 69 Cal. 2d 67, 73, 442 P.2d 685, 688-89, 69 Cal. Rptr. 605, 608-09 (1968).

The importance of anonymity, whether in one's associations or individually, is greatest when minority or unpopular views are being expressed.

ity views is an important contribution to the public forum. Beyond the fact that, in time, minority views often gain popular acceptance, it is important in a democratic society that the various elements be allowed to freely advocate their interests. In the legislative sphere, issues often cut across political, philosphical and community lines. Thus, the type of expression that becomes an "unpopular" view may itself be rather innocuous to the majority of people. Within the small circle of an individual's contacts, however, the expression of such views may result in retaliation from employers, community and social groups.[132] Thus, the effect of chilling speech may have broader implications than only restricting views that are normally considered unpopular. In fact, the expression of ideas from persons in the mainstream of society may also be deterred. Examples include the environmentalist working to oppose the construction of a dam that is favored by his employer, or a person holding a pro-abortion view who is active in religious organizations opposing abortion. These views, while not unpopular in the majoritarian sense, may be unpopular in the smaller sphere of an individual's relationship with his community.

Finally, there is an interest in associating for the purposes of advocacy.[133] Group association is a protected right because it enhances "effective advocacy."[134] This right to association also allows for the pooling of money to advocate beliefs. The right to form together "for the advancement of beliefs and ideas" is diluted if it does not include the right to pool money through contributions, for money is often essential if advocacy is to be optimally effective.[135] Further, the public interest suffers if organizations are unable to effectively express their views, thus reducing the amount of information in the market place of ideas.[136] This would indicate that association includes more than the creation of a permanent group, but contemplates the formation of ad hoc associations around issues as well.[137] This has the salutory result of increasing the circulation of ideas in the political forum.

> Registration of persons engaged in a popular cause imposes no hardship while . . . registration of names of persons who resist popular will would lead not only to expressions of ill will and hostility but to the loss of members by the [unpopular] Association.

NAACP v. Patty, 159 F. Supp. 503, 526 (E.D. Va. 1958). Echoing this view, one scholar has criticized the argument that disclosure is proper if it has a repressive effect on undesirable activities by pointing out that this ignores the simple fact that "exposure operates discriminatorily against unpopular groups." Robison, *Protection of Associations from Compulsory Disclosure of Membership*, 58 COLUM. L. REV. 614, 639 (1958).

132. *See* Buckley v. Valeo, 424 U.S. 1, 64 (1976); Shelton v. Tucker, 364 U.S. 479, 486-87 (1960); Bates v. City of Little Rock, 361 U.S. 516, 521-22 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462-63 (1960).

133. *See* 424 U.S. at 65.

134. The right to association has been recognized by the United States Supreme Court as a basic constitutional freedom. Kusper v. Pontikes, 414 U.S. 51, 57 (1973). Further the Court has noted that the right to association is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." Shelton v. Tucker, 364 U.S. 479, 486 (1968). *See also* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1960).

135. *See* 424 U.S. at 65-66.

136. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

137. Groups or associations are often formed by individuals to promote their common

Within the governmental process, the expression of ideas serves an interest beyond that of the speaker alone. The protections afforded free expression, the right to petition and the right of association allow for the formulation of the ideas that will affect governmental decisions. If governmental policy is to serve the interests of the people, it is necessary to minimize the restrictions that can have an inhibitory effect upon these rights. Since the state's interest in the disclosure regulations of Chapter 6 and the first amendment rights affected by such regulation have been delineated, the required disclosure of influencing activities by Influencers can be subjected to the constitutional analysis previously developed. Thus, the state's interests in disclosure will be balanced against the burdens that disclosure imposes on the first amendment rights of petition, expression and association.

APPLICATION OF CONSTITUTIONAL TESTS TO THE INFLUENCER DISCLOSURE REQUIREMENTS

Regulation of lobbying activities can clearly serve the legitimate state interest of preventing abuses of the legislative process. Such abuses occur when expenditures do not merely communicate ideas, but have the effect of distorting legislative perceptions of public opinion or give the spender an undue influence in the formation of legislative decisions.[138] The individual first amendment rights affected by a disclosure regulation, however, must be protected since such disclosure may prevent the expression of legitimate ideas and individual desires which should be heard by the public and considered by the state legislative bodies. Disclosure can have the further inhibitory effect of discouraging membership in and contributions to associations that advocate unpopular or minority views.

The constitutional analysis applicable to a regulation that has the indirect effect of infringing first amendment rights will be applied to the Influencer regulations in Chapter 6. Because disclosure has the effect of indirectly infringing rights of speech and association, the state must show that a compelling interest is served by such regulation. In order to apply the compelling state interest test, a division between the various types of Influencers has been made. First, the constitutional test will be applied to

interests in the passage or defeat of a specific legislative proposal. The right to associate promotes individual and public interests by permitting such groups to pool funds and otherwise function as a unit to publicly express their interests and beliefs.

138. The communication and advocacy of individual interests and beliefs to affect legislative action involves the concept of influence. The regulation of influence alone is not the purpose of the Act. The Act seeks to prevent *improper influence* from affecting legislative decisions. Thus, improper influence is not communication alone, but the attempt to affect legislative decisions by means that extend beyond communicating an individual's ideas and arguing personal interests. Improper influence comprehends the idea that the legislative decision has been affected by something more than the merits of the position advocated. For example, if a legislator has received a gift or benefit from one influencing legislative action, there is a very real possibility that the legislator will consider more than the merits of the position alone in making his decision to support the Influencer's interest.

the regulation requiring an individual Influencer to disclose his expenditures to engage in direct influencing efforts. Second, discussion will focus on the regulation of the individual Influencer's indirect influencing efforts. Finally, the test will be applied to the regulations requiring the disclosure of direct and indirect influencing expenditures insofar as individual members are required to disclose their own membership in the association or have their membership disclosed by the association.

A. Individual Influencing: Direct Communication

The Influencer is subject to the disclosure requirements of Chapter 6 if he spends $250 or more in one month to influence legislative action by means of *direct* communication with a legislative official.[139] For example, direct communication may take the form of personal contact, letters, telegrams, telephone conversations or similar means of communicating the Influencer's message directly to the legislative official.[140] In most cases, expenditures are necessary if the Influencer is to make use of these types of communication. Payments involved *in connection with* these direct communications are also included in the $250 figure.[141] These would specifically include payments made to research, compile and organize data for use in direct communication. The expenditures made to effectively communicate, when aggregated, may easily surpass the $250 threshold amount, thus requiring the individual to report as an Influencer.

The types of expenses listed above are all expenses that may be incurred if the Influencer is to communicate effectively. If the individual Influencer is using personal funds to influence, and those funds are used for only purposes of direct communication with a state official, the possibility that such

139. CAL. GOV'T CODE §§86108(h), 82045(d).

140. The fact that direct contact necessarily involves minimal disclosure of identity does not mean that broad disclosure via a public record required by the government is permissible. *See* White v. Davis, 13 Cal. 3d 757, 768 n.4, 533 P.2d 222, 229 n.4, 120 Cal. Rptr. 94, 101 n.4 (1975).

141. CAL. GOV'T CODE §82045(d). 2 CAL. ADMIN. CODE §18621 (3) and (5) require an Influencer to disclose:

> (3) The gross compensation paid or payable to employees for that portion of their time devoted to direct communication with elective state officials, legislative officials or agency officials if any part of the purpose of the communication is to influence legislative or administrative action. For the purposes of this paragraph, time spent in direct communication includes only the time of the persons actually communicating and the time of any employees engaged in developing the material upon which the communication is based or which is transmitted. However, no wages of any employee who spends less than 10% of compensated time during any one month in communicating or developing material used in communicating directly need be allocated or reported.
>
> (5) Any payment or portion thereof not described in paragraphs 1, 2, 3 or 4 which would not have been incurred but for the direct communication, or the soliciting or urging others to communicate directly with any elective state official, legislative official or agency official for the purpose of influencing legislative or administrative action.

It had been proposed that travel expenses be excluded from computation of the $250 threshold amount for Influencers. *See* STATE OF CALIFORNIA, FAIR POLITICAL PRACTICES COMMISSION, *Proposed Regulation Amendment,* Draft No. 1, for 2 CAL. ADMIN. CODE §18621. This regulation was not adopted by the FPPC.

expenditure will have the effect of improperly influencing the legislative process is small.[142] The money itself has been used only to present the Influencer's position with supporting data and has not been used to curry the legislator's favor by the means of gifts or other direct financial benefit.[143] In addition, the legislator knows who the Influencer is since there is direct contact; thus there is little chance that a legislator's perceptions will be distorted since he can properly evaluate the source of the influencing effort.[144]

The expenditure, when made for purposes of communication alone, does not extend the influence exerted beyond the merits of the Influencer's position or ability to effectively present his argument.[145] The consideration given to the Influencer's grievance or position is based on effective personal advocacy. This type of advocacy—personal appeals made to a state official—has not been traditionally considered a lobbying activity.[146] Thus, Chapter 6 has gone beyond regulating the type of lobbying activity that may contain the evils of undue influence by extending the regulation to activities where mere influence is present.[147] The state's interest in the disclosure of such activity is small, while the burden placed on individual rights is great. Since there is no compelling interest served by such disclosure, the regulation is overbroad because the regulation is not limited to activities where the state has such an interest in disclosure.

It would seem the public's need to know who is contacting the legislator in this case is not of the same magnitude as when the Influencer has otherwise used money to benefit or unduly influence the legislator. Although disclosure of all contacts with the legislator may enable the public to know more fully who has influenced the legislator's decision, it has never been argued that all such disclosure is vital or constitutionally permissible.[148] When an individual Influencer engages in direct communication with a legislative official to redress a grievance or seek a benefit, he is exercising the right to petition in its most basic form. Although rights of

142. See text accompanying notes 106-114 *supra*.

143. A different situation is present when expenditures are made both for communication and for other influencing purposes such as to benefit a legislative official. In this case, the aggregation of all expenditures to determine if the reporting amount has been reached would be required. This would be necessary since it would be impossible to accurately determine what expenditures may have the effect of improperly influencing legislative action.

144. When a legislator is confronted by the Influencer in person, there is no question of who is behind the influencing effort. If a lobbyist, for example, did not disclose his employer, the legislator would be unable to determine whose interests were actually being represented.

145. Chapter 6 does not attempt to identify the influencing efforts of wealthy persons in particular, but rather the expenditure of money by any person when such expenditure may improperly influence legislative action. Even if Chapter 6 had the purpose of identifying the influencing activities of wealthy individuals, such purpose would probably be impermissible. In this regard, the Court has noted that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

146. See text accompanying notes 25-29 *supra*.

147. See note 138 *supra*.

148. See note 140 *supra*.

expression are also involved since the Influencer is engaged in political speech, the primary right being exercised is the right to petition. Disclosure requirements have the effect of chilling an individual's exercise of the right to petition the government for various reasons.[149] The primary reason is the fear that public identification will result in retaliation by those who disagree with the viewpoint expressed. The effect on the legislative process is to reduce the inventory of ideas and proposals that can be considered by legislators in developing legislative policy. To unnecessarily encumber the individual right to petition the government creates an anomalous result. First amendment rights are intended to facilitate expression of the ideas and interests necessary to a representative government. If representative government is to truly reflect the needs and desires of the public, the representatives must be informed of those needs and desires. Yet, to protect that government by requiring broad disclosure deters the very expression that lies at the heart of a representative government. Thus, the individual first amendment rights are extremely important to maintain a representative form of government. To require disclosure of these activities is to prevent certain members of society from exercising the rights of petition and expression. Therefore, a great burden has been imposed by Chapter 6 on the individual Influencer's exercise of these first amendment rights.

The rights of the individual to petition the government and freely express his political views, when balanced against the state's interest in disclosure, are greater than that state interest when an individual directly presents his grievances to a state official. Thus, the state lacks the compelling interest necessary to maintain the disclosure regulation in light of its deterrent effect upon individual rights. When money is used only to facilitate communication to present the merits of one's position, disclosure places a burden on the ability of individuals to argue their positions effectively. Clearly the use of money must be characterized according to the probable effect it has on legislative decision-making. Thus, the focus of the disclosure regulations should be on the *type of expenditure* rather than on the amount of money spent to influence.[150]

Expenditures for communication alone do not contain the elements of improper influence that Chapter 6 seeks to prevent. If other uses of money are present, however, such as gifts to a legislator or money spent as part of a coordinated lobbying effort, the considerations are quite different. Thus, Chapter 6 should require disclosure when money has been used for purposes beyond direct communication alone. A payment made for the benefit of a state legislator, whether an outright gift or a more indirect benefit, by an

149. See text accompanying notes 74-81 *supra*.

150. The Act, as presently written, includes a wide range of expenditures which must be aggregated to determine whether the $250 amount has been reached. As has been discussed, this threshold amount can be reached by the inclusion of expenditures made solely for the purpose of communicating ideas and personal beliefs.

individual attempting to influence legislative action, may have an effect on the legislator's decision over and above the merits of the individual's position alone. A similar result may follow if the Influencer and legislator have a financial or business relationship with each other. It is important to expose to public view the potential improper influence inherent in these situations. A different problem is raised, however, if the individual Influencer makes expenditures under the direction of a lobbyist. In a sense, this becomes a part of a coordinated lobbying effort since the Influencer, in essence, becomes an agent of the lobbyist.[151] The Influencer in this case has become part of a larger scheme to represent the views of the lobbyist's employer. Thus, the improper influence in this situation flows from the inability of the legislator to detect the true source of the influencing effort.

If money has been spent for purposes other than the individual's communication, the possibility for improper influence is greatly increased. The individual that has a financial relationship with or has given gifts to a legislative official may receive special consideration of his interests in certain legislative action. Further, expenditures that benefit a legislator do not involve communication and, therefore, the individual rights of petition and expression have not been exercised. An individual should be required to disclose these transactions as an Influencer. Such disclosure does not involve first amendment rights and would benefit both the legislative body and the public by identifying the sources of possible improper influence. Where an individual has a financial relationship with an official, it is in the interest of the public to be aware of this individual's influencing efforts in order to evaluate the performance of the official as a legislator. In these situations, the state's interest in disclosure merits great weight. If the Influencer disclosure regulations were narrowly drawn to confine its coverage to situations where money is not being spent solely to communicate the views of the individual, the burden on individual rights would be limited to situations where the state's interest is compelling.

It has been demonstrated that the state does not have a compelling interest in requiring an individual Influencer to disclose his identity when expenditures are made in the exercise of the rights of petition and expression. When, however, expenditures are made for purposes beyond communication, there exists the potential for improper influence that the state has a substantial interest in preventing. If the Influencer has a financial relationship with an official, undue influence may be present and disclosure serves the salutory purpose of alerting the public to this possibility. Further, an individual Influencer should not screen from public view the scope of a lobbyist's true influence. Thus, if the Influencer is acting at the behest of a lobbyist,

151. The term "agent" is used here to connote activity on the part of the Influencer similar to that covered by CAL. GOV'T CODE §82045(b). This use of the word agent is to be distinguished from the strict definition of a lobbyist's agent found in 2 CAL. ADMIN. CODE §18239(c).

disclosure will alert the legislature to the actual source of the influencing activity. Because Chapter 6 fails to limit the Influencer disclosure requirements to situations where the state has a compelling interest in exposing their identity, Chapter 6 is impermissibly overbroad. Therefore, Chapter 6 should be amended[152] to exclude from regulation those Influencers making expenditures solely for purposes of direct communication to legislative officials.

B. Individual Influencing: Indirect Communication

An individual Influencer engaging in indirect influencing efforts is attempting to influence legislative action by urging others to enter into direct communication with legislative officials. Urging others to directly communicate may take diverse forms. It can range from, for example, a full scale publicity campaign to a more modest effort such as placing newspaper ads or printing handbills for distribution. An Influencer engaged in indirect influencing activity is primarily exercising the right of free expression in making his political beliefs public. The right of petition is also involved since the Influencer is urging others to contact the legislative officials; however, free expression is the primary right being exercised.

The Influencer, by engaging in political speech regarding legislative issues, becomes an active contributor to the market place of ideas. The exercise of the Influencer's right of free expression serves the public interest by informing members of the public about matters concerning legislative policy. A disclosure requirement can chill the free exercise of political expression, thus limiting political discussion by deterring an individual's vigorous advocacy of his political beliefs.[153] This type of public advocacy lies particularly close to the purposes of the first amendment.[154] Considering the interests served by disclosure of lobbying efforts,[155] it is difficult to see how this public advocacy could distort the legislature's perceptions of public opinion. When an individual expresses his beliefs and urges others to act, there is an independent decision made by each receiver of the communica-

152. An amendment that limits the scope of Chapter 6 would require a statute that is approved by the electorate. CAL. GOV'T CODE §81012.

153. See text accompanying notes 74-81 *supra*. A further problem related to the chilling effect may arise due to possible vagueness in the phrase "soliciting or urging other persons to enter into direct communication" with specified legislative or administrative officials. CAL. GOV'T CODE §82045(e). See text accompanying notes 51-52 *supra*. For text of this subsection see note 46 *supra*. To avoid this possible vagueness problem, soliciting and urging will have to mean the use of express words of advocacy, such as, "support" or "oppose" specified legislative action by "contracting your representative." *See* Buckley v. Valeo, 424 U.S. 1, 44 n.52, 79-81 (1976).

154. '[S]peech concerning public affairs . . . is the essence of self-government' . . . and the First Amendment must therefore safeguard not only the right of the public to *hear* debate, but also the right of individuals to *participate* in that debate and to attempt to persuade others to their points of view.

Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 193 (1973)(Brennan, J., dissenting), *quoting* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)(Brennan, J., dissenting).

155. See text accompanying notes 106-113 *supra*.

tion to contact a legislative official. The public's expression of support for or opposition to a legislative proposal does in fact reflect their true opinion. This is not the type of "manufactered" or distorted public opinion that will mislead legislative officials as to the public's opinion on an issue.[156] The state's interest in identifying the Influencer in order to prevent distortion of legislative perceptions is not furthered by the disclosure of those expenditures made to communicate with the public. Further, there is no need to inform the public of the Influencer's identity for the purpose of exposing improper influence directed at legislative officials since there have not been any expenditures directed at such officials. The effect of requiring the Influencer to disclose expenditures made to communicate to the public would be to identify those individuals expressing their opinions to the public, thus preventing anonymous speech in the public forum.

Disclosure can have a deterrent effect that stifles free expression; therefore anonymous speech deserves protection.[157] Although public expression of the individual's beliefs or views may in itself be beneficial to the decision-making process, such a view may be very unpopular or unacceptable within the Influencer's own personal or economic community. If an Influencer is required to disclose his identity when he engages in public discussion, there is a danger that the fear of reprisal or harassment will cause him to engage in self-censorship.[158] The danger of chill is quite pervasive and the effects are not limited to individuals or groups advocating ideas generally considered unpopular. The inability to speak anonymously in the public forum can greatly burden the exposition and advocacy of ideas that are needed for effective representative decision-making. Requiring the Influencer to disclose expenditures made to communicate ideas and beliefs to the public burdens both the Influencer's right of expression and the public's interest in being informed. An anomalous situation exists when a regulation attempting to maintain the purity of government actually impedes the speech necessary to the functioning of a democratic government. The expenditures made by the Influencer are for purposes of communication only. Thus, the basic right of free expression is unnecessarily burdened by the disclosure requirements in Chapter 6.

As with the individual Influencer who directly influences, the indirect Influencer may not be representing personal beliefs alone, but may be part of a larger influencing effort. For example, the Influencer may engage in indirect influencing efforts under the direction of a lobbyist. If the Influencer is being directed by a lobbyist, there would appear to be a state interest

156. A distortion of legislative perceptions occurs when legislative officials are unable to determine the source of influencing efforts by a particular group and the legislators believe that public support for or opposition to a proposal is much greater than it in fact is.

157. *See* Talley v. California, 362 U.S. 60, 63-65 (1960).

158. *See, e.g.*, St. Amant v. Thompson, 390 U.S. 727, 732 (1968); Columbia Broadcasting Systems, Inc., v. Democratic Nat'l Comm., 412 U.S. 94, 167 n.17 (1972) (Douglas, J., concurring).

in requiring disclosure of this relationship in order to expose the actual influencing activities of that lobbyist. In such case, the Influencer is engaged in activities that extend beyond the expression of personal beliefs; the state's interest in disclosure of the full scope of a lobbyist's efforts would increase the need for disclosure by the Influencer.[159] In this type of situation, the state has a substantial interest in requiring the Influencer to disclose expenditures made under the direction of a lobbyist, thus the state can permissibly require such disclosure.

The individual right to engage in political expression lies at the core of the first amendment.[160] The state must demonstrate a compelling interest to justify any infringement of that right by disclosure. The interest of the public in free and open discussion on matters of public importance, particularly when they relate to governmental policy, is also affected when individuals refrain from contributing their political views to the market place of ideas. When an individual Influencer directs his advocacy to the public, the receiver's decision to accept or reject the Influencer's argument and communicate with a legislative body reflect the opinions of that receiver. It cannot be said that this activity contains the evils of misrepresentation or distortion of public opinion to the legislative body. If the Influencer is expressing his own views and beliefs and is not supporting a lobbyist in a coordinated lobbying effort, there is no state interest in the Influencer disclosing his activities. There is no compelling state interest in requiring the Influencer to disclose such indirect influencing efforts. Chapter 6, by requiring such disclosure, impermissibly regulates in an area protected by first amendment rights. Chapter 6 should be amended to exclude from regulation independent individual efforts to advocate in the public forum specific legislative action for the purpose of generating support for that individual's position.

C. *Associational Influencing: Direct and Indirect Communication*

An association may become an Influencer by engaging in the same type of direct or indirect influencing efforts discussed in relation to the individual Influencer.[161] Chapter 6 requires an association that becomes an Influencer to clearly identify its purpose, nature, interests, the legislative action it is attempting to influence and the expenditures it has made to influence legislative action.[162] The constitutional questions raised are quite different

159. If an Influencer was allowed to engage in influencing activities supporting or assisting a lobbyist without being required to disclose, this would, in effect, create a loophole for the lobbyist. That is, the full extent of the lobbyist's influencing efforts would not be publicly exposed.

160. See text accompanying notes 115-137 *supra*.

161. CAL. GOV'T CODE §82045(d), (e).

162. CAL. GOV'T CODE §86109(b), (c), (f). An association that becomes an Influencer must, of course, comply with all the reporting requirements contained in CAL. GOV'T CODE §86109. For text of this section, see note 55 *supra*.

when an association, rather than an indiviaul, is required to disclose.[163] The state can legitimately regulate an association by requiring disclosure concerning its structure and activities.[164] The disclosure requirements in Chapter 6, however, interfere with associational rights because they require that membership be disclosed in two different situations.

In the first situation, an industrial, professional or trade association with 50 or fewer members is required to disclose its membership if the association becomes an Influencer.[165] If the association is made up of other organizations, such as a trade association whose membership is comprised of other trade associations or companies, there seems to be little problem with requiring the influencing association to disclose its membership since individual rights are not involved.[166] Further, disclosure serves the purpose of preventing the member associations from hiding behind a "front" association. For example, companies or associations in the oil industry could form an association for influencing purposes calling it the Citizens Group for Energy and hide the true interests represented behind a misleading or non-descriptive title. The interests represented by professional, trade and industrial groups are often well-financed lobbying efforts that can result in the types of improper influence Chapter 6 is designed to expose.[167] Thus, the state's interest in preventing improper influences and insuring that monied interests do not distort legislative perceptions of the public support or opposition regarding legislative action would be subverted if these organizations were allowed to disguise their influencing efforts behind the mask of a front group.[168]

A more difficult problem is raised if the influencing association is comprised of indiviuals from the trades or professions. In this case, the fundamental rights of individuals are involved. Thus, requiring disclosure of individual members must further a compelling state interest.[169] An individual's ability to exercise first amendment rights is not dependent upon the type of interest that is to be advocated.[170] Where the association is engaged in

163. The association's standing to claim injury due to the chilling effect of a disclosure requirement has been limited to situations where the association is asserting the rights of its members. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

164. *See* Eisen v. Regents of Univ. of Cal., 269 Cal. App. 2d 696, 705, 75 Cal. Rptr. 45, 51 (1969).

165. CAL. GOV'T CODE §86109(b)(3). The association must be composed of members from a particular industry, trade, or profession for this subsection to apply. *See* 2 F.P.P.C. OPS. 105, 107 (No. 75-169, July6, 1976).

166. For discussions suggesting that individual rights may be asserted by organizations, specifically corporations, see Moffet v. Killian, 360 F. Supp. 228 (1973); Walden, *More About NOERR-Lobbying, Antitrust And The Right To Petition*, 14 U.C.L.A. L. REV. 1211, 1242-46 (1967); Comment, *Freedom of Speech and the Corporation*, 4 VILL. L. REV. 377 (1959).

167. See notes 106-114 *supra*.

168. To allow an Influencer to hide potentially improper influencing efforts behind an association would result in a failure to inform the public and legislative bodies of important information. This situation would be analogous to that found should an Influencer escape reporting activities conducted under the direction of a lobbyist. See note 151 *supra*.

169. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 464-65 (1958).

170. *Id.* at 460-61.

direct or indirect influencing activities, both the public and the legislature will know the nature, purpose and interests of the association; there is little reason for identifying individual members. Thus, the disclosure of individual members of an association does not serve the state's interest in disclosing activities that may result in improper influence.[171]

In the second situation, associational rights are involved not because the association is required to disclose its membership,[172] but because the individual members of an association are required to disclose as individual influencers if they contribute more than $250 to an association for influencing purposes.[173] If an association is composed of individuals combining to advocate common interests, requiring a member to disclose his identity as an Influencer infringes upon that individual's right to associational privacy, and further interferes with the right to associate for the purpose of political advocacy.[174] The right of association enhances effective advocacy by enabling individuals to pool funds used for communication.[175] An individual who is required to disclose his identity if he contributes money to an association may be inhibited from contributing. The individual's purpose in channeling his communication efforts through an association may be to avoid identification. Thus, the association is deprived of necessary funds to further its direct or indirect influencing efforts.[176] The result of this may be a reduction in public expression of political beliefs and interests by the association with a similar reduction in the ability of the association to petition legislative bodies. The rights of the individual to participate in effective group advocacy are restricted resulting in a reduction in public debate. The association must report as an Influencer, therefore the nature and interests represented by the association will be known. Further disclosure by individual members does not serve the state's interest in identifying improper influences. The information necessary to make this determination has already been disclosed by the association. The disclosure of an individual's membership in an association serves only to interfere with an individual's rights to associational anonymity. If the individual has made expenditures beyond contributions to the association that have a potential effect of improperly influencing legislative decisions, then that individual must report as an Influencer. Where these expenditures are not present, there is no compelling state interest to require an individual to disclose expenditures in exercise of his rights of associational advocacy. Therefore, Chapter 6 is impermissibly overbroad in requiring such disclosure.

171. For a state decision that reaches an opposite result, see Young Americans for Freedom, Inc. v. Gorton, 83 Wash. 2d 728, 522 P.2d 189 (1974).

172. CAL. GOV'T CODE §86109(b)(4).

173. CAL. GOV'T CODE §86108(b). This would be an indirect payment to influence legislative or administrative action.

174. See text accompanying notes 77-81 *supra*.

175. See note 135 *supra*.

176. For example, if an individual Influencer has given a gift or bestowed a benefit on a legislator, the use of money has extended beyond communication of ideas.

There seems to be little question that an association which is an Influencer should report and disclose its influencing activities. It is, however, a different question when the association is required to disclose its membership. If the individual members are also organizations or associations, the deterrent effect created by disclosure would not apply since individual first amendment rights are not involved. When however, the membership is made up of individuals, the deterrent effect of disclosure may substantially interfere with the exercise of first amendment rights. Since the association must disclose its influencing activities, the state does not have a compelling state interest in requiring the individual to disclose his membership in that association. Chapter 6 is overbroad by requiring an individual to disclose and report associational activities and should therefore be amended to exclude those individuals who merely make expenditures to communicate through associations.

CALIFORNIA CONSTITUTIONAL RIGHT TO PRIVACY

In 1972, the California Constitution was amended to create an express right of privacy.[177] The California courts have only begun to suggest the scope of this individual right to privacy.[178] There are, however, privacy considerations that relate to the Influencer's disclosure and reporting requirements under Chapter 6 that must be examined. First, Chapter 6 requires the Influencer to disclose certain financial information[179] in a report filed with the Secretary of State.[180] The California Supreme Court has recognized a right to privacy in one's financial affairs, adopting a compelling state interest test to determine when a disclosure of financial information violates the right to privacy.[181] Therefore, the state must demonstrate a compelling interest before it can constitutionally require an individual to disclose any financial information. The disclosure regulation must achieve this interest by use of the least drastic means.[182] The regulation requiring that information be reported must further the state's interest by requiring the disclosure of only that information bearing a "rational connection" to the activities that give rise to the potential harm that disclosure attempts to prevent.[183] Since Chapter 6 requires disclosure of financial information, this constitutional test must be applied.

It has been previously demonstrated that the state has a compelling interest in the disclosure of those transactions that have the potential for

177. CAL. CONST. art. 1 §1, *adopted* May 7, 1879, *amended* November 7, 1972.
178. White v. Davis, 13 Cal. 3d 757, 773, 533 P.2d 222, 233, 120 Cal. Rptr. 94, 105 (1975).
179. CAL. GOV'T CODE §86109.
180. CAL. GOV'T CODE §81005(a).
181. City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 268, 466 P.2d 225, 232, 85 Cal. Rptr. 1, 8 (1970).
182. *Id.*
183. County of Nevada v. MacMillen, 11 Cal. 3d 662, 671, 522 P.2d 1345, 1350, 114 Cal. Rptr. 345, 350 (1974); City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 269, 466 P.2d 225, 232, 85 Cal. Rptr. 1, 8 (1970).

creating improper influence.[184] Specifically, those transactions which have the potential for improper influence include gifts, financial or business transactions with legislators, payments made for the benefit of legislators, and payments made under the direction of a lobbyist. The disclosure of this financial information bears a rational connection to the compelling state interest in preventing improper influences on the legislative process.[185] The information that an Influencer must disclose does not violate the individual's right to privacy and is therefore constitutionally permissible.

The second problem relating to privacy is present because the disclosure of identity and financial information required by Chapter 6 is embodied in a public record.[186] Since this record remains public information for an indefinite period of time, the Influencer's activities may be easily pieced together long after the influencing effort has occurred. Among the purposes of the privacy amendment was the prevention of the "overbroad . . . retention of unnecessary personal information by government . . . ."[187] Disclosure by the Influencer serves a state interest by informing the public of influences directed at their representatives.[188] Additionally, disclosure serves the purpose of informing those representatives of the source of influencing efforts to prevent distortion of the actual public support for or opposition to a legislative proposal.[189] Therefore, the state interest in disclosure of the Influencer's identity and financial expenditures should be limited to a specific period of time that serves the purposes of the Act in exposing improper influence directed at the legislative process.[190] The information required by Chapter 6, as discussed previously, is closely connected to activities and relationships that may lend themselves to potential improper influence. This information bears at least a relevant relationship to the compelling state interest furthered by the Act. The information is, however, important only so long as the potential for undue influence remains a threat to the legislative process. Once the state interest has been served, the records should be destroyed.

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184. See text accompanying notes 155-158 *supra*.

185. If it is constitutionally permissible for the state to require an Influencer to disclose, then necessarily the state has established a compelling state interest served by such disclosure.

186. CAL. GOV'T CODE §81005(h), 81008. The public record is available for inspection and reproduction by anyone. CAL. GOV'T CODE §81008.

187. White v. Davis, 13 Cal. 3d 757, 775, 533 P.2d 222, 234, 120 Cal. Rptr. 94, 106 (1975).

188. See text accompanying notes 107-113 *supra*.

189. See text accompanying notes 107-113 *supra*.

190. The length of time that the Influencer's report serves the state interest of identifying potential improper influence may best be determined by the FPPC, due to the Commission's expertise in this area. Certainly disclosure should extend beyond the resolution (either passage or defeat) of the legislative matter that the Influencer attempted to influence, as the effects of his activities could carry over beyond that point. While the period that report is maintained as a public record may have to be set somewhat arbitrarily, it should be as short a time as possible. The old lobbying regulations limited the time a report was kept to two years. CAL. GOV'T CODE §9904(b) (repealed by Initiative Measure, June 4, 1974). Presently, original reports *must* be kept for at least seven years and copies for at least four years. CAL. GOV'T CODE §81009(d), (e). There is no limitation on how long they *may* be kept.

CONCLUSION

There is an inherent conflict present when the state regulates individuals who attempt to influence the legislative process. On one hand, the state has a great interest in preventing improper influences that tend to undermine the representative process. On the other hand, the individual rights that may be infringed by such a regulation deserve careful protection. The right to express political beliefs, to petition the government, and to associate for political advocacy lie at the heart of representative democratic government. Therefore, a state regulation that tends to inhibit the exercise of these rights must be carefully drawn to achieve the state interest only to the extent that the interest furthered is greater than the burden placed on individual rights.

Chapter 6 is California's attempt to prevent improper influence directed at the state's legislative process. To achieve this purpose, Chapter 6 requires disclosure by, among others, the Influencer. The Influencer classification includes a broad range of persons engaged in diverse activities. For the purpose of analyzing the deterrent effect that disclosure can have on the exercise of the individual rights of expression, petition and association, this comment has focused on the Influencer as an individual acting on his own or in association with others. Strict scrutiny is required when these rights have been indirectly infringed by a state regulation. The fact that the regulation is based on the expenditure of money does not reduce this requirement since an expenditure for purposes of communication does not in itself contain elements of conduct sufficiently separable from speech. Therefore, a balancing test is applied to the regulation to determine whether the state's interest outweighs the burden on individual rights. Further, the state regulation must be narrowly drawn to achieve the state interest by the least restrictive means.

The use of money to effectively communicate is in most situations a necessity. It is important to clearly identify the type of influence that money may exert to determine whether there is a potential for improper influence directed at legislative decisions. If not otherwise limited, an overbroad disclosure requirement may have the effect of chilling individual rights beyond the extent necessary to further a compelling state interest. Attention was first directed toward an Influencer as an individual directly communicating with legislative officials. The individual's rights of petition and expression are being exercised. The burden placed on these rights by disclosure was balanced against the state's interest in public disclosure of the Influencer's expenditures. Where money is used only for purposes of communication, the possibility of undue influence is so negligible that the state's interest is insufficient to require disclosure. Where, however, the Influencer has a financial relationship or has made expenditures to benefit an official, the possibility that the legislator will consider more than the merits of the Influencer's position is greatly increased and there is a sufficiently

compelling interest to justify disclosure of these influencing activities. Similarly, the state's interest in identifying the extent of the activities of a lobbyist is sufficiently great to require the individual Influencer to disclose activities undertaken at the direction or in support of a lobbyist.

Second, the individual Influencer's indirect influencing efforts were discussed. These efforts are directed at the public to urge others to communicate with legislative officials. The potential for improper influence results from the distortion of legislative perceptions of public support or opposition relating to certain legislation. This potential is not present when the Influencer has publicly expressed views or beliefs and relies on the individual initiative of members of the public to communicate with a legislative body. To chill such activity does not further the state interest in preventing improper influence and thus there is no compelling interest present in such disclosure.

Third, discussion was focused on the associational rights of Influencers. The activities undertaken may be either direct or indirect influencing efforts, and the state's interests in the disclosure of associational membership are the same as when these activities are undertaken by the individual alone. The association itself may be properly required to disclose its purposes, activities and interests. The state must, however, show a compelling interest in the disclosure of the individual members of the association. In cases where the association must disclose members who are individuals, or in cases where members are required to report as individual Influencers, the state must have a compelling interest in publicly disclosing the identity of those individuals. The interests promoted by disclosure and the burdens placed on individual rights are the same as discussed in relation to individual Influencers. Where financial relationships with legislators or coordinated lobbying efforts are present, the state has a compelling interest in disclosure; otherwise, there is no substantial interest in individual disclosure.

Finally, the right to privacy in California was discussed in relation to the required financial disclosure mandated by Chapter 6 and the creation of a public record that may be used to identify an Influencer's activities long after they have occurred. When an Influencer may properly be required to disclose, the financial information reported is relevant to his influencing activities. The disclosure of this information, then, does not violate the individual's right to privacy in his financial affairs. The public record created, however, is not limited to the specific time that the state interests in disclosure are being promoted by Chapter 6. Once the disclosure has outlived its usefulness in exposing potential improper influence, the danger that the record may be used to piece together the political activity of an individual is present. The prevention of this type of unintended use of information was a major purpose of the California privacy amendment. The

public record of political activity required by Chapter 6 should be maintained only for the period that the purposes of the Chapter are being furthered.

The disclosure of Influencer activities, in many cases, serves the state interest of preventing improper influence directed at the legislative functions of state government. These regulations, however, should be narrowly drawn to achieve that interest so that the participation in political activity and discussion will not be inhibited to an unnecessary extent. Chapter 6 of the Political Reform Act of 1974 should be amended to exclude from reporting and disclosure requirements those individual Influencers who make only the expenditures necessary to effectively exercise their rights of expression, petition and association. Further, where disclosure does serve the purpose of exposing potential improper influence, the public record thereby created should be maintained only as long as it serves that purpose.

Stephen T. Landuyt