

SPEECH OR NOT: APPLYING ELECTION LAW STRICT SCRUTINY TO CAMPAIGN FINANCE REGULATIONS

Abstract: This Note will argue that even if money is not speech for First Amendment purposes, campaign contributions and expenditures are still crucial elements of the electoral process and ought to receive some constitutional protection. The United States Supreme Court has in its own election law jurisprudence the analytical tools required to strike a proper balance between the constitutional necessity of a free electoral system and the need to keep elections fair, open, honest and free from corruption. This Note will argue that under the Elections Clause and Qualifications Clause of the United States Constitution, Congress has neither plenary power to regulate campaign finances nor is Congress absolutely barred from enacting all but the most minimal restrictions. Rather, the Supreme Court should apply a balancing test to determine whether a particular campaign finance regulation violates the basic principles of the electoral system.

INTRODUCTION

In January 2000, the United States Supreme Court decided the case of *Nixon v. Shrink Missouri Government PAC* ("*ShrinkPAC*"),¹ which upheld the basic framework of *Buckley v. Valeo*²—the seminal 1976 campaign finance case. *Buckley* was sustained by a six to three vote in *ShrinkPAC* and applied to state campaign finance laws.³ The division on the Supreme Court in *ShrinkPAC* demonstrates that *Buckley*'s future is somewhat uncertain. No fewer than six Justices (Stevens,⁴ Breyer,⁵ Ginsburg, Kennedy,⁶ Thomas,⁷ and Scalia) express some dissatisfac-

¹ 120 S. Ct. 897 (2000).

² 424 U.S. 1 (1976).

³ *ShrinkPAC*, 120 S. Ct. at 901.

⁴ See *id.* at 910 (Stevens, J., concurring) (arguing that money used for political campaigns is not speech, per se, and should be treated only as "speech by proxy").

⁵ See *id.* at 914 (Breyer, J., concurring) (contending that *Buckley* does not and the Court should not reject an equality rationale for campaign finance restrictions and that it is perfectly appropriate for the government to prevent the voice of the few from drowning out the voices of the many).

⁶ See *id.* at 914–16 (Kennedy, J., dissenting) (proposing that *Buckley* be overruled to allow for less government regulation and that the entire system does a great disservice to the First Amendment).

⁷ See *ShrinkPAC*, 120 S. Ct. at 916–17 (Thomas, J., dissenting) (arguing that *Buckley* should be overruled to prohibit significant regulation).

tion with *Buckley* and Justice Kennedy, Justice Scalia and Justice Thomas explicitly argue that *Buckley* ought to be overruled.⁸

In addition to the dissatisfaction with *Buckley* expressed by some members of the Court, there has been an increase in calls for campaign finance reform from the media and several of the Presidential candidates.⁹ It has become dogmatic among politicians of both parties that congressional politics in Washington are corrupted by "huge" infusions of cash into campaign coffers.¹⁰ Given the decades old debate and the sharp disagreements between the opinions of Justice Breyer,¹¹ who seems amenable to overruling or at least interpreting *Buckley* to allow for more regulation, and Justice Thomas,¹² who argues that *Buckley* ought to be overruled to allow only minimal regulation, this dispute seems likely to continue.

The Supreme Court's holding in *Buckley* forms the basis for the constitutional analysis of campaign finance regulations. *Buckley* held that campaign expenditures were equivalent to speech and therefore statutes limiting them would have to withstand strict scrutiny.¹³ The Court also ruled that contributions were not equivalent to political speech but involved mostly associational rights and could be constitutionally justified.¹⁴ The Court also sustained disclosure and reporting requirements, a voluntary system of public financing, and the powers of the Federal Election Commission.¹⁵

⁸ See *id.* at 916 (Kennedy, J., dissenting), 916-19 (Thomas, J., dissenting).

⁹ See Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1054 (1996) (noting that in 1995 more than 400 newspapers editorialized in favor of campaign finance reform). The editorial push for campaign finance reform only intensified after the 1996 elections. See, e.g., *A Fundraiser's Guilty Verdict*, N.Y. TIMES, Mar. 3, 2000, at A23 (noting the conviction of Maria Hsia, a Democratic party fundraiser and associate of Vice President Al Gore for illegal activities relating to a fundraiser held at a Buddhist temple in California and advocating more stringent campaign finance laws). From January 1, 1999 to March of 2000, there were more than 3000 editorial and op-ed pieces favoring campaign finance reform.

¹⁰ See Smith, *supra* note 9, at 1059.

¹¹ See *ShrinkPAC*, 120 S. Ct. at 914 (Breyer, J., concurring).

¹² See *id.* at 916-17 (Thomas, J., dissenting).

¹³ See *Buckley*, 424 U.S. at 39, 44-45.

¹⁴ See *id.* at 26-27.

¹⁵ See *id.* at 143-44. The current system of campaign financing closely mirrors this *Buckley* framework. Individual contributors are limited to making donations of \$1,000 per candidate, per election. 2 U.S.C. § 441a(a)(1)(A) (1994). Political action committees are limited to contributing \$5,000 per candidate, per election. 2 U.S.C. § 441a(a)(2)(A) (1998). There is also an overall cap of \$25,000 on individual contributions to all candidates in one calendar year. *Id.* (1)(B)-(C). Most of the existing controversy over campaign finance reform is over so-called "soft" money. Soft money is not subject to federal regulation and consists of contributions made to political parties and independent committees

In *Buckley*, the Supreme Court stated that “[t]he constitutional power of Congress to regulate federal elections is well established and not questioned by any of the parties in this case.”¹⁶ The Court then cites to several cases to support this proposition.¹⁷ Without analysis, the *Buckley* Court assumed plenary congressional power over federal election campaigns based on the Elections Clause.¹⁸ As it was not contested in the case, this question is technically open. Subsequent decisions and the passage of time, however, suggest that it is, in practice, if not in fact, the constitutional doctrine of the day. The Court has policed state attempts to regulate elections and has developed a large body of law governing the electoral process and the limits on state regulation. Unfortunately, the campaign finance debate has focused almost exclusively on the classification of money as political speech and on a First Amendment analysis of the problem.¹⁹

This Note will argue that even if money is not speech, campaign contributions and expenditures are still crucial elements of the electoral process and ought to receive some constitutional protection. In recent years, the Supreme Court has demonstrated a willingness to reopen questions that were thought to have been long since decided.²⁰ There is, perhaps, a way out of the contentious First Amendment morass by way of an analysis of the goals of the electoral scheme created by the Constitution. The Court has, in its own election law jurisprudence, the analytical tools to clear away some of the confusions of *Buckley* and strike a proper balance between the constitutional necessity of a free electoral system and the need to keep elections fair, open, honest and free from corruption. This Note will argue that the Elections Clause and Qualifications Clause of the United States Constitution sketch the rough outlines of the ideas that ought to animate the electoral system.

which then use the money to indirectly support candidates. Federal election law prohibits the use of soft money to support a particular candidate; it may only be used for general issue advocacy and party building.

¹⁶ *Buckley*, 424 U.S. at 13.

¹⁷ *Id.* at 13 n.16.

¹⁸ U.S. CONST. art. I, § 4.

¹⁹ See generally Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258 (1994); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994); Bradley A. Smith, *Money Talks: Speech, Corruption, Equality and Campaign Finance*, 86 GEO. L.J. 45 (1997).

²⁰ See generally, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun Free Schools Act on the grounds that it exceeded Congress' authority to regulate under the Commerce Clause; it was the first law struck down on such grounds since 1937).

Applying the principles of this system to the issue of campaign finance regulation, Congress has neither plenary power to regulate campaign finances nor is Congress absolutely barred from enacting all but the most minimal restrictions. Rather, the Supreme Court should apply a balancing test, based on the balancing test used in its election law jurisprudence, to determine whether a particular campaign finance regulation violates the basic principles of the electoral system. Because of the importance of political campaigns to the electoral process and the need of those campaigns to spend money to communicate their ideas, the Court should apply strict scrutiny to the entirety of campaign finance laws. Just as in the election law cases, this does not mean that all reform efforts will be doomed to failure. To the contrary, significant regulation would be permissible under such a scheme but it must be justified by a compelling government interest and be narrowly tailored. Many common sense ballot restrictions have been upheld by the Supreme Court and similar campaign finance laws would pass constitutional muster as well.

Part I of this Note will discuss the origins of the twin provisions creating a federal electoral order: the Qualifications Clause and the Elections Clause.²¹ Part II will discuss the two major cases interpreting the Qualifications Clause.²² Part III will discuss the cases interpreting the Elections Clause, relied on by and culminating in *Buckley*.²³ Part IV of this Note will review relevant Supreme Court decisions regulating election law, primarily on the state level. Finally, Part V of this Note will analyze the law discussed and argue that there are both significant powers given to Congress and important internal and external limits on that power. The Note will argue that *Buckley* ought to be overturned and that campaign finance regulations ought to be analyzed as election regulations and subject to the same considerations the Court has used in limiting the powers of states to govern the electoral process. Informed by this body of law, the new constitutional test for campaign finance regulations suggested in this Note will preserve the crucial balance between a free electoral system and an honest electoral system.

²¹ See *infra* notes 23-57 and accompanying text.

²² See *infra* notes 58-96 and accompanying text.

²³ See *infra* notes 97-168.

I. THE FOUNDERS AND THE CONSTITUTIONAL ELECTORAL SCHEME

Article 1, Section 2, Clause 2 of the United States Constitution reads: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."²⁴ Article 1, Section 4 of the United States Constitution reads: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."²⁵ These two provisions, the former known as the Qualifications Clause and the latter as the Elections Clause, are closely connected in the constitutional electoral scheme.²⁶ Together, they embody the constitutional principles of national uniformity and popular sovereignty.

Alexander Hamilton, the principle expositor and defender of the Elections Clause, wrote that there was no "article in the whole plan more completely defensible than this."²⁷ Hamilton's argument was based in the need for the federal government to possess "the means of its own preservation."²⁸ Hamilton feared that state control of the election of federal legislators would "prove the seed of future weakness, and perhaps anarchy."²⁹ Hamilton worried that states opposed to federal policy would use their control over elections to handicap government operations, much the same way that states had crippled the national government under the Articles of Confederation.³⁰ Hamilton's fears were echoed by James Iredell, who argued that it was both "natural and proper" for every government to possess the means for its own preservation.³¹ To leave elections in the hands of the states, would leave the new federal government "at their mercy."³² James Madison feared that without a federal power to regulate elections, the federal government would be subject to "dissolution" at the hands of

²⁴ U.S. CONST. art. I, § 2, cl. 2.

²⁵ U.S. CONST. art. I, § 4.

²⁶ See *United States v. Classic*, 313 U.S. 299; 311, 316 (1941).

²⁷ THE FEDERALIST NO. 59, at 362 (Alexander Hamilton) (Clinton Rossiter ed., 1961) [hereinafter No. 59].

²⁸ *Id.*

²⁹ *Id.*

³⁰ See *id.* at 361-63.

³¹ 4 DEBATES ON THE FEDERAL CONSTITUTION 54 (J. Elliot ed., 1996) [hereinafter ELLIOT'S DEBATES].

³² No. 59, *supra* note 27, at 363.

a single state or a small cabal seeking to disrupt the flow of national policy.³³ At the same time, proponents of the Constitution sought to assuage fears of a federal usurpation of the states by emphasizing the limited scope of the Elections Clause.³⁴

The Federalists saw the Elections Clause as granting procedural power over the conduct of federal elections.³⁵ "Whether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, shd [sic] all vote for all the representatives or all in a district vote for a number allotted to the district" were all questions covered by the Elections Clause, with power divided between the states and the federal government, according to James Madison.³⁶ One delegate to the North Carolina convention declared that "the power over manner only enables them to determine *how* these electors shall elect—whether by ballot, or by vote, or by any other way."³⁷ The authority of the Elections Clause was to be "expressly restricted to regulation of the *times, places, and manner* of elections."³⁸ Hamilton stated that the power given to the federal government by the Elections Clause would be insufficient to effect a substantive federal policy that preferred one sort of candidate to another.³⁹ The phrase "time, place and manner" was to be read quite literally, in terms which all political men of that age could understand.⁴⁰

³³ 3 RECORDS OF THE FEDERAL CONVENTION 311 (M. Farrand ed., 1937) [hereinafter RECORDS].

³⁴ See 4 ELLIOT'S DEBATES, *supra* note 31, at 55, 68. Opponents of the Constitution feared that Congress would use what they saw as the vast powers of the Elections Clause to establish election regulations that would prefer candidates of a particular class or faction. See *id.* Iredell responded by emphasizing the limits of the powers conferred by the Elections Clause, for example, that regulation of the time of election was limited only to the period within the two year term for Representatives embodied in Article I, Section 2. See *id.* at 53.

³⁵ 2 RECORDS, *supra* note 33, at 240 (comments of James Madison); see also United States. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995); *supra* notes 64–72 and accompanying text.

³⁶ See 2 RECORDS, *supra* note 33, at 240–41.

³⁷ 4 ELLIOT'S DEBATES, *supra* note 31, at 71 (statement of Mr. Steele).

³⁸ THE FEDERALIST NO. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961) [hereinafter NO. 60].

³⁹ See *id.* at 371. Critics of the Constitution feared that it would elevate the concerns of the mercantile class over that of the landed, farming classes.

⁴⁰ See 3 RECORDS, *supra* note 33, at 267. In this speech to the Massachusetts convention, Rufus King noted that the electoral scheme allowed for some differences based on each state's peculiarities; for example, in Massachusetts' elections "the manner was by ballot, and the places towns." *Id.* There was also some concern that the "time" provision in the Elections Clause would permit Congress wide latitude, perhaps allowing elections to be

The Federalists sounded two major themes in their defense of the Elections Clause—it was necessary to prevent individual states from altering election regulations so as to disrupt the flow of national government and there was a need for uniformity between states to protect the federal right to vote.⁴¹ The Elections Clause creates a system of power-sharing between the states and the national government, with the latter as final arbiter of election rules.⁴² This would prevent “a combination of a few [ambitious] men, in a few of the most considerable States” from thwarting the desire of a majority of the nation’s people by discontinuing “the choice of members for the federal House of Representatives.”⁴³ Additionally, Madison argued, the Elections Clause would empower the federal government to prevent a majority in one state from further extending its power by diluting the federal voting rights of minorities.⁴⁴ At the same time, however, this grant of power was not plenary and the Federalists took great pains to demonstrate the limited nature of the Elections Clause.

The fear that the federal government would privilege the rights of some men over others also animated the debate over the Qualifications Clause. James Wilson argued that any list of qualifications for office was inappropriate.⁴⁵ Gouverneur Morris argued that disqualifying certain people from holding office was the same as limiting the suffrage rights of the electors.⁴⁶ Others argued for a more extensive list of qualifications and there was considerable

held only once every twenty years. See 4 ELLIOT’S DEBATES, *supra* note 31, at 55. Future Supreme Court Justice James Iredell responded that this term was limited by the command of Article I, Section 2, that the House of Representatives be elected every two years. See *id.* at 54.

⁴¹ No. 59, *supra* note 27, at 363; 3 RECORDS, *supra* note 33, at 311. States could “at any moment annihilate [the federal government] by neglecting to provide for the choice of persons to administer its affairs.” No. 59, *supra* note 27, at 363. James Madison argued that “should the people of any state, by any means, be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government.” 3 RECORDS, *supra* note 33, at 311. Both Madison and Rufus King pointed to South Carolina as an example of the sort of representational inequalities the Elections Clause sought to avert on the national level. See *id.* at 267, 311. South Carolina apportioned their state representatives in the state constitution, the result being that, at the time of the adoption of the Federal Constitution, Charleston, by the operation of state constitutional law, was grossly overrepresented in the state assembly, to the detriment of those in the areas that were less populated when the representational scheme of South Carolina was adopted. See *id.*

⁴² See 3 RECORDS, *supra* note 33, at 267–68.

⁴³ No. 59, *supra* note 27, at 366.

⁴⁴ See 3 RECORDS, *supra* note 33, at 311–12.

⁴⁵ See 2 RECORDS, *supra* note 33, at 251.

⁴⁶ See *id.* at 121–22.

debate over which would be included in the Constitution.⁴⁷ James Madison, during a debate over whether to exclude debtors from being elected to Congress, argued that only those who failed to account for their receipt of public funds should be so banished.⁴⁸ Gouverneur Morris emphasized the qualifications of the voters was more important and feared that government would interfere with the choices of the electorate if too many qualifications were required.⁴⁹

Madison was particularly concerned with leaving discretionary power to exclude members in the hands of the Congress.⁵⁰ Madison argued that the "qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution."⁵¹ Leaving it solely in the hands of the Legislature would be to vest it with an "improper and dangerous power" and if "the Legislature could regulate those of either, it can by degrees subvert the Constitution."⁵² Madison feared that "[q]ualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans [sic] of a (weaker) faction."⁵³

What we are left with, then, is an electoral system with a mixture of state and federal control and with the ultimate procedural authority vested in Congress and the substantive issues left to the decisions of the people. The federal government would possess the means of its own preservation in the Elections Clause but would be restrained from showing partiality in choosing its successors. This tension, between structural integrity and substantive freedom, is felt in the realm of campaign finance reform. Excessive reforms could operate as substantive bars to election for certain classes of candidates while insufficient regulation would leave the federal election system open to corruption and to subversion by state power.

II. INTERPRETING THE QUALIFICATIONS CLAUSE— POWELL AND THORNTON

In *United States v. Classic* the United States Supreme Court stated that "the free choice by the people of representatives in Congress,

⁴⁷ See *id.* at 120-22.

⁴⁸ See *id.* at 122.

⁴⁹ See *id.* at 121-22.

⁵⁰ See 2 RECORDS, *supra* note 33, at 249-50.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 250; see THE FEDERALIST NO. 52, at 293-98 (James Madison) (Clinton Rossiter ed., 1961).

subject only to the restrictions to be found in §§ 2 and 4 of Article I and elsewhere in the Constitution, was one of the great purposes of our constitutional scheme of government cannot be doubted."⁵⁴ This intimate connection between the Qualifications Clause and the Elections Clause calls for a further examination of the former in the effort to determine the proper reading of the latter. This Part will discuss the two major Qualifications Clause decisions.

In 1968, in *Powell v. McCormack*, the Supreme Court held that Congress could not, under its Article I, Section 5 power to judge the qualifications of its members, exclude a duly elected Representative who satisfied the Qualifications Clause.⁵⁵ Adam Clayton Powell, Jr. was a New York City Representative; he was accused of misusing federal money and prevented from taking his seat by a majority vote of the House of Representatives.⁵⁶ Powell argued that the House could only exclude members for failing to meet one of three qualifications expressly laid out in Article I, Section 2 and that he had been unconstitutionally denied his seat.⁵⁷ After reviewing English Parliamentary history, the records of the Constitutional Convention and the ratification debates, the Court, in an opinion authored by Chief Justice Earl Warren, held that the Founders intended to limit the necessary qualifications to those listed in Article I, Section 2 and that Congress had impermissibly exceeded the bounds of its Article I, Section 5 power in excluding Powell.⁵⁸ Therefore, the Court held that Powell had been unconstitutionally denied his seat and could take office.⁵⁹

Chief Justice Warren reasoned implicitly that the electoral scheme adopted by the Founders placed an emphasis on the democratic principle that the people are the ultimate judge of the elected officials and the source of the political order.⁶⁰ "A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.'"⁶¹ The

⁵⁴ 313 U.S. 299, 316 (1941).

⁵⁵ *Powell v. McCormack*, 395 U.S. 486, 549–50 (1968).

⁵⁶ *Id.* at 490–91.

⁵⁷ *See id.* at 492–93.

⁵⁸ *See id.* at 548.

⁵⁹ *See id.* at 550. The Court also held that Congress could have expelled Powell for conduct during that term (but not for conduct in prior terms) but since the vote had been on exclusion and not expulsion, the Court could not have calculated whether he would have been expelled by his colleagues if that was the basis of the excluding vote. *See id.* at 506–12.

⁶⁰ *See Powell*, 395 U.S. at 547.

⁶¹ *Id.* at 547.

Powell opinion analyzed the same debate discussed in Part I, *infra*, and concluded that the Founders wished to list the qualifications for Representatives and Senators so as to limit the power of the Congress to exclude members for political reasons.⁶² The Court concluded that the Founders, fearful of the concentration of too much political power in federal hands, left the electoral system to the judgment of the voters.⁶³ Quoting Alexander Hamilton, the Court wrote that "[r]epresentation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."⁶⁴ *Powell* left open the question of whether states could impose additional qualifications on their federal elected officials.⁶⁵ That question was answered in 1995.

In 1995, in *United States Term Limits, Inc. v. Thornton*, the Supreme Court held that an Arkansas state constitutional amendment limiting the terms of its members of the United States House of Representatives was unconstitutional.⁶⁶ The Court reasoned that the Constitution established fixed qualifications to prevent the possibility that Congress might manipulate the qualifications to secure the election of a favored class of individuals.⁶⁷ Alexander Hamilton argued in *Federalist* 60 that there was no way Congress could abuse the Elections Clause to benefit one group or another because the qualifications for election had been fixed at the time of the Constitution's adoption.⁶⁸ The Court's rule in *Thornton*, as in *Powell*, was based on two democratic principles in addition to the text and history of the Qualifications Clause.⁶⁹ The first was an emphasis on the egalitarian concept that the opportunity to be elected was open to all, and the second was the principle that sovereignty ultimately rested with the people.⁷⁰ The Court quoted Robert Livingston's famous line: "The people are the best judges [of] who ought to represent them. To dictate and control them, to tell them who, they shall not elect, is to abridge their natural

⁶² See *id.* at 533-34.

⁶³ See *id.* at 540-41. In the debate at the Constitutional Convention, Gouverneur Morris had declared that it would be more proper to regulate the qualifications of the electors than tamper with their choices of elected officials. See 2 RECORDS, *supra* note 33, at 121.

⁶⁴ *Powell*, 395 U.S. at 540-41 (quoting 2 ELLIOT'S DEBATES, *supra* note 31, at 257).

⁶⁵ Cf. No. 59, *supra* note 27, at 362.

⁶⁶ *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837-38 (1995).

⁶⁷ See *Thornton*, 514 U.S. at 792-93.

⁶⁸ See No. 60, *supra* note 38, at 371.

⁶⁹ *Thornton*, 514 U.S. at 793-94.

⁷⁰ *Id.* at 794.

rights.’”⁷¹ Therefore, the Court held that the Constitution prohibited any government, state or federal, from abridging the right of people to choose their elected officials freely through the adoption of term limits.⁷²

Thornton followed *Powell* in resting its case not only on the text of the Qualifications Clause but on “an examination of the basic principles of our democratic system.”⁷³ Justice Stevens wrote that “this broad principle incorporated at least two fundamental ideas. First . . . that the opportunity to be elected was open to all . . . Second . . . that sovereignty is vested in the people.”⁷⁴ This “broad principle” on which the constitutional electoral scheme rests, requires removing the power to decide whom shall be elected and why from any governmental body.⁷⁵ The substantive requirements for election to federal office were set at the time of the Constitution and cannot be altered by the federal government or a state government.⁷⁶ The government is limited to regulating election procedures to protect the free choice of the people, not to inhibit it. *Thornton* turned to this question of election procedure in order to refute the state’s contention that the term limits provision was a permissible exercise of the state’s power to regulate the “times, places and manner” of elections.⁷⁷

Thornton rejected this argument on the grounds that “the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.”⁷⁸ The *Thornton* Court recognized the potentially revolutionary nature of allowing states to set term limits for members of the federal legislature.⁷⁹ It would necessarily follow from the power of the state legislatures to set such limits that, according to the Elections Clause, Congress could “make or alter” such regu-

⁷¹ *Id.* (quoting *Powell*, 395 U.S. at 541 n.76 (quoting 2 ELLIOT’S DEBATES, *supra* note 31, at 292–93)).

⁷² *Id.* at 837.

⁷³ *Id.* at 793 (quoting *Powell*, 395 U.S. at 548).

⁷⁴ *Thornton*, 514 U.S. at 793–94.

⁷⁵ *See id.* at 835–38; *Powell*, 395 U.S. at 540 n.74, 541 n.76; 2 ELLIOT’S DEBATES, *supra* note 31, at 292–93.

⁷⁶ *See Thornton*, 514 U.S. at 820–21; *Powell*, 395 U.S. at 547–48.

⁷⁷ *See Thornton*, 514 U.S. at 832–33.

⁷⁸ *See id.* at 833–34.

⁷⁹ *See id.* at 837.

lations—an outcome expressly rejected by the Framers in their crafting of the Qualifications Clause.⁸⁰

Thornton acknowledges, however, that states and Congress have an interest in protecting the "integrity and regularity of the elections process."⁸¹ The state and federal laws upheld in a series of Elections Clause cases were permissible because "they regulated election *procedures* and did not even arguably impose any substantive qualification."⁸² The Court approved of such regulations that assure that elections are "fair and honest and [that] some sort of order, rather than chaos . . . accompan[ies] the democratic processes."⁸³ *Thornton* establishes the constitutional principle that individual electoral choice must be made free of government coercion or prohibition; to impose upon the electorate a governmental vision of their electoral choice would be to "abridge their natural rights."⁸⁴ *Powell* and *Thornton* clearly establish that government may not engage in substantive decisionmaking for the electorate and may only enact regulations to preserve the integrity of the procedures by which those choices are registered in the political process.⁸⁵ From 1880–1934, the Supreme Court issued a series of decisions interpreting the congressional power under the Elections Clause, cases that gave rise to the Supreme Court's assumption of congressional power over campaign finance in *Buckley*.

III. FROM *SIEBOLD* TO *BUCKLEY*: THE ELECTIONS CLAUSE

In 1879, in *Ex parte Siebold*, the United States Supreme Court ruled that the Congress had the power under the Elections Clause to craft any electoral regulatory scheme it chose to protect voters in the exercise of their rights of suffrage.⁸⁶ The *Siebold* decision, while primarily confined to an analysis of the balance between federal and state power, described for the first time the extensive power of Congress to assure that state governments did not interfere with a citizen's federal right to vote.⁸⁷ The provisions at issue in *Siebold* fell within the

⁸⁰ See *id.* at 832.

⁸¹ *Id.* at 835.

⁸² *Thornton*, 514 U.S. at 835; see also *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986); *Smiley v. Hohn*, 285 U.S. 355, 366 (1932).

⁸³ *Thornton*, 514 U.S. at 835.

⁸⁴ See *id.* at 794–95.

⁸⁵ See *id.* at 835; *Powell*, 395 U.S. at 543.

⁸⁶ 100 U.S. 371, 383–84 (1879).

⁸⁷ *Id.* at 385–87.

realm of procedural protections described by Justice Stevens in the majority opinion in *Thornton*.⁸⁸ The statute provided for federal election monitors, appointed by local judges, to observe and protect the polling places.⁸⁹ Given the post-Civil War history of intimidation, Justice Bradley wrote that "[i]n the light of recent history, and of the violence, fraud, corruption, and irregularity which have frequently prevailed at such elections . . . the exertion of the power, if it exists, may be necessary to the stability of our frame of government."⁹⁰ The statutes in question were passed for "regulating and superintending said elections, and for securing the purity thereof, and the rights of citizens to vote thereat peaceably and without molestation."⁹¹ Having so defined the nature of the statutes in question, the *Siebold* Court found that Congress possessed the power to adopt such regulations and provide for their enforcement.⁹² Four years later, the Court revisited the question of election enforcement statutes and again upheld the authority of Congress to secure the individual franchise and the integrity of elections through regulations.

In 1884, in *Ex parte Yarbrough*, the Supreme Court ruled that citizens' voting rights derive from the United States Constitution and that the Elections Clause empowers Congress to protect them.⁹³ The defendants in *Yarbrough* were charged with intimidating an African-American with the intent of preventing him from exercising his right to vote.⁹⁴ The Court reasoned that the power to protect individual voters and secure the election itself from fraud and corruption was essential to the concept of the sovereignty of a republic and based on the Elections Clause.⁹⁵ The *Yarbrough* opinion is based on those two principles—basic national sovereignty and the Elections Clause.⁹⁶

Without the power to protect individual voters, the federal government would be "left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption."⁹⁷ In analyzing the Elections Clause and Congress' action under

⁸⁸ See *id.* at 379–82; cf. *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 835 (1995).

⁸⁹ See *Siebold*, 100 U.S. at 379–82.

⁹⁰ *Id.* at 382.

⁹¹ *Id.*

⁹² See *id.* at 392–93.

⁹³ See 110 U.S. 651, 660–62 (1884).

⁹⁴ *Id.* at 657.

⁹⁵ See *id.* at 657, 660.

⁹⁶ See *id.*

⁹⁷ *Id.* at 658.

that grant of power, the Court categorized the regulations as regulations of election procedure, similar to regulations eliminating the general ticket for congressional elections.⁹⁸ At the end of the day, however, the *Yarborough* Court saw the power at question to be one inherent in a republican sovereign to protect people in the exercise of their right of suffrage.⁹⁹ The court wrote that "[i]t is essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people as that the original form of it should be so."¹⁰⁰ Election regulations were especially pertinent in republics where "political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger."¹⁰¹

The Court warned that the violence at issue in the *Yarborough* case and "the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety."¹⁰² If the government were left with "no authority to provide against these evils, if the very sources of power may be poisoned by corruption," then the American project would indeed be in jeopardy.¹⁰³ The *Yarborough* Court cast Congress' power to protect electoral results from corruption in broad language, justifying, in some sense, *Buckley's* reliance on *Yarborough* for authority. More than four decades later, the Supreme Court would again broadly define the congressional power to regulate elections.

In 1932, in *Smiley v. Holm*, the Supreme Court ruled that the term "legislature" in the Elections Clause referred to the entire lawmaking power of a state and, therefore, a scheme of redistricting for federal elections made pursuant to a federal statute, was subject to a gubernatorial veto.¹⁰⁴ At issue in *Smiley* was Minnesota's redistricting plan, adopted after the census of 1930.¹⁰⁵ The legislature had passed a redistricting plan for the state's nine seats in the United States House of

⁹⁸ See *Yarborough*, 110 U.S. at 660. The general ticket was a method for electing all of a state's delegation to the House of Representatives on an at-large basis. See *id.*

⁹⁹ See *id.* at 666.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 667.

¹⁰³ *Yarborough*, 110 U.S. at 667.

¹⁰⁴ See 285 U.S. 355, 365 (1932).

¹⁰⁵ *Id.* at 361-62.

Representatives.¹⁰⁶ The Governor vetoed the proposal and the legislature sought judicial enforcement of its plan.¹⁰⁷ The Supreme Court ultimately rejected the argument of the Minnesota legislature that, in devising a redistricting scheme, it was exercising an agency power under the federal Constitution and therefore was not subject to the limits of the Minnesota Constitution.¹⁰⁸ The Court ruled that the Constitution contemplated the full exercise of state legislative power as provided for in state constitutions.¹⁰⁹

Smiley also recognized that both Congress and the states derive their powers over federal elections from the Elections Clause of the federal Constitution.¹¹⁰ There was no state power to regulate federal elections prior to the adoption of the federal Constitution and because the only grant of authority to do so is in the Elections Clause, both Congress and the states are bound by the same internal constitutional limitations.¹¹¹

The most interesting part of the opinion, for purposes of discussing campaign finance regulation is the Supreme Court's articulation of the broad range of legislation covered by the Elections Clause.¹¹² Chief Justice Hughes wrote:

The subject matter is the "times, places and manner of holding elections for Senators and Representatives." It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.¹¹³

¹⁰⁶ See *id.* at 361.

¹⁰⁷ *Id.* at 361-63.

¹⁰⁸ See *id.* at 361-63.

¹⁰⁹ See *Smiley*, 285 U.S. at 365.

¹¹⁰ See *id.* at 366-67.

¹¹¹ See *id.*; cf. *Thornton*, 514 U.S. at 832.

¹¹² See *Smiley*, 285 U.S. at 366.

¹¹³ *Id.*

The Court then went on to define the role of Congress as that of a general supervisor over state regulations, leaving the same power in the hands of the states, absent the intervention of Congress.¹¹⁴ The Court's opinion in *Smiley* touches on Congress' broad power to regulate the procedures of elections to assure that the choice of the majority within a district is given full force and effect by law.¹¹⁵ Unfortunately, the *Smiley* Court did not elaborate on this power, but the description is in keeping with *Siebold* and *Yarbrough* on which it relies and the electoral contours created by the Founders in the Constitution itself.¹¹⁶ After *Smiley*, the Court turned its attention to one of the campaign finance statutes passed in the early parts of the twentieth century.¹¹⁷

In 1933, in *Burroughs & Cannon v. United States*, the Supreme Court upheld the convictions of two men accused of violating disclosure and reporting provisions of the Federal Corrupt Practices Act of 1925 ("FCPA").¹¹⁸ The FCPA required that the treasurer of a political committee to keep detailed accounts of contributions and expenditures and to file such reports with the clerk of the House of Representatives at specified times.¹¹⁹ After quoting extensively from *Yarbrough*, the Court ruled that "[t]he power of Congress to protect the election of the President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress."¹²⁰ The Court continued: "Congress reached the conclusion that public disclosure of political contributions, together with the names of the contributors and other details, would tend to prevent the corrupt use of money to affect elections."¹²¹ The statute was permissible because "as a whole [it] is calculated to discourage the making and use of contributions for purposes of corruption."¹²²

¹¹⁴ See *id.* at 367.

¹¹⁵ See *id.* at 366.

¹¹⁶ See *id.* at 366-67; 2 RECORDS, *supra* note 33, at 240.

¹¹⁷ The first campaign finance law, popularly known as the Tillman Act, had been passed in 1907, banning corporate contributions to political campaigns. See ROBERT F. BAUER & DORIS M. KAFKA, UNITED STATES FEDERAL ELECTION LAW 3 (1984). This was followed by expenditure caps adopted in 1910 and 1911 and the Federal Corrupt Practices Act of 1925 ("FCPA"). See *id.* at 3-4.

¹¹⁸ 290 U.S. 534, 548 (1933).

¹¹⁹ See *id.* at 541-42.

¹²⁰ *Id.* at 547.

¹²¹ *Id.* at 548.

¹²² *Id.*

The Supreme Court picked up *Burroughs'* concern with corruption again in 1976, in *Buckley v. Valeo*. In *Buckley*, the Court held that the contribution limits, disclosure requirements, public financing and the creation of a Federal Election Commissioner contained in the Federal Election Campaign Act of 1974 were constitutional.¹²³ *Buckley* was decided primarily on First Amendment grounds and relied on *Smiley*, *Yarbrough* and *Burroughs* to justify the congressional power to regulate campaigns in that way.¹²⁴ The structure created by the Federal Election Campaign Act and the *Buckley* decision remains the foundation and the outline of federal election law today.¹²⁵

The Court's reasoning in *Buckley* was based on the analogy between money and speech in a given context.¹²⁶ The Court struck down one major provision of the law—its strict limits on campaign expenditures—because the “expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.”¹²⁷ In contrast, a “contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.”¹²⁸ This speech analogy has come under heavy criticism by those seeking to overturn *Buckley* to permit more restrictions on campaign expenditures and was rejected by Justice Stevens in his concurrence in *ShrinkPAC*.¹²⁹ The state interest in campaign finance regulation is the “prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on a candidate's positions and on her actions if elected to office.”¹³⁰ While this interest was defined in the context of a First Amendment analysis, it will suffice for a discussion of campaign finance regulations under the principles of the Elections Clause. Before moving to an analysis of the constitutional issues, however, an examination of corruption in the scheme of campaign finance is necessary.

¹²³ *Buckley v. Valeo*, 424 U.S. 1, 143–44 (1976).

¹²⁴ See *id.* at 13 n.16, 14–15.

¹²⁵ See BAUER & KAFKA, *supra* note 117, at 7.

¹²⁶ See *Buckley*, 424 U.S. at 14–15.

¹²⁷ *Id.* at 19.

¹²⁸ *Id.* at 21.

¹²⁹ See *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 910 (2000) (Stevens, J., concurring).

¹³⁰ *Buckley*, 424 U.S. at 25.

IV. ELECTIONS & BALLOT ACCESS UNDER THE CONSTITUTION

Campaign finance regulations can have the effect of limiting the numbers of candidates who are able to seek election and changing the overall calculus for potential candidates as they weigh the decision whether or not to seek a particular office. Under the current system, for example, because candidates are limited to raising money in \$1,000 chunks, they must assemble a broad base of financial supporters and often must begin fundraising years in advance of the election. Candidates for United States Representative are always less than two years from their next election and those in competitive districts must continually raise money and prepare for campaigns. Prior to the adoption of the FECA in 1974, candidates could raise money from a few wealthy supporters to begin their campaigns and seek money in rather large chunks periodically. Now, candidates spend a considerable amount of time building up a "war-chest" in advance of the election, well before other campaign activities begin. Whatever campaign finance system is adopted, then, will have a profound effect on voter choices and could operate as a bar to certain candidates or classes of candidates. Such laws could be analyzed in an analogous fashion to state ballot access laws, which have a long history in the Supreme Court.

The Supreme Court applies strict scrutiny when examining state ballot access laws.¹³¹ Rights of political participation stand "poised between procedural due process . . . and the First Amendment."¹³² At the same time, voting rights must be made equally available and not simply available and therefore contain an element of equal protection analysis.¹³³ Regardless of its precise constitutional foundation, the Supreme Court has developed extensive election law jurisprudence. The crux of electoral constitutional law is that while the rights of voters are fundamental, "there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process."¹³⁴ The Court has also held that the rights of candidates are bound up with the rights of voters, as "it is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contem-

¹³¹ See *Am. Party of Tex. v. White*, 415 U.S. 767, 780 (1974).

¹³² LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1062 (2d ed. 1988).

¹³³ See *id.*

¹³⁴ See *Storer v. Brown*, 415 U.S. 724, 730 (1974).

porary issues."¹³⁵ A campaign finance regulation has the potential to impact the choices of voters if it is drawn, consciously or not, to favor a certain class of candidates.¹³⁶

In strictly scrutinizing ballot access laws, the Supreme Court is not guided by a "litmus-paper test." Instead, a court must engage in "an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments [and] . . . then must identify and evaluate the precise interests put forward by the State."¹³⁷ In this balancing test, the Court critically examines both the nature of the state's interest and the practical operation of the ballot access restriction.¹³⁸ For example, the Court has declared that a state has no interest in protecting existing political parties from competition and may not regulate ballot access in furtherance of that interest.¹³⁹ But the Court has acknowledged that states have a legitimate interest in requiring candidates to demonstrate some modicum of support before they are given ballot access to avoid confusion, deception, and potential frustration of the democratic process at the general election.¹⁴⁰

Most recently, the Court decided the case of *California Democratic Party v. Jones*, holding that California's open primary system violated the rights of that state's political parties.¹⁴¹ The Court's analysis in *Jones* can be readily transposed to a campaign finance regulation, as the interests asserted by the state and rights pressed by the political parties are similar. Additionally, the status of parties under the Constitution can be analogized to the nature of modern political campaigns that, while temporary, are essentially private associations devoted to the election of a particular candidate and the promotion of that candidate's views. The constitutional analysis in *Jones*, which balanced the important electoral rights of parties and citizens against the interests of the state in conducting a certain sort of election, can be applied to

¹³⁵ See *Lubin v. Panish*, 415 U.S. 709, 716 (1974).

¹³⁶ One could readily see that a campaign finance law that permitted incumbents to raise up to \$5,000 from individuals and challengers only \$1,000 per person would be a constitutional violation. It is the contention of this Note that the Supreme Court, in applying strict scrutiny to campaign finance regulations ought to take the practical effects of a campaign finance law into account.

¹³⁷ See *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

¹³⁸ See *id.* at 790-93.

¹³⁹ See *id.* at 801-02.

¹⁴⁰ See *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

¹⁴¹ See 120 S. Ct. 2402, 2414 (2000).

campaign finance reform. Thus, this Note will consider the *Jones* case in some detail.

In *Jones*, four California political parties challenged California's blanket primary election law.¹⁴² In a blanket primary, all candidates from all parties appear on a single ballot. Each voter may choose one candidate from the entire pool and the leading candidate from each party advances to the general election.¹⁴³ The district court and the Ninth Circuit Court of Appeals held for the state, but the Supreme Court reversed, holding that the lower courts gave insufficient weight to the parties' interest in excluding non-members from the nominee selection process.¹⁴⁴ The Court described the parties' status as quasi-public, and stated that although their right to exclude is not as absolute as those of purely private organizations, political parties are entitled to First Amendment protection.¹⁴⁵ A state statute that burdens the right to exclude must satisfy strict scrutiny where the party's actions do not otherwise violate the Constitution.¹⁴⁶ Subjecting the statute to strict scrutiny, the Court concluded that it impermissibly burdened the parties' right to exclude. There was also evidence that the threat of "party-raiding," were not insubstantial and that the nature of the primary would force party candidates to moderate their positions in order to appeal to an ideologically heterogeneous electorate.¹⁴⁷ Most interestingly, for campaign finance reform, the Court considered and rejected seven state interests advanced to defend the statute. It is this process of interest analysis that was largely missing from *Buckley* and, to a lesser extent, *ShrinkPAC*.¹⁴⁸

¹⁴² See *id.*; Comment, *California Democratic Party v. Jones*, 115 HARV. L. REV. 269, 269 (2000) [hereinafter Comment]. The law was challenged by the Republican, Democratic, Libertarian, and Peace and Freedom Parties. These four parties had by-laws requiring their nominees to be selected in closed primaries. See *id.* at 271.

¹⁴³ This is to be contrasted with partisan primaries, in which only voters of a particular party (and independents in open primaries) select the party nominee and non-partisan primaries where the top two vote-getters, regardless of party, advance to the general election. See Comment, *supra* note 142, at 270-71.

¹⁴⁴ See *Jones*, 120 S. Ct. at 2407.

¹⁴⁵ See *id.* at 2402, 2407.

¹⁴⁶ See *id.* at 2407 & n.5; Comment, *supra* note 142, at 271. The Court did so to distinguish *Jones* from the *White Primary Cases*, which held that there is no First Amendment right to race-based exclusion from the electoral process. See *Jones*, 120 S. Ct. at 2407 & n.5; Comment, *supra* note 142, at 271-72.

¹⁴⁷ See *Jones*, 120 S. Ct. at 2411-12.

¹⁴⁸ For example, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court simply accepted the \$1,000 limit on individual contributions without any consideration of why this number is proper to prevent corruption and the appearance of corruption.

The seven interests advanced by California in *Jones* were: producing representative elected officials; expanding the candidate debate beyond partisan concerns; increasing the power of members of the minority party in districts controlled by the majority party; promoting fairness; affording voters greater choice; increasing voter participation; and protecting privacy.¹⁴⁹ The Court held that the first two interests could be rejected out of hand because they "are simply circumlocution for producing nominees and nominee positions other than those the parties would choose if left to their own devices."¹⁵⁰ The Court held that such an interest was incompatible with the freedom of speech and expression embodied in the electoral system.¹⁵¹ The third interest, designed to increase the power of voters in the minority party in majority-dominated districts, was also not permissible because it was simply a "reformulation of an asserted state interest we have already rejected—recharacterizing nonparty members' keen desire to participate in selection of the party's nominee as 'disenfranchisement' if that desire is not fulfilled."¹⁵² The other four asserted interests were potentially legitimate but had to be addressed not "in the abstract . . . but rather by asking whether the aspect of fairness, privacy, etc. . . . is highly significant" under these particular circumstances.¹⁵³ The Court considered each in turn, finding that each one lacked the significance to be considered important or even contradicted the stated goal of the law. Finally, the Court concluded that even if the interests had been compelling the law was not narrowly tailored because the same objectives could be achieved by a nonpartisan blanket primary. The Court's strict scrutiny in *Jones* and all of its election law cases forces the legislature passing the law to comply with the important constitutional issues raised by any state intervention in the political process. Concurring in *Jones*, Justice Kennedy observed that "[i]n a free society the State is directed by political doctrine, not the other way around." The government may regulate election procedures to ensure fairness and to keep elections free from corruption but may not impose its own substantive vision of voters' choices.

¹⁴⁹ See *Jones*, 120 S. Ct. at 2412–13.

¹⁵⁰ See *id.* at 2412.

¹⁵¹ See *id.*

¹⁵² See *id.* at 2413.

¹⁵³ See *id.*

V. ANALYSIS

The theme that emerges from our consideration of both the Founder's understanding and the Supreme Court's interpretation of the Elections Clause and the Qualifications Clause is that the government, when regulating elections, may not impose its own substantive will on the voters. The government may not do so directly by prohibiting certain candidates from appearing on ballots or taking their seats based on extraconstitutional criteria. Neither may the government do so indirectly through election laws that are designed to promote the election of one kind of candidate over another.¹⁵⁴ Nevertheless, the aims of the campaign finance reform movement and those of the Founding Fathers and subsequent interpreters are largely the same.¹⁵⁵ Both want to secure the rights of individual voters to cast their ballots and have them counted in proportion to their percentage of the eligible voting population choosing to cast ballots in a given election.¹⁵⁶ Both desire to keep the election free from corruption.¹⁵⁷

The Elections Clause has been interpreted—correctly in my mind—to embrace more than basic procedural provisions such as the date of election and the existence of congressional districts. It has been extended to protect the rights of individual voters and to secure elections from corruption. But there must be some limit to the extent that Congress can regulate campaign finance. The Elections Clause embraces all powers necessary and proper to protect the integrity of elections and the rights of voters eligible to cast ballots in elections and to do so without interference or fear of intimidation by public or private actors.¹⁵⁸ This power is extended to campaign finance regulations to the extent that restrictions on the free rein of campaign

¹⁵⁴ See *Cal. Democratic Party v. Jones*, 120 S. Ct. 2402, 2412 (stating that California's interest in promoting moderation through the blanket primary reduced "to nothing more than a stark repudiation of freedom of political association: Parties should not be free to select their own nominees because those nominees, and the positions taken by those nominees, will not be congenial to the majority. We have recognized the inadmissibility of this sort of 'interest' before").

¹⁵⁵ See *Ex parte Yarbrough*, 110 U.S. 651, 658 (1884); Fred Wertheimer & Susan Weiss Maines, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1127-31 (1994).

¹⁵⁶ See *Yarbrough*, 110 U.S. at 666; Edward B. Foley, *Equal-Dollars-Per-Voters: A Constitutional Principle for Campaign Finance*, 94 COLUM. L. REV. 1204, 1204 (1994). Foley's argument goes a step further than the concerns of the Court in *Yarbrough* to embrace a notion of equality of voice in the campaign process and not simply the protection of the individual franchise in the act of voting itself. See Edward B. Foley, *supra*, at 1226-28.

¹⁵⁷ See *Burroughs & Cannon v. United States*, 290 U.S. 534, 548 (1933).

¹⁵⁸ See *Yarbrough*, 110 U.S. at 666-67; 3 RECORDS, *supra* note 33, at 311.

money are reasonably calculated to prevent the corruption of the elections themselves or to prevent the intimidation of voters or interference with rights of suffrage.

The Qualifications Clause serves as an important constitutional check on the power of Congress to erect barriers to entry not contained in the Constitution. In keeping with the rest of its election law jurisprudence, which recognizes the distinction between procedural regulations and governmentally imposed substantive decisions, the Court, guided by its ballot access precedents, ought to apply strict scrutiny to campaign finance regulations. The government seeking to regulate campaign finance should be forced to advance a compelling interest to support the regulation and demonstrate that the regulation is narrowly tailored to serve that end. Additionally, courts should scrutinize the nature of the regulation to be assured that the campaign finance regulation does not place an impermissible burden on the rights of voters. While this test would erect substantial barriers to the adoption of campaign finance regulations, it would allow for significant regulation—as do the Court's ballot access precedents. The success of the Court in navigating the rough constitutional and political waters surrounding the issue of ballot access indicates that, if it proceeds in a similar fashion with campaign finance laws, there is a significant chance of success in this area.

The Supreme Court has noted the intimate connection between the Elections Clause and the Qualifications Clause.¹⁵⁹ The Court has interpreted the Qualifications Clause quite narrowly, prohibiting the state and federal governments from using other constitutional powers that would effectively add to the three stated qualifications of age, citizenship and residency.¹⁶⁰ Underlying this interpretation is a deeply rooted assumption that "the true principle of a republic is, that the people should choose whom they please to govern them."¹⁶¹ The Founders' political calculus depended on the system of checks and balances created within the federal government, between the federal government and the states, and between both governments and the people who were the source of all legitimate political authority.¹⁶² Popular elections are the "great source of free government" and

¹⁵⁹ See *United States v. Classic*, 313 U.S. 299, 316 (1941).

¹⁶⁰ See *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837-38 (1995); *Powell v. McCormack*, 395 U.S. 486, 549-50 (1968).

¹⁶¹ 2 ELLIOT'S DEBATES, *supra* note 31, at 257.

¹⁶² See *id.* at 257-58.

should be governed by "the most unbounded liberty allowed."¹⁶³ Excessive interference by the government with popular elections would tend to mute their effectiveness as a check on governmental authority and a guidepost by which representatives of the people can navigate their policies. Yet these elections must also be "perfectly pure"¹⁶⁴ so as not to fall victim to the "two great natural and historical enemies of all republics, open violence and insidious corruption."¹⁶⁵ Therefore a balance must be struck between leaving elections sufficiently free of governmental coercion to make them effective checks on federal power while at the same time protecting them from corruption and external influences that would damage the concept of popular government at the heart of democracy.

The balance is achieved in the concert of the Qualifications Clause and the Elections Clause.¹⁶⁶ Under Qualifications Clause jurisprudence, Congress and the states are powerless to set the substantive criteria by which voters make decisions about candidates for office.¹⁶⁷ States cannot determine that voters should not elect United States Representatives who have been elected to three terms or United States Senators who have been elected to two terms.¹⁶⁸ The United States Congress cannot prohibit voters from electing Representatives who had committed acts of corruption while serving in Congress.¹⁶⁹ It is simply beyond the power of any government to make substantive judgments about the nature of the electoral choice of the body of the people, except as provided for in the Constitution.

The first question that needs to be answered is a definition of a substantive requirement. Clearly, the Court ruled that exclusion on the basis of corruption imposed a qualification on Representative Powell (and, by extension, all members of the House of Representatives) that he not have violated anti-corruption provisions.¹⁷⁰ Just as clearly, the Court ruled that the term limits provision in *Thornton* imposed upon candidates (and, by extension, on voters) the qualification of not having been elected to the House of Representatives three times or the Senate twice.¹⁷¹ Because the power of both the

¹⁶³ *Id.* at 257.

¹⁶⁴ *Id.*

¹⁶⁵ *Yarborough*, 110 U.S. at 658.

¹⁶⁶ *Cf. Classic*, 313 U.S. at 316.

¹⁶⁷ *See Thornton*, 514 U.S. at 794-95, 837; *Powell*, 495 U.S. at 547-48.

¹⁶⁸ *Thornton*, 514 U.S. at 784, 837.

¹⁶⁹ *See Powell*, 495 U.S. at 490, 547-48.

¹⁷⁰ *See id.* at 490.

¹⁷¹ *See Thornton*, 514 U.S. at 784, 837.

state and federal government to regulate federal elections has its origins in the Elections Clause, it would be safe to assume that the state could not exclude a member for corruption and that Congress could not impose term limits.¹⁷² The error made by the state government in *Thornton* and by Congress in *Powell* was essentially the same. In each case the governmental body imposed its own vision of who the people ought to elect; they decided that the people should not elect a Representative to a fourth term or elect as a Representative a man who had violated anti-corruption provisions. In both cases, the Court struck down the governmental action because it violated the principle that "the people are the best judges of who should represent them."¹⁷³ *Powell* and *Thornton*, in some ways, were easy cases. The election laws challenged in both cases effectively prohibited a certain class of individuals from directly holding a particular office.

Not all campaign finance regulations impose some substantive vision of who should be elected to office but many do. For example, by limiting the amount candidates may raise to \$1,000 per contributor, per election, current campaign finance laws advantage candidates who raise money in relatively small chunks.¹⁷⁴ This does not necessarily mean that such a limit is unconstitutional, rather, it means that the law must be justified by a compelling state interest. Just as the Constitution prohibits the government from making substantive judgments about whom the people may elect, it is also within the powers of (and is, in some ways, the duty of) those governments to protect the electoral choice of voters both in their individual and collective capacities.¹⁷⁵ The government is confined, then, to making procedural safeguards for elections, and within that realm the power of Congress and of the state governments are nearly limitless.¹⁷⁶ This power over procedure, balanced against the substantive freedom enjoyed by the electorate and preserved by the Qualifications Clause, has its textual basis in the Elections Clause.¹⁷⁷ The Elections Clause

¹⁷² Cf. *Smiley v. Holm*, 285 U.S. 355, 364-65 (1932).

¹⁷³ See *Thornton*, 514 U.S. at 794-95; *Powell*, 395 U.S. at 541, n.76 (quoting 2 ELLIOT'S DEBATES, *supra* note 31, at 292-93).

¹⁷⁴ See 2 U.S.C. § 441a(a)(1)(A) (1994) (limiting contributions to \$1,000 per individual donor); see also Trevor Potter, *Where are We Now? The Current State of Campaign Finance Law*, in CAMPAIGN FINANCE REFORM: A SOURCEBOOK 5-6, 9-10 (Anthony Corrado et al. eds., 1997).

¹⁷⁵ Cf. *Yarborough*, 110 U.S. at 666-67.

¹⁷⁶ See *Smiley*, 285 U.S. at 366.

¹⁷⁷ See U.S. CONST. art. I, § 4; see also 2 RECORDS, *supra* note 33, at 240-41 (statement of James Madison); 4 ELLIOT'S DEBATES, *supra* note 31, at 71 (statement of Mr. Steele).

gives Congress and the state governments the power to protect "the integrity and regularity of the elections process," and the Supreme Court will uphold restrictions that regulate "election *procedures*" and do not "even arguably impose any substantive qualification."¹⁷⁸

The crucial question for the regulation of campaign finance is whether a particular law imposes a substantive governmental vision on the choice of the electorate or is simply a procedure for securing the individual right to vote and protecting the electoral process from corruption.¹⁷⁹ To make this determination, it is necessary to establish a working definition of procedure. The crafters and defenders of the federal Constitution described what was meant by election procedure. According to Madison, the questions to which the Elections Clause was addressed included "[w]hether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place [should] all vote for all representatives or all in a district vote for a number allotted to the district."¹⁸⁰ Alexander Hamilton declared that Congressional authority was to be "expressly limited to the regulation of the *times, places and manner* of elections."¹⁸¹ And, in the North Carolina convention, Mr. Steele stated that "the power over manner only enables them to determine *how* these electors shall elect—whether by ballot, or by vote or by any other way."¹⁸² Rufus King offered his own definition, describing the "manner" of Massachusetts' election as "by ballot, and the places, towns."¹⁸³

The Founders' descriptions make their procedural concept fairly clear. The Elections Clause would, under the original understanding, empower Congress to determine who gets to vote, where, and how. Of course, elections have evolved considerably since the Eighteenth century. The procedural focus of the Elections Clause, however, remains consistent as is evidenced by Justice Stevens' opinion in *Thornton*.¹⁸⁴

¹⁷⁸ *Thornton*, 514 U.S. at 835.

¹⁷⁹ There is a close connection between the individual right to vote and the prevention of corruption. See *Yarborough*, 110 U.S. at 660–62. Corruption dilutes the influence of an individual voter. The right to vote and have that ballot counted is separate from the right to receive and turn in a ballot—a right that would be essentially meaningless if the votes were not counted or additional ballots cast that served to dilute the influence of an individual vote.

¹⁸⁰ 2 RECORDS, *supra* note 33, at 240.

¹⁸¹ No. 60, *supra* note 38, at 371.

¹⁸² 4 ELLIOT'S DEBATES, *supra* note 31, at 71.

¹⁸³ 3 RECORDS, *supra* note 33, at 267.

¹⁸⁴ See *Thornton*, 514 U.S. at 835.

The Founder's concept of a procedural power has been carried through in the Supreme Court's interpretation of the Elections Clause.¹⁸⁵

In *Smiley*, the Supreme Court listed the areas in which Congress can regulate under the Elections Clause. Chief Justice Hughes wrote that the power covered the regulation of "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, duties of inspectors and canvassers, and making and publication of election returns."¹⁸⁶ All of these activities are related to the actual issuing and counting of ballots on Election Day and are designed to assure the unhindered electoral choice of eligible voters.¹⁸⁷ "Notices" are posted to inform voters of the upcoming election with the intention of allowing them to choose whether or not to cast a ballot.¹⁸⁸ Notices do not require any specific action on the part of voters; rather, they present information and leave the decision to the eligible chooser. Voter "registration" helps to ensure the integrity of elections by providing a list of those legally able to cast ballots.¹⁸⁹ This serves to prevent the dilution of the votes of legal voters by interlopers seeking to influence the election from the outside. Power to provide for the "supervision of voting, protection of voters, duties of canvassers"¹⁹⁰ hearken back to *Siebold*, where the Court ruled that Congress had the power to provide for the enforcement of federal rights held by citizens under the federal Constitution.¹⁹¹ These three powers grow naturally out of the power to regulate election procedures; without such authority, the procedural safeguards needed for elections would be useless. Finally, the power for the "making and publications of election returns" allows Congress to require a uniform time for the announcement of election results in a timely fashion for several reasons, including allowing for less time to interfere with the ballots after votes have been cast.¹⁹² The final category delineated by *Smiley* is the "prevention of fraud and corrupt practices."¹⁹³

¹⁸⁵ See, e.g., *Smiley*, 285 U.S. at 366; *Yarbrough*, 110 U.S. at 657, 660; *Siebold*, 100 U.S. at 396.

¹⁸⁶ *Smiley*, 285 U.S. at 366.

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ See *Siebold*, 100 U.S. at 382, 396.

¹⁹² See *Smiley*, 285 U.S. at 366.

¹⁹³ *Id.*

Regulation of campaign finances would fall under this last category.¹⁹⁴ The inclusion of "fraud and corrupt practices" within this litany of Election Day activities, tends to support a narrow interpretation of the phrase.¹⁹⁵ The type of corruption covered by the Elections Clause under the decision in *Smiley* would be corruption of the election itself—voters illegally casting ballots, ballots being miscounted, votes from beyond the grave, etc. Contrast this with the decision in *Buckley*, where the Court ruled that campaign finance regulations could be upheld to prevent corruption or even the appearance of corruption and defined corruption as a *quid pro quo*—a campaign contribution in exchange for governmental favor once a candidate is in office.¹⁹⁶ This is not technically, however, a corruption of the election since there is no charge that the candidate receiving the most votes did not win or that ineligible voters cast ballots or that party machinery was used to manipulate the voting process. In short, the notion that campaign finance regulations may be upheld on the grounds that they prevent *quid pro quo* corruption or the appearance of corruption is not supportable by cases prior to *Buckley*, and *Buckley* itself does not adequately justify the nature of the state's interest in preventing the appearance of corruption. As Gary Jacobson has pointed out, the "appearance of corruption" is an incredibly vague statement that is based solely on the subjective impression of the public who may or may not really know what is going on.¹⁹⁷

Two things are clear from a reading of the main Elections Clause cases. First, concern over corruption is aimed at real corruption of the electoral process, primarily the addition or subtraction of ballots in a given election. Second, the concern over money is not concentrated on the "appearance" that money has an inordinate impact on the electoral process. When the *Yarborough* Court expressed its concern over the "free use of money in elections" it was not dealing with an electoral system that was heavily regulated, in fact, it was completely unregulated and campaigns focused not on television advertising or

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

¹⁹⁶ See *Buckley v. Valeo*, 424 U.S. 1, 45 (1976).

¹⁹⁷ See Gary C. Jacobson, *Campaign Finance and Democratic Control: Comments on Gottlieb & Lowenstein's Papers*, 18 HOFSTRA L. REV. 369, 377 (1989); Smith, *supra* note 9, at 1067 n.113.

other means of persuasion but on large organizations devoted to bringing (or bribing) loyal voters to the polls.¹⁹⁸

The constitutional principle is clear. The electoral choice of citizens must be left to the citizens' own discretion. The Constitution gives the people the right to make electoral decisions on their own grounds without coercion from the federal government. The substantive prohibition and the procedural power give effect to the electoral choices of citizens. The prohibition of the Qualifications Clause protects citizens from the coercion of the government. The procedural power allows Congress and state government to protect the choice of individual voters from external coercion and corruption. The Framers wanted a system that was "pure" and "free."¹⁹⁹ *Buckley* failed in this regard by deciding the case on First Amendment grounds instead of basing it on the principles of the constitutional electoral system.

Using the constitutional electoral system as a guide, the debate over whether or not money qualifies as speech should be irrelevant. Government is not restrained simply by the speech aspects of the First Amendment; rather, it is restrained by the limited nature of the Elections Clause, the limiting power of the Qualifications Clause, and the political rights guaranteed by the First Amendment. What is needed, then, is a balance between the government's interest in regulating campaign finance and the rights of voters to choose from a wide range of candidates and freely participate in the electoral process. The government can regulate campaign finance if, under strict scrutiny, the Court determines that there is a compelling government interest and that the regulation is narrowly tailored. The Court can look to its own ballot access jurisprudence to find a ready analogy for analyzing campaign finance laws in this way. There, the balance is struck between a need for a regular, non-chaotic election process and the rights of voters to choose whom they wish to govern them.²⁰⁰

In *Buckley*, the Supreme Court ruled on four basic provisions: contribution limits, expenditure limits, public financing and disclosure and reporting requirements.²⁰¹ The Court upheld limits on individual contributions because, the Court reasoned, they were only an

¹⁹⁸ See *Yarborough*, 110 U.S. at 667. Interestingly, the Court has ruled that the bribery of voters is not a constitutional violation per se. See *United States v. Bathgate*, 246 U.S. 220, 226 (1918).

¹⁹⁹ See 2 ELLIOT'S DEBATES, *supra* note 31, at 257.

²⁰⁰ See *Storer v. Brown*, 415 U.S. 724, 730 (1974).

²⁰¹ See *Buckley*, 424 U.S. at 21, 60-61, 107-08.

incident to free speech and not speech itself.²⁰² The limit of \$1,000 per individual, per candidate is essentially arbitrary.²⁰³ The Court did not analyze why the number was chosen or why it was necessary to prevent corruption of the system. The *Buckley* Court simply assumed that it served the purpose of preventing corruption and the appearance of corruption and could therefore be justified under a First Amendment analysis. What the Court ignored is the substantive nature of the \$1,000 contribution limit. The limit, in effect, tells voters that they cannot elect a candidate who accepts contributions in excess of \$1,000 because the candidate is inherently corrupted by that money.²⁰⁴ This limit favors candidates who can effectively raise money from a broad group of individuals who can write large checks rather than the previous system that was largely financed by a few millionaire supporters of candidates.²⁰⁵ It removes from the voters the choice of which kind of candidate and imposes upon the political process the substantive view that campaigns financed by relatively small contributions are better.²⁰⁶ Absent a showing of the corrupting effect of a particular numerical contribution limit, such limits impose a view of electoral choice on citizens and artificially limit not only the criteria on which to base their decisions but the choice of candidates too.²⁰⁷

In *Buckley*, the Court struck down expenditure limitations on the grounds that they impose "direct and substantial" limitations on the free speech of candidates.²⁰⁸ Under the formulation of the Elections Clause argued in this Note, this aspect of the *Buckley* opinion would stand. Expenditure limitations are the strongest substantive restraint on candidates' conduct. The Congress, in enacting such restraints, would be making a substantive judgment as to the amount of campaigning that ought to be done by an otherwise qualified congressional candidate.

Public financing presents an interesting question under the Elections Clause. On the one hand, it gives benefits to candidates, implic-

²⁰² See *id.* at 26-27.

²⁰³ See *id.* at 27-28.

²⁰⁴ Cf. *Powell*, 395 U.S. at 543.

²⁰⁵ See Smith, *supra* note 9, at 1052-55.

²⁰⁶ *Id.* at 1062-63.

²⁰⁷ See LARRY SABATO & GLENN SIMPSON, DIRTY LITTLE SECRETS 23-28 (1995). Sabato and Simpson outline the benefits given to incumbents and certain kinds of candidates by the \$1,000 contribution ceiling. This limit also requires a vast input of time in fundraising operations and has served to discourage several nationally known figures from running for office.

²⁰⁸ See *Buckley*, 424 U.S. at 39.

itly making known a congressional preference for candidates who accept public financing. The current public financing system, which was at issue in *Buckley*, is available only to Presidential candidates and is purely voluntary.²⁰⁹ *Buckley* upheld the subsidies under the spending power in the General Welfare Clause.²¹⁰ Under the Elections Clause, such subsidies would be suspect but would likely withstand whatever level of scrutiny applied to them. The Qualifications Clause cases do not reach the question of whether or not a government may express a preference for a particular type of candidate. They only reach the issue of whether or not the government may prohibit the election of particular candidates based upon substantive judgments about what type of candidate "should" be chosen by the voters. Public financing, if approached in the proper fashion, may serve as a stimulant for the types of campaigns Congress and the public desire, without imposing a substantive vision on the public. A voluntary public financing system would likely pass muster under the Elections Clause. Similarly, a system like the one upheld in *Buckley*, but extended to congressional elections, would likely be constitutional under an Elections Clause analysis.

Under the Elections Clause analysis put forth in this Note, much of America's current campaign finance laws and most radical proposals for change would be held unconstitutional. This does not mean, however, that our political processes must be forever doomed to the corruption of money and the pernicious influence of wealth. Though the Constitution prohibits the government from making substantive judgments and then imposing them upon electors, it also imparts to Congress the power to secure and enhance the voting power of individuals. To the extent that corruption dilutes the electoral influence of voters, Congress may enact laws to protect electoral procedures and secure the voting rights and influence of eligible individuals. In this procedural sphere, the power of Congress is nearly unlimited.

The strongest measure Congress can take would be to require more extensive disclosure of contributions and expenditures by political campaigns. The internet allows for nearly instantaneous disclosure of campaign finances. These would be easily accessible by voters and media sources within hours of a given contribution or expenditure. Disclosure requirements add to the potential knowledge of each voter and enhance each individual's capacity to make a reasoned and

²⁰⁹ See *id.* at 114.

²¹⁰ See *id.* at 118-19.

deliberate choice at the ballot box. Disclosure can also be justified under a corruption rationale. Sunlight often proves to be the best cure for questionable political conduct. Without sufficient disclosure, the possibility that secretive outside forces would enter into electoral processes and corrupt them would increase.²¹¹ Disclosure is the prototypical example of a campaign procedure that does not run afoul of the constitutional electoral scheme. It is also a powerful weapon against outsiders attempting to improperly influence an election to secure benefits to themselves. Also permissible under the Elections and Qualifications Clauses would be restrictions on last minute campaign ads that do not give the opposition the chance to respond. These ads can skew election results and make a reasoned independent judgment by citizens almost impossible, especially if the last minute charges are particularly salacious or inflammatory.²¹²

What the Court must evaluate and what may, in the end, be dispositive is what interests are compelling. In *Jones*, the Court emphatically held that producing a certain kind of candidate, a moderate one, was not a permissible state interest, much less a compelling one.²¹³ Campaign finance laws that are aimed at promoting the prospects of certain ideologies would fail this part of the test. The real question is whether the promotion of equality is a sufficiently compelling state interest to override the associational rights of the campaigns. The campaign finance literature is dominated by those seeking to reduce what they perceive as corruption that leads to an unequal distribution of political power, with large contributors having undue influence because of their financial wherewithal. This is where the battle is currently joined and where it will be joined in the future. Given the space constraints of this Note, there is not room to fully analyze this question. Nevertheless, this much can be said: under an election law analysis, the promotion of equality is more likely to be a constitutionally permissible interest. Narrow tailoring, however, would likely put the onus on states to publicly finance elections rather than restrict private contributions. A voluntary system of public financing, it seems to me, is the best solution for all sides in this controversy. The question remains whether the political will exists to allocate scarce resources to fund election campaigns.

²¹¹ See generally SABATO & SIMPSON, *supra* note 207, at 257-363.

²¹² See *Bush Ad Accuses McCain of Opposing Cancer Research*, N.Y. TIMES, Mar. 4, 2000, at A1.

²¹³ See *Jones*, 120 S. Ct. at 2412.

CONCLUSION

Campaign finance reform will remain a contentious political issue for many years. Calls for reform echo around the nation as it moves into this Presidential election year. Candidates from both parties have made well-publicized calls for more regulations and more restrictions on the conduct of federal campaigns. While this Note has disputed some factual claims made by many of the reformers, its focus has not been on the substantive merits of the legislation. It may well be that proponents of campaign finance reform are correct in some of their diagnoses and that more reform is needed. However, the Constitution does not merely prohibit misguided or unpopular legislation. For that there is little need.

Regardless of the problems with extensive private financing of political campaigns, the threat to liberty posed by significant campaign reform cannot be understated. The Framers wisely formulated an electoral system that left much of the choice to the people who were charged with monitoring their elected officials. No system of campaign regulation that detracts from this crucial, substantive role played by the people—the source of all sovereignty—should be held constitutional. The Supreme Court's decision in *Buckley v. Valeo* was in error because it stripped too much of this substantive control from the people. More extensive regulations would do further violence to the concept of a free electoral system. Congress may enhance the substantive authority of the people through procedural safeguards but may not restrict electoral freedom by imposing substantive requirements through campaign finance regulations. At bottom, the people are responsible for assuring the accountability, honesty and integrity of our elected officials. If the people fail in their task of eternal vigilance, no system, no matter how perfect, can keep American politics free. That is, as Thomas Jefferson wrote, the price of liberty, and we ought not—and under the Constitution, cannot—appoint the federal government to monitor itself for us.

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