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Let Justice Be Done Though the Heavens Fall – Why Ballot Regulations and Political Money Are Two Sides of the Same First Amendment Coin

By Habib Olapade

On June 24, 1974, Richard Nixon took a seat in the Oval Office, placed his head in his hands, and wept, a broken man. During Nixon's second term, the administration spent all of the President's renewed political capital fighting allegations of financial foul play in the 1972 campaign.[1] When confronted with the prospect of a legion of lawsuits from public interest firms, Nixon yielded and turned over his campaign records. The classified documents revealed that the Nixon campaign was bankrolled by multiple million-dollar contributions from a few individuals and Fortune 500 Companies.[2] To the extent that government benefits from fair and untainted elections to draw on the electorate's confidence, Nixon had not only broken the rules, he made a mockery of the process.[3]

However, it was unclear whether Nixon had violated any campaign finance regulations – or at the very least whether any violation was deserving of punishment. Federal bans on

[1] Nixon fought to the end in order to prevent secret White House tapes from confirming his role in the debacle. In the end he was forced into submission by a unanimous Supreme Court composed of four members he appointed. *See* United States v. Nixon, 418 U.S. 683 (1974) (holding that the president could not claim executive privilege in the absence of a need to protect military, diplomatic, or national security secrets and ignore a special prosecutor's request for tape recordings and documents that were known to be relevant to the prosecutor's task).

[2] *See* United States v. Finance Committee to Re-Elect President, 507 F.2d 1194 (1974) (revealing a list of more than 1,500 persons who had contributed over 5 million dollars to the Nixon campaign – including Richard Mellon Scaife, a heir to the Mellon fortune, and W. Clement Stone, a billionaire insurance magnate – and a concerted effort by the Nixon campaign to avoid disclosure requirements in the Federal Election Campaign Act of 1972 by collecting over 20 million dollars in contributions from individuals and corporations before the statute became effective on April 7, 1972). American Airlines was fined $5,000 for making an illegal $55,000 contribution to the Nixon campaign and attempting to cover up the transaction by employing a Lebanese agent to funnel the cash through a Swiss bank account. For a treatment of corporate prosecutions resulting from illegal campaign activity, *See* HERBERT E. ALEXANDER, FINANCING THE 1972 ELECTIONS (1976).

[3] *See* R. Michael Alvarez & Thad E. Hall, *Measuring Perceptions of Election Threats: Survey Data from Voters and Elites, in* ELECTION FRAUD: DETECTING AND DETERRING ELECTORAL MANIPULATION 71-88 (R. Michael Alvarez, Thad E. Hall, & Susan D. Hyde eds., 2008).

contributions from corporations and labor unions were unenforced for decades.[4] Nixon, always the pragmatist, could hardly be faulted for breaking regulations that none of his competitors likely bothered to comply with either.

In 1974, in response to public outcry over Nixon's campaign, Congress passed several amendments to the Federal Election Campaign Act of 1972 (FECA).[5] The amendments provided that "no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceeds $1,000."[6] Contributions are direct monetary gifts from a donor to a campaign. The statute also prohibited any "person [from] making any expenditure [relative] to a clearly identified candidate during a calendar year [which] exceeds $1,000."[7] Expenditures are usually, but not always, media ads that support a certain political position and candidates who support that position, without explicitly naming the candidates or coordinating with them.[8]

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[4] The Tillman Act of 1907, 2 U.S.C. § 441b prevented corporations from contributing money to political campaigns and was the first federal law to restrict corporate involvement in the electoral process. The Taft-Hartley Act of 1947, 29 U.S.C. § 401-531 made the contribution ban permanent for labor unions. UC Irvine Law Professor Richard Hasen writes that "disclosure reports were often missing, incomplete, or wrong. Enforcement was so lax that the Justice Department refused to prosecute 20 Nixon fundraising committees that had not filed a single disclosure report during the 1968 presidential campaign, or 107 congressional candidates who also violated disclosure rules." Richard L. Hasen, *The Nine Lives of* Buckley v. Valeo, *in* FIRST AMENDMENT STORIES 345, 349 (Richard W. Garnett & Andrew Koppelman eds., 2012). Some scholars may insist that Nixon's behavior, regardless of what others were doing, was still inexcusable. But in this instance, at least as it pertains to Nixon's fundraising activities, condemnation of the former president's behavior is contingent on whether one believes that unenforced, formal regulations have all the moral force of statutes that are actively enforced.

[5] Federal Election Campaign Act of 1972, Pub. L. No. 93-433.

[6] 2 U.S.C. § 608 (1974).

[7] *Id*. Congress also limited the amount of personal and family funds that candidates could spend on their campaigns (*id.* § 9004), placed an aggregate cap on campaign expenditures for candidates running for federal offices (*id.* § 30104), erected a public financing regime for presidential election campaigns (*id.* § 6096), and established the Federal Election Commission (*id.* § 30106). These provisions will not be examined in this article.

[8] Expenditures that are coordinated in any way with a candidate or her campaign are treated as contributions. *See Federal Election Commission v. Colorado Republican Federal Campaign Committee II* 533 U.S. 431 (2001) (establishing that the First Amendment allows a party's coordinated election expenditures to be treated functionally as contributions). *Cf. Colorado Republican Campaign Committee v. Federal Election Commission* 518 U.S. 604 (1996) (holding that a party's independent expenditures may not be subject to contribution limits applicable to candidates when a candidate has not been nominated). With regard to an electioneering communication's reference to a clearly identified candidate, for quite some time ads that refrained from using magic words such as "vote for," "elect," "support," "cast your ballot for," "vote against," "defeat," or "reject" were deemed permissible. However, the line between ads that "expressly advocated" for a candidate and ads that only advocated on behalf of political

According to former chair of the Senate Subcommittee on Elections and Privileges, Claiborne Pell, the independent expenditure limitation was intended to "create a climate which minimizes the cause of abuse, and...[allows] voters their rights to choose candidates who are not beholden to the large, and so often compromising, political contribution."[9] Expenditure limitations also enhanced the effectiveness of contribution limits by reducing the demand for money amongst candidates[10]and preventing wealthy individuals from using independent ad campaigns to acquire undue influence over public officials.[11]

However in *Buckley v. Valeo* (1976), the Supreme Court invalidated FECA's independent expenditure limit on the grounds that it violated the First Amendment right to freedom of speech. This article argues that the democratic theory underpinning the Court's majority opinion in

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issues was always unclear as evidenced in *Federal Election Commission v. Wisconsin Right to Life* 551 U.S. 449 (2007) (ruling that corporations and unions could seek an as-applied exception from § 201 of the Bipartisan Campaign Reform Act, which prevented corporations and unions from engaging in express advocacy within 30 days of a federal primary election or 60 days of a federal general election).

[9] FEC, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974 193 (1977).

[10] *See* Buckley v. Valeo, 424 U.S. 1 (1976) (White. J., dissenting) (disputing the Court's equation of money with speech and arguing that expenditure limits are necessary in order to ensure that contribution limits are effective). To the extent that the 1974 FECA amendments sought to decrease the role of money in politics, lowering maximum contribution limits but allowing unlimited expenditures would have been counterproductive. This was the case because if campaigners were allowed to spend as much as they wanted to on elections and continued to believed that there was a positive correlation between expenditure levels and winning elections, they would be incentivized to raise the same amount of money they had accumulated before the passage of the FECA amendments. However with smaller maximum contribution limits, the campaigners would have to raise that money among a broader base of supporters, which arguably would have increased the amount of time a candidate devoted to fundraising – a result that presumably, the FECA amendments did not want to achieve. Expenditure limits reinforced the statutory framework by capping the demand for money among campaigns. This point was made by Senator Bill Bradley of New Jersey:

> All interested money in politics is potentially corrupting. Whether it comes from an
> Individual, a PAC or a candidate's own investment, it sometimes comes with strings attached
> And limiting one source will only open up others. Money in politics is like ants in the kitchen.
> You have to close every hole, or they will find a way in.
> Bill Bradley, *Money, Interest Groups are Corrupting Democracy*, THE BALTIMORE SUN, July 21, 1996.

[11] H.R. REP. NO. 93-1239, at 6 (1974). It is still an open question whether independent expenditures are beneficial or harmful to campaigns they seek to support. The consensus answer seems to be that any prospective benefit is limited and might even be counterproductive. *See* Richard L. Berke, *Outside "Help" on Issues Raises G.O.P. Fears of Voter Backlash*, N.Y. TIMES, Mar. 25, 1998. However, even if this is the case, it does not eradicate the prospect of wealthy spenders gaining undue access or influence over public officials. Candidates can often find out who has been spending funds to in order to influence their chances of election and reward these spenders accordingly if they win, or promise access in the event that they win in order to discourage independent expenditures. *See* Cass Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM L. REV. 1396 (1994).

Buckley was flawed and is normatively undesirable compared to a more inclusive communitarian model. This piece then proposes a new framework for evaluating limits on independent expenditures. In particular, it argues that courts should evaluate expenditure limits and ballot regulations under a similar standard because the objectives of the two procedural regulations are analytically indistinguishable.

The Supreme Court's per curiam *Buckley* opinion is riddled with internal contradictions because it prioritized compromise over principled reasoning.[12] The opinion was delivered under severe time constraints in part because the Justices wanted to ensure that federal candidates had a clear picture of which regulations they would be obliged to follow during the upcoming 1976 election season.[13] Of particular interest here was the Court's differential analysis of expenditure and contribution limits under the First Amendment. According to the Justices, contribution limits were constitutional because they only entailed "a marginal restriction on the contributor's ability to engage in free communication" because "contributions… at most [only]…provide[d] a rough index of support for the candidate."[14] A limitation on contributions therefore involved little

[12] The opinion contained 178 footnotes with 5 different opinions attached to the per curiam opinion. The literature criticizing *Buckley* is large and growing. *See* Peter Strauss, *Corruption, Equality, and Campaign Finance*, 94 COLUM L. REV. 1369 (1994), J. Skelly Wright, *Politics and the Constitution: Is Money Speech*, 85 YALE L.J. 1001 (1976), Daniel Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, SUP. CT. REV. 1-43 (1976), Cass Sunstein, *Free Speech Now*, U. CHI. L. REV. 255 (1992), *and* Ronald Dworkin, *The Curse of American Politics*, 16 N.Y. REV. OF BOOKS 45, 19-24 (1996).

[13] The FECA's swift passage to the nation's highest tribunal was no accident. During the Senate's debate on the FECA amendments, Senator James Buckley of New York introduced an amendment to provide for expedited review of the statute, which would allow a prospective challenger to file a lawsuit in U.S. District Court for the District of Columbia. The D.C. court would then certify constitutional questions for an en banc hearing before the United States Court of Appeals for the District of Columbia Circuit with appeal to the U.S. Supreme Court also being provided. During debate Senator Buckley said:

> [It] is a modification that I am sure will prove acceptable to the managers of the bill. It merely provides for the expeditious review of the constitutional questions I have raised. I am sure we will all agree that if, in fact, there is a serious question as to the constitutionality of this legislation, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time.
>
> 120 Cong. Rec. 10562 (1974).

[14] 424 U.S. at 29-30.

restraint on political communication and was closely drawn to serve the state's compelling interest in preventing quid pro quo corruption or the appearance of corruption.[15]

On the other hand, the Court viewed expenditure limits as categorically different from contribution restrictions because a "restriction on how much a person or group can spend on political communication during a campaign reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[16] Consequently, the $1,000 spending limit excluded all citizens except candidates and political parties from the most effective means of mass telecommunication.[17] After taking notice of this fact, the Court concluded that the expenditure limitations would have to pass strict scrutiny, or be narrowly tailored to serve a compelling government interest, in order to be held constitutional. Because strict scrutiny is perhaps the most rigorous standard of review a court trying constitutional issues can employ, the chance that the Justices would uphold the expenditure limits were slim from the outset.[18]

The Court refused to accept the argument that expenditure limits were appropriately tailored to prevent corruption or the appearance of corruption for two reasons. First, the Justices argued that spenders could dodge the limit as long as they did not explicitly urge the election or defeat of a candidate in their message. Second insofar as candidates were the only entities the FECA sought to protect from corruption, independent expenditures could not corrupt them because independent expenditures by definition could not be coordinated with a candidate This

[15] *Id.* at 31.
[16] *Id.* at 29.
[17] This sentence was accompanied by a footnote that said: "being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.* at 120.
[18] Giving credence to the popular idiom that strict scrutiny is strict in theory, but fatal in fact. *See* Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 3 (1972).

was the case because political campaigns do not receive independent expenditures and have no control over how they are spent.

The Justices then turned to another potential rationale for the limits: equalizing speaking power among individuals and groups. They famously declared that "the concept that the government may restrict the speech of some [in] society in order to enhance the relative voice of others is wholly foreign to the First Amendment" and struck down the expenditure limitations.[19]

Countless commentators have lambasted *Buckley*'s equating money with speech as absolutely antithetical to any reasonable notion of democracy.[20] But, I contend that this portrayal is superficial. *Buckley* can in fact be read as consistent with democracy albeit only a certain type: pluralist or/public choice democracy.[21]

Pluralist and public choice democrats are pragmatists in so far as they recognize the limits of the citizen's ability to register her opinions with her seemingly distant government.[22] Voters may have a tough time communicating with decision-makers, may not be well-informed, and can be easily influenced by slanted information.[23] In order to overcome these barriers, pluralists believe that the populace mobilizes and fragments into different interest groups based on salient identities or preferences that precede and are unaltered by debate during and after election season. This phenomenon, in turn, gives rise to more organizations. For example, dairy milk farmers may collectively organize and apply pressure on the government for preferential subsidies. In response, soy milk producers may organize and lobby the government to protect

[19] 424 U.S. at 37. *See also McCutcheon v. Federal Election Commission* 134 S.Ct. 1434 (2014).
[20] *See, e.g.*, Phillip Elliot, *Former Supreme Court Justice John Paul Stevens: Money is not Speech*, HUFF. POST, April 30, 2014, David Kaiys, *Money Isn't Speech and Corporations Aren't People*, SLATE, January 22, 2010, Peter Overby, *Hillary Clinton Supports Amendment to Get Hidden Money Out of Politics*, WBGH NEWS, Apr. 18, 2015, *and* Newton N. Minow, *Spending is not Free Speech*, WASH. POST, Feb. 16, 2000.
[21] Pam Karlan & Samuel Issacharoff, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L.REV. 1723 (1999).
[22] *See* WALTER LIPPMANN, PUBLIC OPINION (1949); *see also* DAVID TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION (1951).
[23] *See* LIPPMANN, *supra* note 22; *see also* TRUMAN, *supra* note 22.

their interests. Since the pluralist model assumes that no one group has enough power to control the governing process and can only hold onto the reins of power for as long as it can retain a coalition of supportive factions, control of the government constantly switches between parties composed of different groups.[24] Hence under the pluralist model, the political system exists in order to facilitate the aggregation of pre-existing desires and enable voters to obtain government benefits or prevent government action in accordance with those desires. To this end, *Buckley*'s accordance of First Amendment protection to political money allows these relatively equal groups to speak/spend as much as they want without fear of reprisal.[25] If one accepts pluralism, *Buckley* is a refreshing reinforcement. However, if pluralist democracy is found to be unacceptable, *Buckley* is no longer a palatable decision.

As a purely descriptive matter, pluralist democrats and cynical public choice theorists may be correct in arguing that their democratic theory closely resembles how the national government functions currently.[26] But even if we were to concede this point, it has no bearing on whether such a system is ideal or even permissible when compared to other alternatives. Indeed, the pluralist model is deficient from both a procedural and substantive perspective.

Practically speaking, procedural integrity during elections is requirement of representative democracy. If one believes that representative democracy has a legitimate claim

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[24] *See* MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 135 (1911).

[25] When a state regulation appears to be motivated out of a desire to regulate speech because of its content or the viewpoint it professes, courts presume that the regulation violates the First Amendment and apply strict scrutiny. *See Texas v. Johnson* 491 U.S. 397 (1989) (invalidating a ban on flag burning that was under-inclusive because the regulation sought to ban the communication of anti-government sentiment); *see also Consolidated Edison Corporation v. Public Service Commission* 447 U.S. 530 (1980) (commenting that content based regulations of speech can only be sustained on challenge, if the law is a precisely drawn means of serving a compelling state interest) *and R.A.V. v. City of St. Paul* 505 U.S. 377 (1992) (establishing that the state may not regulate unprotected forms of hate speech by favoring one viewpoint over another). Compare this approach to state regulations of speech which are found to be motivated by interests other than the suppression of ideas. *See United States v. O'Brien* 391 U.S. 367 (1968) (upholding a ban on the burning of draft cards as a state effort to ensure the efficiency of the draft rather than a prohibition on the expression of anti-war sentiments) *and Kovacs v. Cooper* 366 U.S. 77 (1949) (upholding an ordinance preventing the use of sound trucks in streets as a time, place, and manner restriction).

[26] See RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 354-355 (1990).

over other forms of government because it is founded on and makes regular recourse to popular sovereignty then, the elections that allow the government to consult its raison d'être ought not unjustly discriminate between who may and may not participate.[27] For our purposes, the justness of exclusion is determined by whether an electoral procedure forecloses the participation of a group because the group possesses a trait that bears no relevance towards intelligent exercise of the ballot. For instance, *ceteris paribus*, the state may prevent the mentally ill from voting but may not disenfranchise the poor. This conclusion is sound for two reasons. First, in law and fact every citizen ought to have an equal claim on their government irrespective of race, religion, gender, or wealth (henceforth referred to as the *non-discrimination* principle).[28] Second, the government in question loses legitimacy in the eyes of its citizens if voter turnout and civic engagement levels are lowered by unjust exclusion (henceforth referred to as the *legitimacy* principle).[29] Low levels of voter turnout and civic engagement are harmful because they encourage apathetic behavior among the citizenry during election season, a time when the exact

[27] *See* Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, U. CHI. LEGAL F. (1995); *see also* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 47 (1689).

[28] The Supreme Court's 14th amendment equal protection jurisprudence shows a deep commitment to the non-discrimination principle. *See Korematsu v. United States* 323 U.S. 241 (1944) (establishing for the first time that government distinctions on the basis of race will be subject to strict scrutiny), *Brown v. Board of Education I* 347 U.S. 483 (1954) (overturning the separate but equal doctrine in public education), *United Jewish Organizations of Williamsburg v. Carey* 430 U.S. 144 (1977) (ruling that state consideration of race in the context of redistricting immediately after the Civil Rights Movement was not invidious and thus warranted rational basis review as opposed to strict scrutiny), *Adarand Constructors Incorporated v. Peña* 515 U.S. 200 (1995) (establishing that all race based distinctions by the state are invidious and will be subject to strict scrutiny), *Church of the Lukumi Babalu Aye v. City of Hialeah* 508 U.S. 520 (1993) (holding that an ordinance preventing the religiously-mandated ritual sacrifice of animals violated the free exercise clause of the First Amendment), *Sherbert v. Verner* 374 U.S. 398 (1963) (establishing that termination of public employment for reasons that conflicted with the employee's religion were to be subject to strict scrutiny), *Reed v. Reed* 404 U.S. 71 (1971) (ruling that a state probate statute that gave preference to men over women in the administration of estates violated the 14th amendment's equal protection clause), *Craig v. Boren* 429 U.S. 190 (1976) (establishing that state regulations discriminating on the basis of gender would be subject to intermediate scrutiny), *and Harper v. Virginia State Board of Elections* 383 U.S. 663 (1966) (striking down a state poll tax as a violation of the 14th amendment's equal protection clause).

[29] *See Grutter v. Bollinger* 539 U.S. 306 (2003) (upholding the University of Michigan Law School's affirmative action program in part on the grounds that a failure to integrate leadership positions in American society would stir racial unrest and further inhibit the arrival of a color-blind society).

opposite demeanor is required, and have the potential to impair the government's ability to function.

Just electoral procedure is not the only prerequisite for a government hoping to fall under the democratic label. A state that grants universal suffrage and ensures equal opportunity to participate in the political process would still be seen as deficient to most if it silenced political dissidents, segregated on the basis of race, or subordinated half the population based on gender.[30] It follows that substantive rights are just as important as procedure. At a minimum, governmental outcomes in a democracy must respect the individual dignity of all because the right to participate is meaningless if the individual autonomy and self-development it promotes are made contingent on the governing majority's whim (henceforth referred to as the *rights* principle).[31] From this perspective, the principle of procedural due process in elections also has a substantive element because voter apathy, in tandem with collective action dilemmas, can prevent the enactment of policies that a majority of citizens would support.[32] If we are willing to say that citizens would benefit not only from participating in enacting policies they support, but also from reaping their benefits as well, and that they have a right to engage in these activities, then the polity has suffered a substantive harm when its will is frustrated because of a governmental framework that promotes this discrepancy.

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[30] One need only observe the consensus in modern legal academia on such cases as *Prigg v. Pennsylvania* 41 U.S. 539 (1842) (holding that slave-owners have a common law right of recapture for reclaiming runaway slaves), *Dred Scott v. Sandford* 60 U.S. 393, *and Bradwell v. State* 83 U.S. 130 (denying that the 14th amendment's privileges and immunities clause conferred any rights upon women and remarking in dicta that the law of the creator required that women remain in the home). *See, e.g.*, Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, SUP. CT. HISTORY 247-294 (1994), Christopher Eisgruber, *The Story of Dred Scott: Originalism's Forgotten Past*, CONSTITUTIONAL LAW STORIES 155-186 (1993), *and* CATHERINE MACKINNON, SEX EQUALITY (2001).

[31] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980), Martin Redish, *The Value of Free Speech*, 130 U. PA. L.REV. (1974), *and* Edwin Baker, *Scope of First Amendment Freedom of Speech*, 25 UCLA L.REV. 964 (1978).

[32] *See* RUSSELL HARDIN, COLLECTIVE ACTION (1982).

This suggests the failings of pluralist/public choice democracy. Pluralism fails on all three counts established above. One must first consider the *non-discrimination* principle. While pluralists argue that there is no de jure framework in place to deny racial minorities, members of persecuted religious groups, women, or the poor the right to vote and participate in elections, they are wrong to assume that all people have equal political power. Pluralism assumes that every group has equal financial ability to organize and assert their interests in the marketplace of ideas by taking out political ads. Many members of marginalized groups do not have enough disposable income to engage in pluralist politics; in fact they may not even know that there are others out there who feel as oppressed and rejected as they do.[33] In truth, the flaw with the pluralist heaven is that the chorus sings with a strong upper class accent. If the voter is unable to effectively communicate her perspectives on these issues or influence the choices on the ballot simply because her pocketbook is empty then, the right to vote is meaningless. *Buckley*, in its majestic equality, allows the rich as well as the poor to spend millions on ads and take over TV stations.[34]

Pluralism does not fare any better when we turn to the *legitimacy* and *rights* principles. I examine these two together because a violation of the *legitimacy* principle is sufficient to prove a violation of the *rights* principle as well. Pluralists may say that one would be hard-pressed to come up with an empirical study proving that the current campaign finance regime is a major cause of voter apathy. But in a nation with an electorate of over 300 million individuals, where voters already believe that their one vote will not make a difference, is it unreasonable to presume that an electoral system favoring the wealthy will further discourage lower and middle

[33] *See* ELMER SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE (1960); *see also* JOHN GAVENTA, POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY (1980).

[34] This line is a play on a famous quote from the French poet, Anatole France. France declared that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." ANATOLE FRANCE, THE RED LILY 91 (1894).

class citizens from participating in the electoral process?[35] Skepticism towards the apathy argument should be a result of its novelty and plausibility – and it is certainly not unprecedented that "the greatest menace to political freedom is an inert people" pummeled into submission by "the baneful influence of exorbitant wealth."[36] This should give unelected jurists more reason to defer to, rather than scrutinize, campaign finance regulations. Thus, we return to square one. If pluralist/public choice democracy cannot provide an intellectual framework for evaluating the propriety of campaign finance reform, what theory can?

I contend that a communitarian model can provide the democratic foundation we seek. In contrast to pluralism, a communitarian theory of democracy, presumes that political preferences are not immutable but, can change through deliberation on what the public good, whatever that may mean, requires.[37] In the words of Stanford Law professor Pam Karlan, the purpose of politics in a communitarian democracy "is as much about creating preferences as it is about satisfying them."[38] This small but important shift in premise yields implications that bring communitarian democracy into greater conformity with the *non-discrimination*, *legitimacy*, and *rights* principles.

Deliberation is essential for a communitarian democracy. Because the quality of deliberation is improved by the inclusion of many different perspectives in the polity, communitarian democracy dictates that the state take affirmative steps to remove structural

[35] *See* J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality*, 82 COLUM. L.REV. 625 (1982).
[36] Whitney v. California 274 U.S. 357 (1927) (Brandeis, J., concurring) (upholding a conviction under a state criminal syndicalism statute but adding more girth to the incitement test); *see also* Nixon v. Shrink Missouri Government Political Action Committee 528 U.S. 377 (2000) (remaking that the amount of empirical evidence need to satisfy heighted scrutiny varies with the novelty and plausibility of the professed government reason).
[37] *See* JOHN RAWLS, A THEORY OF JUSTICE (1971) *and* Owen Fiss, *Money and Politics*, 97 COLUM. L.REV. 2479 (1997).
[38] *Supra* note 21, at 15.

impediments preventing disadvantaged groups from advancing their views.[39] This requirement accommodates the *non-discrimination* principle. It also implies that regulations (or an absence thereof) permitting some groups to drown out or dilute the message of others, who are unable to organize because they lack an arbitrary or irrelevant characteristic, are to be disfavored. In turn, increased inclusion in the deliberative process, in tandem with other state efforts, is likely to increase civic participation and improve perceptions of the governing regime's procedural *legitimacy* among all groups, not just the well-off.[40] Finally, when voter apathy and collective action impediments are combatted to the fullest extent possible, a state is less likely to suffer a substantive harm in the form of a policy outcome that would not have resulted had the entire citizenry been properly incentivized to speak up during the electoral process.[41] Hence, the political *rights* of the populace are protected. Skeptics may reply that no practical implementation of the communitarian theory can omit all subtle devices working to discriminate against certain groups, cast doubt on the government's legitimacy, or prevent the full exercise of political liberty.[42] This much is true but, half a loaf is preferable to none at all. It follows that *Buckley* was wrong as a matter of principle. Therefore, one must examine how a communitarian democratic theory can inform and restructure our understanding of the problems at issue in *Buckley*.

If we adopt a communitarian lens, the $1000 cap on expenditures at issue in *Buckley* is best understood not as a restriction on speech but instead, as a procedural regulation designed to ensure fair elections. There are several reasons why this categorization is suitable. First, restricting the amount of money a private citizen may spend independently on a campaign does

[39] *See* JAMES FISHKIN, THE VOICE OF THE PEOPLE (1997).
[40] *See* HARDIN, *supra* note 32.
[41] SCHATTSCHNEIDER, *supra* note 33; GAVENTA, *supra* note 33.
[42] *See, e.g.*, Lillian BeVier, *Campaign Finance Reform, Specious Arguments, Intractable Dilemmas*, 94 COLUM. L.REV. 1258 (1994).

not place a blanket ban on political speech or censure a given viewpoint. To the contrary, the cap only forces wealthy spenders to engage in different kinds of speech that may be more conducive to deliberation such as volunteer canvassing. A sincere face to face conversation about a political issue is likely to promote the discovery of truth and the intellectual development of the citizenry in a way that a thirty second ad never could.[43] The alternative modes of communication promoted by this regulation also 'levels the playing field' among speakers because, unlike money, time and effort are resources that are more readily available to the less fortunate. Cynics may retort that this view is flawed because an expenditure cap disproportionately disadvantages conservative advocacy and stifles the discovery of the truth because money is essential for waging effective campaigns. As an empirical matter, the first objection is dubious because the political opinions of elite donors are not homogenous – indeed, the interests of the wealthy differ in many important ways such that a restriction on their ability to spend, even if it does disproportionately affect this class, is not a pretext for censuring conservative or liberal ideas.[44] The second objection, that money is needed in campaigns, betrays a fundamental misconception that has obscured a true understanding of what was at stake in *Buckley*. Regardless of how broadly one reads the First Amendment, almost all parties agree that spending money is an action that is analytically distinguishable from speech. There are some instances where money can advance expression and there are others where it does not. For our purposes, money is only significant insofar as it is a vehicle for speech. But as established above, it is not the only way to disseminate information about candidates. Moreover, to the extent that money is the only viable means of transmitting electoral expression currently, this unfortunate status quo is a function of the political system's failure to limit demand for the commodity. Expenditure limits were

[43] Dworkin, *supra* note 12.
[44] *See* Shaila Dewan and Robert Gebeloff, *Among the Wealthiest 1%, Many Variations*, N.Y. TIMES, Jan. 14, 2012.

designed to correct this. In short, if one limits the amount candidates and private citizens may spend, large independent expenditures quickly lose their preferred position. Hence, the second objection is circular. All that remains is to devise a new legal framework for evaluating campaign finance limits.

There is a great deal of similarity between ballot regulations and political money. Both regulations arise in the context of elections, implicate countervailing First Amendment rights, and are justified by the compelling state interest in maintaining order during elections and ensuring procedural fairness. In the same way that one may not use the ballot as a soapbox to overwhelm voters with repetitive and slanted messages in order to prevent them from exercising a discriminate choice, public deliberation requires a measure of streamlined equity to ensure that ideas are evaluated on their merits, rather than on how forceful their advocates are.[45] Communitarian democracy requires electoral speech to facilitate deliberation, and supports the idea that the real purpose of the "First Amendment…is not to guard…unregulated talkativeness. [The provision] does not mean that on every occasion every citizen shall speak in the public debate, but it does mean that everything worth saying shall be said."[46] To be clear, I am not advocating that the government make content based decisions or censure electoral speech. Rather. I contend that the constitution permits the government to foster deliberation among all its citizens by ensuring that economic inequality does not bleed into the political sphere. If one believes that the discovery of truth is better promoted by communitarian deliberation instead of non-representative interest groups with static policy stances, an interpretation of the First Amendment that does not balance the right of the polity to deliberate against expenditure rights is incorrect. Hence, courts should evaluate expenditure limits with the same balancing test that

[45] FISHKIN, *supra* note 39.
[46] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

they use when reviewing ballot regulations. A jurist first asks whether the limit unduly burdens pure speech while also taking the pro-deliberative rationale into account. If the limit is burdensome, it must be narrowly tailored to serve a compelling government interest. If the limit is not burdensome, it only needs to be rationally related to a legitimate government purpose in order to be upheld. This approach is preferable because it takes reasons of state into account in the inquiry and forces judges to be realists when evaluating laws that touch the heart of a democracy's ability to function. In this particular instance, if justice is to be done, circumstances must be reckoned with.

Free Speech, the Citizen, and the State:
A More Comprehensive Model of National Security

By Christopher Putney

The relationship between freedom of speech (as articulated in the First Amendment of the U.S. Constitution) and the national security interests of the United States has historically been a controversial one.[1] An account of the tension that characterizes this relationship is incomplete without taking into consideration the relevant developments and factors that have come to define our understanding of these First Amendment liberties central to American liberalism.[2] I will initially specify the ways in which the terms "free speech" and "national security" are used and provide context for this tension, legally and politically speaking. I will then identify institutional and historical factors relevant to First Amendment issues in order to formulate what I term "national security as citizen-safety," a more comprehensive legal-political doctrine which serves as an alternative to the present competing approaches dominating American national security discourse.

Typically, the phrase "free speech" evokes notions of the liberties articulated in the U.S. Constitution's First Amendment, and refers to an individual citizen's right to publish, speak, associate, peaceably assemble, etc. *without* state interference.[3] Despite household notions of

[1] *See* U.S. CONST. amend. I, § 2; *see also* Geoffrey R. Stone, *Free Speech and National Security,* UNIVERSITY OF CHICAGO LAW SCHOOL: CHICAGO UNBOUND *84*, 939 (2009), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2975&context=journal_articles.

[2] "Liberalism" here, refers to the broadly construed political and philosophic doctrine championed by the architects of the U.S. Constitution, and the Enlightenment philosophers they so closely drew from in their political activities. It is not to be confused with the term's common use today, in describing a vague collection of Progressive political views. We can roughly describe this particularly *American* notion of liberalism as I use it here in the following way: liberalism is the deeply rooted principles of individual liberty enumerated in the Bill of Rights, and the broader intellectual/cultural heritage the European Enlightenment thinkers (among others) provided the Founders with. This characterization as I use it, is unique to the United States culturally and historically—the liberal tradition broadly speaking of course, is not.

[3] *See* U.S. CONST. amend. I, § 2; *see also* MURRAY DRY, THE ANTI-FEDERALISTS: AN ABRIDGEMENT (Herbert Storing eds., University of Chicago 1985).

largely uninhibited freedom from state interference in relation to our participation in speech acts (whether verbal or nonverbal), the Supreme Court's position on the issue is ultimately complex and needs serious examination considering its implications for national security. Freedom of speech is not an absolute right in the United States and in most other democratic nations around the world. I hope to indicate how the commonplace notion of the American citizen's freedom of speech concerning national security interests rarely captures the deep complexity of the relevant issues.

It must be assumed that any national security policy implemented by state actors, regardless of their governmental position, would also hold significant consequences for American foreign policy as well. Not only must we recognize the very nuanced, complex diplomatic spheres of activity as they affect national security, but we must also see how the concerns of both American foreign policy and national security are deeply entwined.[4] Broadly speaking, the significance of the relationship between U.S. foreign policy and national security can be partially explained by the federal government's indispensable role in national security today. Simply by virtue of the United States' geographical size and corresponding military power, especially after the Second World War, its dominant role in world affairs has fashioned a federal government significantly more concerned with national security. Born of these concerns, both the President and Congress utilize a technologically and institutionally complex operational apparatus beyond the scope of most experts' total comprehension.[5]

In order to distill an accurate perspective on free speech in a national security context, the "speech" discussed here is limited mainly to communication that is specifically critical of any

[4] *See* OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, http://www.dni.gov/index.php/about/mission (last visited May, 2015).
[5] *Id.* (diagram describing the organizational breakdown of membership agencies within the Office of the Director of National Intelligence).

action or inaction by the many departments, offices, and governmental actors (whether appointed or elected) constituting the three branches of the federal government of United States, though most state actors and national security related institutional operations fall under the administration of the executive branch or Congress. Citizens participating in speech that meets this "critical" qualifier, and that disseminates (whether legally or not) information considered by state actors to be sensitive to national security interests, is typically the most sensationalized and can be the most suitable for judicial review.[6] I use the terms "free speech," "critical speech," and "speech" to refer to this specific type of state-critical communication characterized by its exercise on First Amendment grounds. State-critical speech has a rich political, social, cultural, and jurisprudential background in America and has been held by many throughout history to be of fundamental importance to the proper functioning of a liberal democratic regime.[7]

The concept of national security — especially its relationship with contemporary civil liberties — must also be considered in light of the position America occupies in a global geopolitical context (for instance, all of the diplomatic, military, and foreign policy-related factors within this context). The often broadly construed concept of national security must be understood to include important economic, political, and military elements. This is the case insofar as all of these factors help contribute to the stability of the U.S. in its foreign and domestic affairs. Generally speaking, the United States is nationally "secure" when its government's many resources and activities allow for the proper execution of duties and far-reaching administrative-regulatory tasks generated and assigned to it, by the Constitution. Domestically, the task of governing (broadly construed to include the constitutionally mandated

[6] *See* Wikimedia Foundation v. National Security Agency, No. 1-15 (D. Md. filed Oct. 23, 2015) (for an apt illustration of this sensationalism).

[7] *See* Whitney v. California, 274 U.S. 357 (1927) (Justice Brandeis, dissenting) (for a summation of the Court's philosophic support of speech protection broadly understood).

domestic operations of the various branches) can be seen clearly in the activities of the U.S. Congress and the executive. However, with respect to foreign policy many of the activities today rely on the executive almost exclusively, both as Commander-in-chief of the U.S. military and as the primary representative to foreign nations.[8] At its core, national security as citizen-safety describes the role of the federal government as a mechanism for the many societal ends sought by citizens, including *both* the protection of civil liberties and effective national security efforts. This broad conception of the state's role in comprehending what are at times conflicting imperatives, is largely actualized by the domestic administrative-regulatory framework roughly summarized above.

National security as citizen-safety is an attempt to provide a more comprehensive national security doctrine by adding a collection of domestic legal-political requirements to the security imperatives of the state. These imperatives are conceptually simple but complicated in their application. A more compressive legal-political understanding of national security is beneficial to citizens individually and collectively, in that the robust nature of the American national security apparatus and its activities has the potential to diminish the legitimacy and strength of critical speech exercised on First Amendment grounds.

As an alternative to other models of national security, national security as citizen-safety seems viable because of its ability to effectively address and mitigate the tension identified between critical speech, and oft-cited "national security interest" claims by the state. It possesses a more comprehensive formulation of national security with a quantifiable aspect and a more abstract element. This perspective describes the interest the state and citizens have in the preservation of their own survival in terms of personal safety and protection from domestic/foreign military or quasi-military forces (armed forces and mobs). Concretely, this

[8] THE FEDERALIST NO. 70 (Alexander Hamilton) (for administrative and admittedly unitary role of the President).

somewhat obvious aspect of government's fundamental role must be included in our understanding of the nation's security in order for both the state and its citizens to be properly secured. This theory requires that in their physical environments, persons will be protected from bodily harm or injury.[9] Local and state law enforcement officials, emergency response personnel, as well as the branches of the U.S. military can be tasked with these basic and quantifiable security requirements.

The protection of certain fundamental civil rights guaranteed to citizens by the Constitution (e.g. freedom of critical speech) is included in this view of national security as the more abstract element. This aspect concerns the conflicting interests of the state as well as speech that criticizes the state, or simply the citizen's participation in said speech. In this view, citizens are "safe" from encroachments on their civil/political rights, and threats to physical harm from both state and non-state actors. Such a view, with its more comprehensive formulation concerning state-critical speech, both expands certain aspects of our government's role, and simultaneously limits others. Federal agencies including, but not limited to, the Department of Justice, the Department of Defense, the CIA, the FBI and the Department of Homeland Security, make up central components of our national efforts to keep the United States secure in terms of citizens' protection from physical harm (and in addition to these governmental bodies' national security-related activities, one must also consider that the branches of the U.S. military are all under the direction of the executive *at all times).* This comprehensive principle underlying national security as citizen-safety's aims would have a significantly more complicated applied meaning, depending on the activities of the citizen (or groups of citizens). If the principle of comprehensiveness is upheld by state-actors, then until the consequences of a citizen's actions

[9] *See* THOMAS HOBBES, LEVIATHAN (Edwin Curley ed., Hackett Publishing 1994) (1668) (for a succinct and influential treatment of this type of civil violence and strife).

somehow surpass a quantifiable threshold of likely harm (to be determined by law), their free capacity for exercise of critical speech must be protected as a legal entitlement.[10] For a liberal democratic nation like the U.S. to truly be secure, citizens must be protected from and by their government, whether a given enemy is domestic or foreign, military or nonmilitary, legally empowered or otherwise.

Regarding our understanding of critical speech, the state must be protected if our security interests are to remain intact and comprehensive. The inevitable tension between a government's ability to protect its citizens and civil liberties like freedom of speech critical of these efforts is rarely questioned. The controversy seems to arise as citizens' claims to free speech become diametrically opposed or even framed by legislators and other citizens as being mutually exclusive.

The U.S. Supreme Court has adopted a number of jurisprudential perspectives on free speech and national security over its history. Elements in key cases have helped shape the imperatives to both protect and at times curtail speech in the name of national security interests.[11] The Court's history of relevant rulings has contributed to what I term the "wartime perspective" regarding the relationship between national security and free speech, and it remains a frequently cited account of the controversy today. This perspective is general, but also simple enough that one can identify it by any effort (in theory or practice, usually on the part of the Court or other state actors) to mitigate tension between critical speech and security interests. This effort usually takes the form of a wartime-peacetime test. It does not attain the same level of comprehensiveness as the formulation of national security as citizen-safety, because it fails to

[10] *See* U.S. CONST. pmbl. (for use of phrases like, "domestic Tranquility", "common defence", and "general Welfare").

[11] *See* Patterson v. Colorado, 205 U.S. 454 (1907), Schenck v. United States, 249 U.S. 47 (1919), Gitlow v. New York, 268 U.S. 652 (1925) and Brandenburg v. Ohio, 395 U.S. 444 (1969).

ask more than one question respecting conflicting interests: Was the Nation at war when the speech took place?[12]

The wartime perspective seems absolute, but certainly not comprehensive in its power to assess the First Amendment rights of citizens in the face of national security concerns. Insofar as it fundamentally associates the security of the Nation during wartime (however ambiguously defined "security" might be), with a sort of knee-jerk intolerance of critical speech based in fear, something central to our liberal political tradition seems lacking in its test's speech restriction doctrine. The wartime perspective's test is also incomplete because the only factor taken into consideration, aside from how the critical speech is categorized, is quite simply whether or not the nation was at war during the time of its utterance. This scenario is also true in reverse, seeing as how speech critical of the state during peacetime is thought to be *less* dangerous to our national security, and consequently easier for the state to protect usually by way of the Court's First Amendment proponents.[13] There are many historical examples of this rationale being invoked by state actors, many of which demonstrate its eventual failure as a mechanism for balancing the conflicting interests effectively.

Prior to many of the significant cases heard by the Supreme Court in the last two centuries there were the Alien and Sedition Acts of 1798 and the Espionage Act of 1917 during

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[12] This importantly simple version of the sentiment behind the wartime perspective unavoidably precipitates the paradox of governmental restriction of speech that in one manner or another is construed as, or literally does, put the nation "at risk" during a war. The perspective's test-question seems to grapple with not only whether the speech inhibited certain military aims or strategies in actuality (or risked doing so), or whether the speech's critical nature simply weakened (or risked weakening) support for the war effort, but very broadly whether or not simply by virtue of being at war, the national security interests of the moment demand special limitations or restrictive inclinations respecting First Amendment speech.

[13] *See* Cohen v. California, 403 U.S. 15 (1971) and Texas v. Johnson, 491 U.S. 397 (1989) (for examples of speech during wartime *and* peacetime that were explicitly state-critical, yet upheld by the Court. *Cohen* offers insight into anti-war speech being punished and inhibited by state actors by virtue of its likelihood to "disturb the peace," as well as the Court's role in reversing state decisions in favor of speech protection. Importantly, Paul Cohen's wartime exercise of critical speech was not the kind divulging classified information. In *Texas v. Johnson,* explicit (though non-verbal/non-written) critical speech was challenged and protected again, demonstrating the Court's important role of peacetime speech.)

the Adams and Wilson administrations respectively.[14] Both of these laws contained provisions designed to restrict speech that would interfere with national military efforts abroad (i.e., the Quasi-war with France and World War I), though the language of the laws intentionally targeted citizens' domestic activities relating to anti-state sentiment.[15] These speech activities ranged from open criticism of the Adams administration in the press, to other published criticisms of the Wilson administration from the beginning of the Great War onward. Both laws were used by authorities to prosecute and convict offenders in courts all over the country, importantly on national security grounds.[16]

Another and perhaps more infamous example of the state's exercise of power to restrict First Amendment rights is the suspension of the writ of habeas corpus by President Abraham Lincoln on numerous occasions during the American Civil War. The most memorable instance was in September of 1862 when the President declared martial law to prevent and prosecute any disloyal practice that could inhibit the war effort.[17] These early cases demonstrate that the executive and judicial branches of the government have under historical, political, and military pressures sought to restrict speech on national security grounds in adherence to a narrower, non-comprehensive conception of national security. No doubt, defenders of state speech restriction would use the wartime perspective to justify their actions in these situations. Doing so sacrifices the more fundamental, abstract, rights-oriented national security interests of citizens, articulated in the citizen-safety view. Though there are circumstances that warrant the prohibition of critical speech that could cause severe harm to national interests (at home and abroad), the more central

[14] *See* Geoffrey R. Stone, *Free Speech and National Security*, UNIVERSITY OF CHICAGO LAW SCHOOL: CHICAGO UNBOUND *84*, 939 (2009), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2975&context=journal_articles.
[15] *Id.*
[16] *Id.*
[17] *Id.*

question seems to be how frequently these circumstances arise and to what extent they truly compel speech restriction on national security grounds.

Taking into account that the U.S. has been officially or unofficially engaged in military conflict (at home and abroad) in every century since its inception makes the relationship between speech restriction and national security a dubious one. Additionally, many classified endeavors that the executive branch helps orchestrate can be said to contain the same "sensitive" foreign policy, intelligence-gathering, diplomatic, and defense-related details during official peacetime, as during war. The historical instances of speech restriction I've mentioned are surely *not* exceptions to the rule—especially considering the long history of military engagements that could, at least in theory, warrant the wartime perspective's invocation. The national security apparatus' sheer size as well as its unceasing operation and capabilities transcend any war's lifespan, even if national security operations do somehow increase or change the demands for speech restriction during war. The institutional-governmental activities that characterize our national security apparatus during wartime cannot be so distinct from peacetime operations (if they're distinguishable at all), as to legally restrict critical speech fundamental to the liberal legal-political tradition that gave rise to the very governmental framework performing the restrictions. The logic underlying the wartime perspective's test, and other similar formulations of the tension between speech and security say otherwise. The wartime view misunderstands (or at least misrepresents) the very nature of the U.S. government's contemporary security-related activities, as well as the implications for the test's ability to protect speech. The popular justification that national security *threats* have developed in such a way that national security imperatives now demand this type of constant, virtually unrelenting operation is not a sufficient explanation for the problematic conclusion the view produces. For if the government's many

security-related functions are dynamic, ongoing, and preventative in their national security motivations, and they do not simply cease or lessen when a war ends, then the test's vague standard for restricting speech becomes inapplicable. The wartime view accepts this contemporary picture of the federal government's virtually unceasing national security operations, without acknowledging that its standard for speech restriction dependent on the nation's "wartime" status is in practice no standard at all.

Though not all First Amendment cases have contained instances of speech critical of the state, a few key twentieth-century cases are vital to the Court's contemporary understanding of the First Amendment as it relates to national security. This "result" in the judicial sense of the word, I understand to be a specifically *doctrinal* one. In other words, the legal-political doctrine characteristic of the wartime perspective has been supported by and is perhaps even a direct result of certain Supreme Court rulings.[18] In the 1907 landmark case *Patterson v. Colorado*, the "bad tendency principle" was adopted, marking a new classification of speech restriction.[19] Generally speaking, we can rule out this case as one involving anti-war speech or speech that divulged any information considered by state actors to be detrimental to national security interests. Its significance is found in the legal test it created and utilized for the decision. The notion of "bad tendency" articulated in the Court's holding essentially claims that speech can be restricted on the basis of its tendency to "incite" or cause "illegal" actions.[20] Ten years after *Patterson*, (during World War I) the Espionage Act was passed by Congress, and three years after it took effect, the Supreme Court heard the resulting landmark case: *Schenck v. United States*.[21]

[18] *See* Cohen v. California, 403 U.S. 15 (1971) and Texas v. Johnson, 491 U.S. 397 (1989).
[19] Patterson v. Colorado, 205 U.S. 454 (1907).
[20] Patterson v. Colorado, 205 U.S. 454 (1907).
[21] *See* Schenck v. United States, 249 U.S. 47 (1919).

Schenck is a significant case in the legal history of First Amendment rulings because it established the important "clear and present danger" principle—a doctrine that further developed the Court's position on free speech.[22] Simply put, the Court's reasoning allowed the government to restrict speech otherwise protected on First Amendment grounds if, as Holmes stated, "[the] words used are used in such circumstances and are of such a nature as to create a clear and present danger."[23] Justice Holmes articulated the rationale behind the wartime perspective arguing explicitly that, "When a nation is at war, many things that might be said in time[s] of peace are such a hindrance to its effort that their utterance will not be […] protected by any constitutional right."[24] This doctrinal trend continued eight months later with the case *Abrams v. United States*, wherein a Russian immigrant was convicted for distributing written, pro-revolutionary literature advocating socialist-anarchist views.[25] Ironically, Justice Holmes employed the clear and present danger principle in his dissent, calling for Abrams' conviction to be overturned.[26]

Other controversial cases of speech restriction upheld by the Court in the interests of national safety continued into the 1920s with the case *Whitney v. California*, where a woman was convicted merely for being a member of the Communist Party.[27] It wasn't until the 1960s that the clear and present danger doctrine was exchanged for another, more rigorous perspective on protection of critical speech.[28] *Cohen v. California* yielded this more rigorous perspective. *Cohen* was a disturbance of the peace case in 1971 that protected political speech (i.e. critical speech)

[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *See* Abrams v. United States, 250 U.S. 616 (1919).
[26] *Id.*
[27] Whitney v. California, 274 U.S. 357 (1927).
[28] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) and Cohen v. California, 403 U.S. 15 (1971).

despite its potentially offensive nature.[29] The staunch and arguably offensive nature of the speech in *Cohen* had more to do with local concerns than it did any military or intelligence-related issues. In many ways *Cohen* epitomizes the Court's development towards a more contemporary perspective on critical-speech during wartime, culminating in the "Imminent Lawless Action" principle.[30] This principle stated that First Amendment protection could be extended to speech, even speech that criticizes government and/or risks law breaking, unless the speech incites a violation of the law that is both "imminent" *and* "likely."[31] Even in this ruling, the quantifiable security (i.e. the physical safety) of the Nation during wartime was not offered by the Court as grounds for speech restriction, including even that speech, which like Paul Cohen's, is said to violate existing public law.[32] This fact shows a tangible and significant shift in the Court's First Amendment jurisprudence toward a more comprehensive conception of national security as it relates to critical speech.

A proponent of the wartime perspective and/or the Court's similar doctrinal stance on critical speech pre-1971 — when the ruling in *Cohen* was handed down — might argue that even where governmental elements of the national security apparatus are not clearly inhibited by anti-war or anti-state speech, such speech still poses a threat to national security none-the-less, and consequently warrants restriction.[33] Contrary to this view, I assert that national security as it is

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[29] *Id.*

[30] *Id.*

[31] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (This case helped the Court formulate its mid-twentieth century doctrinal perspective on First Amendment speech, especially by asserting that the likelihood of *future* law breaking was central, in addition to the imminence of it because of speech.)

[32] *See* California Penal Code Ann. § 415 (1968) (the California statute that Paul Cohen was charged with violating because of his emblazoning the words "fuck the draft" on his jacket. The law limited speech (or other activity) based on its "offensive" nature.)

[33] Many examples of this continued invocation of the wartime perspective could be found today, in both theory and practice, especially because of the events and subsequent military/national security-related activities of September 11, 2001. *See* 18 USC § 2712 (2001) (The Patriot Act—This controversial law amended much existing policy on national security, and created even more when Congress first passed it in 2001. Key provisions of it have been continued after the Bush administration, and its far-reaching, detailed nature provides for a large amount of tools, resources and regulations concerning constituent parts of the Nation's broadly construed security apparatus.)

conceptualized by the Court today developed in the twentieth century in an attempt to include better protection of speech from state-restriction. This is the case insofar as First Amendment protections have been applied in line with the more comprehensive account of national security.[34]

The Court's current position[35] indicates that if the Imminent Lawless Action doctrine can serve comprehensively to maintain national security — from both the perspective of the state's complicated governmental affairs *and* the citizens' expression of criticism via speech — than it should be adopted in place of the overly simplified wartime perspective. Aside from the question of an effective balancing mechanism between these interests, it remains clear that the Supreme Court has played an important role throughout our history in how critical speech is protected under the First Amendment.

The broad institutional, legal, political and military aims of the U.S. Government — as well as the aims of citizens who exercise their First Amendment right to free speech in their *criticisms* of the government — equally defend their efforts as being in line with the "best interest" of the Nation at large. No observer would doubt that citizens whose speech criticizes government, as well as state interest in restricting this brand of speech on national security grounds both profess for the country's security to be better ensured by their efforts. If a balancing effort of some sort is to exist between these competing interests, it must take cognizance of the fact that motivationally, both parties are attempting to preserve the same thing: the security of the nation as they see it, whether or not their specific conception of security is the

[34] Whether or not the cases discussed here illustrate the state's pursuit of a comprehensive national security, as it relates to speech that includes specifically *classified* information is unclear. This seems to be the persistent complicating factor in a perspective of national security as citizen-safety, because the threshold of quantifiable harm concerning state secrets and classified intelligence/military information is so circumstantial, and admittedly difficult to assess. Any comprehensive, more robust attempt by the Court (or other state actors) to protect speech on comprehensive national security grounds, must find some feasible, measurable method for determining how to quantify potential harm.

[35] I refer here mainly to the Court's reasoning as it is developed in *Brandenburg,* mentioned earlier.

same. Based on the historical and institutional details discussed, I conclude that these conceptions are without a doubt dissimilar, and that the conflict they give rise to is problematic.

The controversy accompanying this conflict of interests persists as much today as it has at other times in our history, likely because the interests themselves seem diametrically opposed. It is reasonable to assume that our modernized legal-political system, per on-going technological advancement and hyper-bureaucratized intelligence imperatives (largely making up the government's security apparatus) has actually *increased* the tension between these interests. This is to say that the state's day-to-day activities involve processes that the executive and legislative branches would quite literally be inhibited from performing by certain critical speech, especially if that speech discloses classified intelligence/defense related information. However, a citizen or group of citizens who disapprove of state action/inaction (including illegally declassified information regarding government activities) would argue that their criticism of state activities is crucial to changing the very activities they oppose so adamantly. On one side, the state would claim the citizens' protection via state activity (whether respecting affairs of a foreign nature, domestic, or both) and that this activity better preserves national security (i.e. their safety and well-being generally), while the citizens themselves claim exactly the opposite.

National security as citizen-safety is a more comprehensive model for national security in the United States, because it includes both measures for the security of the nation in the domestic sense (e.g. protection of fundamental civil liberties like speech) *and* with respect to the preservation of its citizens' safety from militaristic harm (whether domestic or foreign in origin), without sacrificing either imperative. This is possible insofar as the more abstract notion of a civil right (in this case free speech) legitimizes any institutions which possess the formal power necessary to protect and restrict such rights — power which is necessarily derived from the

governed themselves, and consequently used for the securing of their safety.[36] When circumstances drastically set state security interests against those of citizens participating in critical speech, a higher degree of First Amendment protection should be required for the critical speech, rather than the strategic aims of the government. This protection should be required unless the *quantifiable* calamity resulting from the speech can be demonstrated. This threshold for speech restriction in the name of state national security interests would include a certain circumstantial component to it. In practice, the content and quantifiable results of the speech in question would both prove decisive for varying and unpredictable security-related circumstances. As a basic guiding principle for the complex situations often associated with national security questions, citizens should not have their right to critical speech infringed upon *unless* they face a tangibly harmful military threat.[37]

The wartime perspective persists today in public opinion, academic discourse, and in the minds and actions of certain state actors (whether they are members of the Judiciary or not). It does not account for the problematic nature of current or future citizens' speech restrictions. These citizens could possibly suffer unnecessarily for their government's miscalculations on the matter, however well-intentioned the actions of the national security apparatus or the Court may be. If national security in this more comprehensive sense is not adhered to and pursued to the extent that it is possible by both citizens and state actors (in all three branches of the U.S. government), there exists a very real danger of integral First Amendment speech rights being undermined, if not totally degraded by the state over time.

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[36] *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (Richard Cox ed., Harlan Davidson 1982) (1689).

[37] If at the risk of encroaching upon this right, the state were to restrict speech in the name of national security in violation of the citizen-safety model, and afterward this encroachment was found to be executed unjustly or mistakenly, rectification of some kind would be warranted. Because the representatives and senators making up the Congress are the state actors who institutionally remain most closely accountable to the citizenry (at least in theory), they would need to remain responsive in ways that the Court likely could not, aside from overturning decisions, or striking down provisions which provided for the "unjust" state actions hypothesized here. Perhaps the Court would also order injunctive or financial relief of some kind.

Overruling Separate but Equal: The Fight for Equal Protection

By William Yoss

In 1787, with the ratification of the Constitution, the Founding Fathers established a document which followed a "living" and "evolving" interpretation. The Constitution, the basis of governance in the United States, has consistently maintained its dynamic capacity and changed in tandem with an evolving American society. Because the nation does not remain *sicut*, the Constitution needs to be treated in an equivalent fashion. In the words of Thomas Jefferson, "as [the human mind] becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times."[1] Society will never hold its course; therefore, neither shall the Constitution.

In *Brown v. Board of Education*, the Court considered how the United States of 1896 differed from that of 1954. As is written on the subject of education, "in approaching this problem, we cannot turn back to 1868 when the 14th Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written."[2] The Court recognized the evolved cultural underpinnings of education in the United States after seven decades. In 1896, education was not a state-sanctioned system as it was in 1954, nor was it treated with much import. During the Gilded Age, education beyond basic literacy and arithmetic was reserved for those who could afford it and who desired to pursue higher education. In 1954, however, education, where it was supplied by the State, provided a fundamental period of development for young American citizens. As is correctly pointed out of that era by the ruling in *Brown*, "today, education is

[1] QUOTATIONS ON THE JEFFERSON MEMORIAL, https://www.monticello.org/site/jefferson/quotations-jefferson-memorial#_note-9 (last visited Nov. 29, 2015).
[2] Brown v. Board of Education, 347 U.S. 483, 493 (1954).

perhaps the most important function of state and local governments."[3] Education had progressed to become a more prevalent part of the American lifestyle; it had become a pivotal element to success within the United States. From 1896 to 1954, the value of education changed significantly, becoming an unequivocally central part of American society. As such, Justice Warren, in the Court's holding, stated, "[education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[4] Because education became the most important function of governments, the states, as dictated by the 14th Amendment, were required to provide it on equal terms.

In 1954, the Supreme Court of the United States followed through with this idea and announced the unanimous decision of *Brown v. Board of Education* and *effectively* overruled the precedent of the separate but equal doctrine of *Plessy v. Ferguson* (1896). Some justices, however, were reluctant to join the majority, doubting that the Court was operating within its constitutional role. Yet in its holding, Chief Justice Earl Warren's Court remained within the confines of the powers beholden to the judiciary and utilized precedents in its considerations. The Court realized the changing social circumstances in the United States and, by interpreting the Constitution as a "living document," revoked *de jure* segregation in education. The ruling continued to expand and move beyond the designated role of the Court in the future case of *Plyler v. Doe*.

In deliberating *Brown*, the Court had two justices, Justice Jackson and Justice Frankfurter, who viewed the Court as overstepping its role as a judicial body. Frankfurter ardently supported civil rights and believed in equality, but he felt that if the Court ruled in favor of Brown, it would violate the doctrine of separation of powers. In a similar opinion, Justice

[3] *Id.*
[4] *Id.*

Jackson saw the Court as breaching its role, becoming a legislating body rather than a judicial one. The Supreme Court, however, was within its power to rule on *Brown*. Chief Justice John Marshall created the precedent of judicial review in *Marbury v. Madison*, granting the Supreme Court the power to decide on the constitutionality of a law and, thus, interpret the Constitution.[5] While *Brown* set a precedent in that it went further than any court has gone before, it remained within its domain. The unanimous decision, an impressive feat considering the presence of strong opposition on the bench, reached by Chief Justice Warren reveals that he was able to present a united front for America to confront segregation.

However, if the Court had directly overruled *Plessy*, the judiciary would have overstepped its role to decide on the case at hand. *Plessy* ruled on the segregation of train cars; however, it was up to the various legislatures to broaden the reach of segregation, which many had already done. On the other hand, *Brown* ruled on segregation in education. As such, it is up to the legislatures to expand the ruling from education to other arenas. Yet, many persons argue that *Brown* did not go far enough as to overrule all segregation. But as *Brown* and *Plessy* covered different areas, it is not within the Court's authority to move into other areas where segregation applies. The power to end segregation was delegated to the legislature. After the ruling in *Plessy*, the legislatures of the southern states passed the infamous Jim Crow laws. Nevertheless, after *Brown*, Congress passed the Civil Rights Act of 1964, which was a legislative extension of *Brown* that held to the same ideological beliefs.

Up to *Brown*, the separate but equal doctrine was common in some regions of the country and could be considered tradition for these areas. Yet education's place in the eyes of the legislature evolved and so did the attitudes of race relations throughout most of the nation. By the mid-20th century, America was witnessing a cultural turning point that entailed a radical

[5] *See* Marbury v. Madison, 5 U.S. 137 (1803).

change in the perception of race. For example, in World War II, the armed forces remained segregated, but black males were able to enlist and fight for the American campaign against the Nazis. Throughout the conflict, black-only units fought with valor and distinction. Units, such as the Tuskegee Airmen and the 92nd Infantry Division, exemplified the American fighting spirit and proved to their fellow Americans the valor they possessed. Coming from 1925, when an Army study determined that African-Americans were unfit for service before World War II and for the formation of black units, the valiant actions of African-Americans in uniform set the precedent for the full integration of the U.S. military in 1948, despite facing severe racial barriers. Advancing this change in attitude, President Truman ordered the integration of the armed forces after the war. By 1950, most units had been integrated. However, the armed forces were not alone in changing the hearts and minds of Americans in the 20th century.

As race relations improved in America, attitudes towards segregation evolved as well. The mid-20th century brought many questions to the forefront of American society. Of them the question of the efficacy of the ideological basis for segregation was paramount. From the 1930s to the 1950s, America faced two ideological enemies: the Nazis and the Soviets. In its wars against these adversaries, the United States established itself as the champion of freedom, liberty, and equality while casting the Nazis and, eventually, the Soviets as ideological enemies. Because America tolerated the segregation of races within its jurisdiction, an inconsistency developed. These ideological developments along with other external factors were a major part the slow movement to end segregation in the United States, and the Justices of the Supreme Court of 1954 took the first bold step in doing so.

In its arguments in *Brown,* the Court utilized precedents, which suggested that separate but equal was inherently unequal. These previous cases delineated a slow but steady shift in the

interpretation of the constitutionality of segregation. The cases of *State of Missouri ex rel. Gaines v. Canada* (1938), *Mclaurin v. Oklahoma State Regents* (1950), and *Sweatt v. Painter* (1950) built upon the idea of the inherent inequality of segregated education and proved pivotal in the *Brown* decision. In discussing each of these cases, it is clear that they were necessary in overturning part of the *Plessy* decision. Previous precedents on the inequality of segregation, specifically regarding education and the inhibition of constitutional rights, were a necessary precursor to Warren's decision in *Brown*.

In *Gaines,* the Court reviewed the case of a black graduate student who was denied admittance to a Missouri university because of the color of his skin.[6] Subsequently, he and the National Association for the Advancement of Colored People sued the school and succeeded in bringing the case before the Supreme Court. The Court held that if the state were to provide an education to white students, it must, in accordance with the Equal Protection Clause, admit students of all races or provide them with equal facilities. While the case did not challenge the separate but equal doctrine, it did mark a steady change in the direction of equality by declaring that states must provide equal protection under the law to all its citizens.

Sweatt and *McLaurin* also became landmark cases in the decision of *Brown v. Board*. *Sweatt* was the case of a prospective black student, Heman Sweatt, who was denied admission to the School of Law at the University of Texas on racial grounds. The state district court necessitated that the university provide Sweatt with an education equivalent to that of the white students. However, white and black schools were unequal. Compared to the UT School of Law, the new Negro Law School had only 5 full-time professors and 16,500 volumes in the library compared to UT's 16 full-time professors and a 65,000-volume library. Furthermore, its location separated students from the legal environment necessary to nurture an effective education. The

[6] *See* Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).

Supreme Court saw the segregated school as unequal in terms of quantity (professors and books) and intangibility (the lack of access to the law school environment).[7] *McLaurin*, a case in which George McLaurin was denied admittance to the doctoral program for education at the University of Oklahoma, established that a public institution of higher learning could not provide different treatment to a student solely because of their race, as doing so deprived the student of their 14th Amendment right to equal protection.[8] These cases, while not going as far as to overrule separate but equal, served as the basis for the arguments in *Brown*.

Brown, however, differed from these previous cases in that the conditions of the schools in Kansas were equal. Yet, the social context of *Brown*, as in the progression of race relations, enabled the Court to hold that segregation itself was unequal. In the opinion, Chief Justice Warren details the inherent inequality created by segregation due to the fact that it denotes a sort of inferiority unto the target group.[9] Because of the imposed inferiority, the Court held that separate but equal prevented students from achieving equal opportunity in education and therefore equal protection under the laws of the states wherein they resided. Thus the unconstitutionality of segregation was established, and separate but equal was held to be anything but equal.

In the latter half of the 20th century, *Plyler v. Doe* became a centerpiece in progressing the 14th Amendment and the precedent of integrated education which *Brown* established.[10] The case became a natural extension of *Brown* as it extended the definition of "any person" in the Equal Protection Clause. *Brown* cemented the Equal Protection Clause of the 14th Amendment as a precedent throughout the nation, meaning all citizens were guaranteed equal protection under

[7] *See* Sweatt v. Painter, 339 U.S. 629 (1950).
[8] *See* McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).
[9] *See Brown*, 347 U.S. at 483.
[10] *See* Plyler v. Doe, 457 U.S. 202, 786 (1982).

the laws. *Plyler*, deliberating on a case of illegal immigrants attending school in Texas, held that the children were protected under the Equal Protection Clause and, therefore, should be afforded an education. Through a ruling on education, the Supreme Court in *Plyler* utilized *Brown* as the main precedent since both ruled on education and access to it. In its holding, the Court found that the 14th Amendment extended beyond citizens to "any person within its jurisdictions."[11] The Court, however, was divided five-four on the decision, citing concerns that the Court was overextending its powers. While the decision was an extension of *Brown,* the holding did go beyond the powers of judicial review. The Court ruled on legislation that did not restrict the ability of students to attend school or provide them with unequal facilities, but rather required them to pay in order to attend a school. According to the concept of judicial review, the Court rules on the application of rights throughout the country, and it does not act as a legislature. Texas's decision to only allow citizens to attend the school without paying a fee, though they still paid taxes, was not unconstitutional, as it was not discriminating against students on the basis of protected identities. Nevertheless, by extending the definition of "person" to include anyone born within the borders of the United States, *Plyler* became a natural extension of the Equal Protections Clause of the 14th Amendment and *Brown*.

Brown v. Board of Education, by ruling segregation in public schools unconstitutional, became a landmark case that established the Equal Protection Clause as an official doctrine to be used in courts. In deliberating its holding, despite the discord among fellow judges, Chief Justice Earl Warren presented a unanimous decision that revealed the Court could go beyond what it had done before. The notion of a "living" Constitution and the right of the Court to interpret it were pivotal for its ability to hold that separate but equal was unequal. By utilizing the social context, previous precedents of the Supreme Court, and its powers as the head judicial body in the US,

[11] *Id.*

the Court in *Brown v. Board of Education* properly overruled *Plessy's* doctrine of separate but equal. And as Thomas Jefferson iterated during his lifetime, the government of the United States is not in a constant state of being; therefore, nor is its foundational doctrine. Society evolves, as is showcased through the dramatic shift in public opinion on race in America; as it adapts, the Constitution needs to progress with it.