Hastings Constitutional Law Quarterly

Volume 47
Number 1 *Fall 2019*

Article 4

Fall 2019

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*by* MATTHEW M. RYAN*

## I. Introduction

In 2016, then-presidential candidate Donald Trump refused to publicly release his tax returns.[1] Troubled by this decision, state lawmakers in at least twenty-five states proposed legislation requiring disclosure of a presidential candidate's tax returns.[2] These laws ("release laws") according to a sponsoring legislator, allow "statehouses to take th[e] matter into their own hands and ensure that their voters have the information they need to make a decision as important as casting a vote for President of the United States."[3] An opponent of such efforts dismissed the laws as "sour grapes over the election."[4]

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1. Andrew Buncombe, *Donald Trump Refuses to Release Tax Returns – The First Candidate to do so Since 1976*, THE INDEPENDENT (May 11, 2016), https://www.independent.co.uk/news/world/americas/us-elections/donald-trump-refuses-to-release-his-tax-returns-the-first-candidate-not-to-do-so-since-1976-a7025076.html.

2. Kira Lerner, *More Than Half of States are Trying to Force Trump to Release His Tax Returns*, THINKPROGRESS (Apr. 6, 2017, 8:39 PM), https://thinkprogress.org/state-legislation-trump-taxes-bd00db338546; *see also* Alexi McCammond, *The Big Picture: The State Efforts to Keep Trump off the 2020 Ballot*, AXIOS (June 24, 2018), https://www.axios.com/states-tax-return-laws-presidential-2020-trump-88e84cce-7214-409d-b4c7-a24aad919bdb.html.

3. Fenit Nirappil, *Blue-State Lawmakers Want to Keep Trump Off 2020 Ballot Unless He Releases Tax Returns*, WASH. POST (Jan. 3, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/01/03/blue-state-lawmakers-want-to-keep-trump-off-2020-ballot-unless-he-releases-tax-returns/.

4. *Id.*

For three years subsequent to President Trump's decision, no state had passed a release law. In New Jersey, former Governor Chris Christie vetoed a bill, calling it a "transparent political stunt."[5] Similarly, in California, former Governor Jerry Brown vetoed a law, citing constitutional concerns.[6] During this time, the Democratic-controlled House of Representatives Ways and Means Committee sought the tax returns through its statutory power, an effort now being litigated.[7]

On July 30, 2019, however, California became the first state to pass a release law.[8] Governor Gavin Newsom argued it promotes his state's "strong interest in ensuring that its voters make informed, educated choices in the voting booth."[9]

Challenges to California's law have swiftly moved to court.[10] Many commentators have offered their opinion on the constitutionality of release laws,[11] and a few law review articles have examined the

5. Alexi McCammond, *The Big Picture: The State Efforts to Keep Trump Off the 2020 Ballot*, AXIOS (June 24, 2018), https://www.axios.com/states-tax-return-laws-presidential-2020-trump-88e84cce-7214-409d-b4c7-a24aad919bdb.html.

6. *Id.*

7. *See Comm. on Ways and Means, U.S. H.R. v. U.S. Dep't of Treas.*, 19-cv-1974 (D.D.C. July 2, 2019) (The House Committee on Ways and Means filed a lawsuit on July 2, 2019, seeking the President's tax returns.).

8. *Governor Gavin Newsom Signs SB 27: Tax Transparency Bill*, STATE OF CALIFORNIA (July 30, 2019), https://www.gov.ca.gov/2019/07/30/governor-gavin-newsom-signs-sb-27-tax-transparency-bill/.

9. *Id.*

10. *See, e.g.*, *Jerry Griffin v. Alex Padilla*, 19-cv-1477 (E.D. Cal. Aug. 1, 2019). On September 19, 2019, District Judge Morrison England Jr. temporarily enjoined the California law. *See* John Myers, *Federal Judge Blocks California Law to Force Disclosure of Trump's Tax Returns*, LA TIMES (Sept. 19, 2019), https://www.latimes.com/california/story/2019-09-19/trump-tax-returns-federal-court-challenge-california.

11. *See, e.g.*, Vikram D. Amar, *Can and Should States Mandate Tax Return Disclosure as a Condition for Presidential Candidates to Appear on the Ballot*, JUSTIA: VERDICT (Dec. 30, 2016), https://verdict.justia.com/2016/12/30/can-states-mandate-tax-return-disclosure-condition-presidential-candidates-appear-ballot; Danielle Lang, *States Can Require Financial Disclosure by Presidential Candidates to Safeguard Electoral Transparency*, TAKE CARE (Apr. 6, 2017), https://takecareblog.com/blog/states-can-require-financial-disclosure-by-presidential-candidates-to-safeguard-electoral-transparency; Derek T. Muller, *Don't Use the Ballot to Get Trump's Tax Returns*, N.Y. TIMES (Apr. 3, 2017), https://www.nytimes.com/2017/04/03/opinion/dont-use-the-ballot-to-get-trumps-tax-returns.html; Laurence H. Tribe, et al., *Candidates Who Won't Disclose Taxes Shouldn't Be On The Ballot*, CNN (Apr. 14, 2017, 5:21 PM), http://www.cnn.com/2017/04/14/opinions/state-laws-requiring-tax-return-disclosure-legal-tribe-painter-eisen/index.html; *Governor Gavin Newsom Signs SB 27: Tax Transparency Bill*, CALIFORNIA GOVERNOR (July 31, 2019), https://www.gov.ca.gov/2019/07/30/governor-gavin-newsom-signs-sb-27-tax-transparency-bill/ (Erwin Chemerinsky, Theodore J. Boutrous, Jr., and David Boies providing statements in support of California law's constitutionality).

topic.[12] But no paper has gone beyond analyzing whether the release laws are constitutional, and instead considered how release laws offer a chance to clarify consequential ambiguities in the Constitution. This Article does just that.

More interesting than the political tussle surrounding President Trump's decision to release his tax returns, release laws implicate significant—and complex—constitutional issues, including the definition of "qualification" Supreme Court case law, the right of privacy, the Emoluments Clauses, and the extent of state power in choosing the President. This Article reviews federal precedent to more clearly define what constitutes a qualification for political office. It then explores the First and Fourteenth Amendments' protections for a candidate running for office, and the corresponding need to balance the burdens of and justifications for a release law. A release law raises privacy concerns unclearly settled by prior case law regarding the right to privacy, and it promotes novel justifications for states to curb presidential corruption, including implicating the Emoluments Clauses. This Article concludes by investigating the state's heightened role as a gatekeeper to the presidency and exploring the role of states as a last resort to resolve conflicts of interest.

### A. The Proposed State Laws

California's release law and other states' proposed laws differ in certain respects. For clarity, this Article assumes a hypothetical release law that requires a presidential candidate to release her tax returns from the preceding five years to the respective state's election agency.[13] If a candidate does not have to complete a tax return under federal law because her income does not meet the prescribed threshold, then she is not required to release her

12. *See* Eric T. Tollar, *Playing the Trump Card: The Perils of Encroachment Resulting from Ballot Restrictions*, 51 SUFFOLK. U. L. REV. 695 (2018) (arguing release laws are unconstitutional); *see also* Danielle Lang, *Candidate Disclosure and Ballot Access Bills: Novel Questions on Voting and Disclosure*, 65 UCLA L. REV. DISC. 46 (2017) (addressing *Term Limits*' impact on release laws, conducting the *Celebrezze* balancing test, providing suggestions for drafting the release law, and concluding a release law is constitutional); *see also* Daniel J. Hemel, *Can New York Publish President Trump's State Tax Returns?*, 127 YALE L.J. 62 (2017) (examining whether New York could require release of President Trump's state tax returns). As of September 9, 2019, Derek T. Muller appears to have a forthcoming article arguing the release laws are unconstitutional titled "Weaponizing the Ballot." *See* Derek T. Muller, *Weaponizing the Ballot* (Abstract), SSRN (Sept. 9, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450649.

13. *See, e.g.*, Brad Hoylman, *Hoylman Forces NY State Senate Vote on Trump's Taxes*, N.Y. STATE SENATE (Mar. 10, 2017), https://www.nysenate.gov/newsroom/press-releases/brad-hoylman/hoylman-forces-ny-state-senate-vote-trumps-taxes.

returns.[14] If the candidate's income does meet the threshold, then the election agency posts the returns publicly months before the general election, but redacts the candidate's address and Social Security number.[15] If a candidate does not comply, her name is not placed on the state's presidential ballot for the general election.[16]

### B. What Information Tax Returns Reveal

Tax returns provide important information.[17] Unlike financial disclosures, which presidential candidates must now complete,[18] tax returns show foreign business activity and assets with losses.[19] The returns also provide exact financial figures, rather than approximate ranges.[20] Proponents of release laws argue that tax returns are more thoroughly

14. *See, e.g.*, *Presidential Primary Elections: Ballot Access: Hearing on S. 149 Before the S. Comm. on the Judiciary*, 2017 Leg., 2017-2018 Sess. (Cal. 2017) (report from Sen. Mike McGuire, Chairman, S. Governance & Fin. Comm.).

15. *See, e.g.*, S. 149, 2017–2018 Leg. (Cal. 2017), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB149.

16. *See, e.g.*, *Bill Would Bar Presidential Candidates From Appearing on Mass. Ballot Unless They Release Tax Returns*, WBUR (Dec. 13, 2016, 2:12 PM), http://www.wbur.org/politicker/2016/12/13/barrett-tax-returns-legislation. Notably, the California law prohibits placement on the *primary* election ballot. *See* Presidential Tax Transparency and Accountability Act, S. 27, 2018-2019 Reg. Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB27.

17. *See, e.g.*, Carly Fiorina, *2013 Form 1040*, TAXNOTES, https://s3.amazonaws.com/pdfs.taxnotes.com/2019/C_Fiorina_2013.pdf (last visited Aug. 30, 2019); *see also* Mitt Romney, *2011 Form 1040*, TAXNOTES, https://s3.amazonaws.com/pdfs.taxnotes.com/2019/M_Romney_2011.pdf (last visited Aug. 30, 2019). The title of this paper is not intended to imply that candidates are only required to provide Form 1040; tax returns released will likely constitute much more than Form 1040.

18. 5 U.S.C.A. App. 4 § 101 (2006).

19. Norman Eisen & Richard W. Painter, *What Trump's Tax Returns Could Tell Us About His Dealings with Russia*, POLITICO (Oct. 31, 2016), http://www.politico.com/magazine/story/2016/10/donald-trump-taxes-russia-214405; *see also* Carly Fiorina, *2013 Form 1040*, TAXNOTES 41 (last visited Aug. 30, 2019), https://s3.amazonaws.com/pdfs.taxnotes.com/2019/C_Fiorina_2013.pdf (showing passive investments in the Netherlands). Some experts argue the returns reveal very little. Jim Zarroli & Joel Rose, *What Trump's Taxes Would Not Show About His Finances*, NAT'L PUB. RADIO (Apr. 18, 2017, 4:32 PM), http://www.npr.org/2017/04/18/524569221/what-trumps-taxes-would-not-show-about-his-finances.

20. On disclosures, the ranges can be quite broad. For instance, in 2012, Mitt Romney's IRA was valued between $21 million and $102 million. *See* William D. Cohan, *Mitt Romney Is Worth $250 Million. Why so Little?*, WASH. POST (Oct. 5, 2012), https://www.washingtonpost.com/opinions/mitt-romney-is-worth-250-million-why-so-little/2012/10/05/64128882-0c20-11e2-a310-2363842b7057_story.html. The ranges also have caps, which means very large amounts may not be fully captured. *See* Pamela Engel, *TRUMP: My Financial Disclosure 'Is The Largest in the History of the FEC,'* BUS. INSIDER (May 17, 2016), http://www.businessinsider.com/trump-financial-disclosure-fec-2016-5 (Trump campaign stating that "[t]his report was not designed for a man of Mr. Trump's massive wealth. For instance, they have boxes once a certain number is reached that simply state $50 million or more. Many of these boxes have been checked.").

reviewed by the Internal Revenue Service than disclosure forms by the Federal Election Commission, so filers report their taxes more accurately.[21] But lying on either type of form carries significant penalties.[22] Furthermore, tax returns covering a number of years—as required by the release laws—provide a more historical picture compared to disclosure forms, which reflect a snapshot in time—often, one or two preceding calendar years.[23]

Currently, tax returns cannot be disclosed except in limited circumstances.[24] Under 26 U.S.C. § 6103, state employees are prohibited from disclosing returns "in any manner."[25] The United States Secretary of the Treasury may only disclose the returns if the taxpayer consents to such disclosure.[26] Illicit release results in significant criminal penalties.[27]

## II. The Background Case Law: *U.S. Term Limits, Incorporated v. Thornton*

*U.S. Term Limits, Incorporated v. Thornton* is the marquee case for analyzing the legality of a release law.[28] In 1992, Arkansas amended its state constitution to prohibit from its ballot United States House of Representatives members who had served three terms and Senators who had served two terms.[29] Such candidates could still win via write-in candidacy.[30] The Supreme Court, in a 5-4 split, found Arkansas' law unconstitutional.[31]

Prior to *Term Limits*, in *Powell v. McCormack*, the Court established that the Constitution prohibited Congress from adding qualifications to its members beyond those enumerated in the Constitution's Qualifications

21. *Presidential Primary Elections: Ballot Access: Hearing on S. 149 Before the S. Comm. on the Judiciary*, 2017 Leg., 2017-2018 Sess. (Cal. 2017) (report from Sen. Mike McGuire, Chairman, S. Governance & Fin. Comm.).

22. *Compare* 5 C.F.R. § 2634.701 (2019) *with* 26 U.S.C. § 7207 (2002).

23. Norman Eisen & Richard W. Painter, *What Trump's Tax Returns Could Tell Us About His Dealings with Russia*, POLITICO (Oct. 31, 2016), http://www.politico.com/magazine/story/2016/10/donald-trump-taxes-russia-214405.

24. *See* 26 U.S.C.A. § 6103.

25. 26 U.S.C.A. § 6103(a)(2) (Westlaw through P.L. 116-53); *see also Church of Scientology v. IRS*, 484 U.S. 9, 10 (1987).

26. 26 U.S.C.A. § 6103(c) (Westlaw through P.L. 116-53). A few other exceptions are provided for in the statute: *see* 26 U.S.C.A. § 6103(d) (Westlaw through P.L. 116-53) (allowing release for state tax enforcement); 26 U.S.C.A. § 6103(h)(2) (Westlaw through P.L. 116-53) (allowing release for criminal law purposes).

27. 26 U.S.C.A. § 7213 (Westlaw through P.L. 116-53) ("Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.").

28. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

29. *Id.* at 784.

30. *Id.* at 828.

31. *Id.* at 838.

Clauses.[32] *Powell* arose from the House's refusal to sit a duly-elected member because he allegedly misused House funds in a prior term.[33]

*Term Limits* expanded to the states *Powell*'s prohibition against Congress. Like in *Powell*, the Court found that the Framers intended to keep elections open to all candidates in order to increase democratic participation.[34] Unlike in *Powell*—because state power was now at issue—the Court examined whether states had the "reserved" power under the Tenth Amendment to add qualifications to obtaining public office.[35] This debate—occurring in 1995—was particularly important given the "Federalism Revolution,"[36] and the perceived need for the Court to draw lines permitting states broad power while ensuring national stability.[37]

The *Term Limits* Court contentiously debated the states' reserved power.[38] Justice Stevens's Majority Opinion and Justice Thomas's Dissenting Opinion provided thorough historical analysis to bolster their claims. The Majority presented many *Federalist Paper* quotes,[39] while the Dissent countered with post-ratification state laws.[40] In addition to wrestling

32. *Powell v. McCormack*, 395 U.S. 486, 548 (1969); *see also* U.S. CONST. art. I, § 2, cl. 2 ("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."); U.S. CONST. art. I, § 3, cl. 3 ("No Person Shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."); U.S. CONST. art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.").

33. *Powell*, 395 U.S. at 490.

34. *Term Limits*, 514 U.S. at 779, 793–95 (1995) (citing *Powell*, 395 U.S. at 540–41).

35. *Id.* at 798.

36. *See generally* Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7 (2001).

37. *See* Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 79–80 (1995) ("*Term Limits* elicited a confrontation among the Justices over the basic structural principles of the federal union . . . ."); Leon Lazer, *The Term Limits Case*, 12 TOURO L. REV. 373, 386 (1995) (quoting Professor Laurence H. Tribe saying, "[i]f the Constitution's failure to nail down a given matter with absolute finality becomes an excuse for the states to adopt measures that will be upheld by the Supreme Court regardless of how much they may undermine the integrity of the nation, then the ability of the country to hold together in difficult times may be seriously endangered").

38. *See* Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 80 (1995) (observing that the Majority and the Dissent battled to a draw over textual interpretation and historical context).

39. *Term Limits*, 514 U.S. at 806–08 (quoting THE FEDERALIST NOS. 52, 57 (James Madison)).

40. *Id.* at 905–10 (Thomas, J., dissenting).

over the Constitution's history, both sides scuffled over its text. For the Majority, the Constitution's enumeration of three congressional qualifications in the Qualifications Clauses was ample evidence that the Framers created an exhaustive list.[41] For the Dissent, those three qualifications were simply a baseline that could be further expanded upon if a state chose to do so.[42]

Likely sensing that the Originalist and Textualist solutions provided no clear answer, the Majority bolstered its position with two structural considerations. First, the Court looked to the fact that the people voted to elect their congressperson—"a fundamental principle of our representative democracy" that states could not obstruct.[43] Second, the Court cautioned that state-mandated qualifications would lead to a "patchwork of state qualifications," and undermine Congress's purpose to represent all people.[44]

## III. What is a Qualification?

*Term Limits* established that a state cannot add qualifications for members of Congress beyond those enumerated in the United States Constitution. Yet, the Opinion did little to define a qualification. To be fair, a comprehensive definition of "qualification" is difficult to formulate because the Constitution contains an inherent tension. The Elections Clauses permit some state regulation of federal elections. For instance, states, in Article I of the Constitution, can regulate "the times, places, and manners" for congressional elections, and in Article II of the Constitution, states may regulate the "manner" of selecting their electors for the Electoral College.[45] Thus, a state can regulate the "manner" of choosing its officeholders,[46] but it cannot add a qualification to the office.[47] In wrestling with this tension, the Court has avoided comprehensive definitions and, instead, approached interpretation of state laws on a case-by-case basis. As Justice Neil Gorsuch

41. *Term Limits*, 514 U.S. at 805.

42. *Id.* at 867 ("[T]hese different formulations—whether negative or affirmative—merely establish *minimum* qualifications.").

43. *Id.* at 819–22.

44. *Id.* at 822.

45. U.S. CONST. art. I, § 4, cl. 1 ("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 Place of Chusing Senators."); U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.").

46. *See* U.S. CONST. art. I, § 4, cl. 1; *see* U.S. CONST. art. II, § 1, cl. 2.

47. *See generally Term Limits*, 514 U.S. 779; *see generally Powell*, 395 U.S. 486.

observed in a law review article advocating for congressional term limits prior to *Term Limits*, the Court "knows a qualification or manner regulation when it sees one."[48]

*Term Limits* provided two guideposts for defining a qualification. It is an obligation: (1) targeting a "class of candidates,"[49] or (2) impermissibly "handicapping"[50] or "barring"[51] a candidate. These standards offer no clear resolution for a release law.

### A. A Class of Candidates: "Inherent" Qualities Targeted

*Term Limits*' reference to targeting a "class" of candidates is derived from *Storer v. Brown*, a Supreme Court decision upholding a California law requiring candidates to disaffiliate from a political party for one year and to obtain 5% of the electorate's signatures before running as an Independent in an election.[52] The law prohibited primary campaign losers from spoiling the general election for primary winners. *Term Limits* summarized the *Storer* decision as allowing a state to regulate election procedures, and "not even arguably impos[ing] any substantive qualification [on] a class of potential candidates."[53]

Yet, determining whether a law imposes a substantive qualification is no easy task. "The rule is not self-executing and is no substitute for the hard judgments that must be made."[54] A substantive characteristic—as the United States Court of Appeals for the Third Circuit helpfully summarized in a case in which it assessed a law requiring candidates to pay a filing fee in order to run for political office—is something "inherent in [each] candidate."[55] It is "involved in the constitution or essential character of something,"[56] and "existing in something as a permanent, essential, or characteristic attribute."[57]

A law review article, written by Danielle Lang, expanded on the United States Court of Appeals for the Third Circuit's definition. The Article

48. *See* Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 HOFSTRA. L. REV. 341, 355 (1991).

49. *Term Limits*, 514 U.S. at 832.

50. *Id.* at 836.

51. *Id.* at 831.

52. *Storer v. Brown*, 415 U.S. 724 (1974).

53. *Term Limits*, 514 U.S. at 835.

54. *Storer*, 415 U.S. at 730 ("[A]s a practical matter, there must be a 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 processes.").

55. *Biener v. Calio*, 361 F.3d 206, 212 (3d Cir. 2004).

56. Merriam Webster Dictionary Online (2019), https://www.merriam-webster.com/dictionary/inherent.

57. Oxford Dictionary (2019), https://www.lexico.com/en/definition/inherent.

described a law imposing a substantive qualification as excluding access to the ballot "based on personal characteristics—things that cannot be changed, at least not at the point of election."[58] Such laws differ from permissible "laws that ask candidates to do something any candidate could do in order to gain ballot access."[59] Courts should use the release laws as a chance to cement this definition of qualification into case law.

The Constitution coheres with this definition. Whether one was born naturally in the United States[60] is dictated by the past and cannot be changed. Likewise, whether one has lived thirty-five years on Earth or has been a United States resident for fourteen years[61] is dictated by the past and cannot be changed at the point of election.

Case law also comports with the proposed definition of a substantive characteristic. In *Term Limits*, the Court properly struck down the Arkansas law because a candidate could never change whether they had served three terms in the House or two terms in the Senate.[62] Similarly, in *Powell v. McCormack*, Mr. Powell could not undo his misuse of House funds.[63] Other imaginable laws using this Article's definition of a substantive characteristic would easily be struck down, including laws limiting candidacy to veterans, lawyers, persons without a felony record,[64] or persons with certain IQs.[65] These laws would be dictated by past action and impossible to change at the point of election.

The release laws do not target an inherent or substantive characteristic of candidates. Until a candidate releases her tax returns, she will have the characteristic of not releasing returns. Similarly, like the law upheld in *Storer v. Brown*, until a candidate obtains 5% of the electorate's signatures, she will have the characteristic of not obtaining such signatures.[66] Both such characteristics, however, could easily change while running for office: a candidate could either consent to release of their returns or obtain signatures

58. Danielle Lang, *Candidate Disclosure and Ballot Access Bills: Novel Questions on Voting and Disclosure*, 65 UCLA L. REV. DISC. 46, 55 (2017).

59. *Id.*

60. *See* U.S. CONST. art. II, § 1, cl. 5 ("No person except a natural born Citizen . . . shall be eligible to the Office of the President.").

61. *See* U.S. CONST. art. II, § 1, cl. 5 ("[N]either shall any person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.").

62. *Term Limits*, 514 U.S. at 779.

63. *Powell*, 395 U.S. at 486.

64. *Danielson v. Fitzsimmons*, 44 N.W.2d 484 (Minn. 1950).

65. Of course, laws that target protected constitutional classes such as women or racial minorities would also be struck down for violating the Fourteenth Amendment's Equal Protection Clause.

66. *Storer*, 415 U.S. at 724.

from 5% of the electorate. Not targeting a substantial characteristic is step one of passing constitutional muster. Release law's constitutional issues get murkier from here.

## IV. Burden on the Candidate

Under *Term Limits*, even if a law does not target a class of candidates, it is an unconstitutional qualification if it impermissibly "handicaps" or "bars" a candidate from running for political office.[67] This language from *Term Limits* is borrowed from prior case law that assessed the burdens placed on a candidate under the First and Fourteenth Amendments.[68] The Amendments protect two "overlapping" rights, forming "interwoven strands of liberty": the right of the candidate to advance her political beliefs, and the right of voters to support candidates who share their political beliefs.[69] To assess whether the law is an impermissible handicap or bar, courts weigh the burden to the candidate against the state's relevant interest.[70] This balance is no "litmus-paper test," but instead, is a "matter of degree."[71] The release laws introduce novel burdens and justifications, with no clear resolution.

### A. Administrative Burden on the Candidate

Often, courts have assessed a law's burden based on the administrative feasibility of compliance. For instance, in *Anderson v. Celebrezze*, the Court struck down a March filing deadline for a November election for being too early,[72] and, in *Williams v. Rhodes*, it rejected a requirement to obtain signatures from 15% of the electorate for being too large.[73] Unlike these

67. *Term Limits*, 514 U.S. at 831–32.

68. The case law bleeds the analysis for what constitutes a qualification with the First and Fourteenth Amendment analysis. *See, e.g.*, *Biener*, 361 F.3d at 212–13 (Third Circuit framing a filing fee as an impermissible handicap based on "wealth" and a violation of an indigent candidate's Fourteenth Amendment rights under the Equal Protection Clause); *see also Storer*, 415 U.S. at 728–36 (analyzing the First and Fourteenth Amendments simultaneously with the Qualifications Clause).

69. *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (citing *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968)).

70. *See id.* at 789 ("A court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments . . . It then must identify and evaluate the interests put forward by the State to justify the burden imposed by its rule.").

71. *Storer*, 415 U.S. at 730; *but see Schaefer v. Townsend*, 215 F.3d 1031, 1038 (9th Cir. 2000) (In dicta, the Ninth Circuit stated that the balancing test is anachronistic. But *Schaefer* dealt with a California law requiring residency prior to winning the election, which directly conflicted with the U.S. Constitution's text regarding residency once elected, so no balance was needed. For cases that do not target a substantive characteristic nor directly conflict with constitutional text, the law must be assessed by balancing state interests against burdens to candidates.).

72. *Anderson*, 460 U.S. at 780 (1983).

73. *Williams v. Rhodes*, 393 U.S. 23 (1968).

laws, release laws are not administratively burdensome: each private citizen earning a threshold income must complete a tax return in order to comply with federal law[74]—independent of their decision to run for political office.[75] Therefore, the administrative burden is as simple as consenting to the release of already-completed tax forms.

In fact, Congress already requires presidential candidates to comply with a process more administratively burdensome than the release of prepared returns. Under the Ethics in Government Act of 1978, Congress mandated that all presidential candidates submit a financial disclosure statement.[76] A candidate must report any source of income—including transactions, liabilities, and assets—greater than $200.[77] Candidates complete financial disclosure forms from scratch. Completing such forms can be "excessive," as one lawyer put it, and prevent "good people from running for office."[78] These disclosure requirements have never been found unconstitutional.

Imposing an administrative burden is not the only way to improperly hinder a candidate, however. In *Shub v. Simpson*, a Maryland court struck down a law requiring congressional candidates to swear an oath to the state constitution that prohibited membership to a subversive organization.[79] In *United States v. Richmond*, a federal district court struck down a plea agreement that required a member of Congress to agree to not run for re-election.[80] Giving an oath or signing a plea bargain could be completed with administrative ease; taking a few minutes at most. Nonetheless, those actions were impermissible because they burdened the candidate's access to the ballot in other ways by prohibiting membership to an organization

74. 26 U.S.C. § 6012(a) (2018).

75. *See, e.g. Presidential Primary Elections: Ballot Access: Hearing on S. 149 Before the S. Comm. on the Judiciary*, 2017 Leg., 2017-2018 Sess. (Cal. 2017) (report from Sen. Mike McGuire, Chairman, S. Governance & Fin. Comm.) (Presumably, states would not require tax return release for candidates who did not complete returns because they earned below the threshold amount and were not required to file federal tax returns.).

76. 5 U.S.C.A. App. 4 § 101 (2006).

77. 5 U.S.C.A. App. 4 § 102 (2012); *see also* Richard Rubin, *What a Presidential Candidate's Financial Disclosures Do, and Do Not, Reveal*, BLOOMBERG (May 15, 2015, 7:10 AM), https://www.bloomberg.com/politics/articles/2015-05-15/what-a-presidential-candidate-s-financial-disclosures-do-and-do-not-reveal.

78. Marlena Baldacci, *Presidential Candidates Have Long History of Releasing Tax Returns*, CNN (July 16, 2012, 8:26 PM), http://politicalticker.blogs.cnn.com/2012/07/16/presidential-candidates-have-long-history-of-releasing-tax-returns/ (quoting Rob Kelner, attorney at Covington and Burling LLP).

79. 76 A.2d 332, 339–40 (Md. 1950). The *Shub* court did not base its holding on the First Amendment right to association because it was not explicitly recognized in 1950, but the right would almost certainly be implicated today. *Cf. NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

80. 550 F.Supp. 605 (E.D.N.Y. 1982).

and by leveraging the criminal justice system against the candidate's decision to run.

### B. Privacy Burden on the Candidate

With the release laws, the candidate would be burdened by what the returns reveal much more than by the administrative action required to comply. Tax returns contain private financial information that may have no bearing on how a candidate would serve as President. As one commentator argued, returns contain information for "prurient" interests only.[81] For instance, during the 2012 United States presidential election, Mitt Romney delayed releasing his tax returns.[82] Commentators suspected that Romney hesitated because the returns would reveal how much he donated to the Mormon Church, information that could be abused by voters who dislike the Church of Latter-Day Saints.[83] Tax returns could implicate other personal affairs unrelated to public office such as private gifts to in-laws in financial straits,[84] medical surgery payments,[85] or business interests that could assist competitors.[86]

For this reason, a candidate may challenge the release laws under the constitutional right to informational privacy,[87] offering courts an opportunity to clarify this undefined right. In *NASA v. Nelson*, a contract employee sued the National Aeronautics and Space Administration ("NASA") because the agency conducted a standard background check that included collecting information regarding employees' recent drug use and contacting

81. Edward Morrissey, *Romney Voyeurs: Digging for Tax Return Porn*, FISCAL TIMES (Jan. 19, 2012), http://www.thefiscaltimes.com/Columns/2012/01/19/Romney-Voyeurs-Digging-for-Tax-Return-Porn.

82. Doug Mataconis, *Should Presidential Candidates Be Expected to Release Their Tax Returns?*, OUTSIDE the BELTWAY (Jan. 19, 2012), http://www.outsidethebeltway.com/should-presidential-candidates-be-expected-to-release-their-tax-returns/.

83. *Id.*; *see also Mitt Romney, Tax Returns from 2011*, TAXNOTES 333 http://www.taxhistory.org/thp/presreturns.nsf/Returns/9F81699BC7D6DE238525798F0051C35F/$file/M_Romney_2011.pdf (showing a donation of $1,115,484 to The Church of Jesus Christ of Latter-day Saints).

84. DEP'T of the TREAS., IRS, *Instructions for Form 709: United States Gift* (2018), https://www.irs.gov/pub/irs-pdf/i709.pdf.

85. DEP'T of the TREAS., IRS, *Publication 502: Medical and Dental Expenses* (2018), https://www.irs.gov/pub/irs-pdf/p502.pdf.

86. *See Russell v. Bd. of Plumbing Exam'rs of Cty. of Westchester*, 74 F.Supp. 2d 339, 348 (S.D.N.Y. 1999) (striking down a New York law that required plumbers to release tax returns in order to receive plumbing license).

87. All ballot access laws are subjected to external constitutional provisions—such as the Fifteenth, Nineteenth, and Twenty-Fourth Amendments—although the First and Fourteenth Amendments are most commonly the bars.

references.[88] In deciding for NASA, the Supreme Court assumed a constitutional "interest in avoiding disclosure of personal matters,"[89] but subjected that "interest" to a deferential balancing test, which tipped in favor of the government.[90] Under the test, the Court ruled that the Government had a legitimate interest in ensuring its employees were not taking illicit drugs, which was more significant than the plaintiff's privacy interest because the Privacy Act ensured the information collected by the Government would not be disseminated publicly.[91] In *Whalen v. Roe*, nearly forty years before *Nelson*, the Court upheld a New York statute that allowed the state to collect personal information on all New Yorkers who were prescribed certain drugs.[92] The Court believed such a system—used to combat illicit drug use—was an "orderly and rational legislative decision."[93] In the same year as *Whalen*, President Richard Nixon raised a privacy interest trying to prevent release of his presidential papers under the post-Watergate Presidential Records Act of 1978.[94] The Court concluded that the papers could be made public because they dealt with presidential duties, so the public interest in transparency outweighed President Nixon's privacy interest.[95]

The release laws go beyond the actions upheld in the *NASA*, *Whalen*, and *Nixon* triad. First, the laws seek to publicly disseminate private matters protected by statute against disclosure. In *NASA* and *Whalen*, the Court found it significant that privacy statutes prevented public dissemination.[96] This protection is not available with release laws. In fact, nearly all of the laws' power comes from public dissemination.[97] Second, unlike Nixon's presidential papers, the release laws disseminate more personal material—a

88. 562 U.S. 134, 138 (2011).

89. *Id.* (quoting *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) and *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 457 (1977)).

90. The Court's use of "interest," as opposed to "right," is significant. The Supreme Court has been hesitant to find a "right" to informational privacy. Many have attempted to argue a right exists by combining the penumbra of the Constitution's First, Fourth, Fifth, and Fourteenth Amendments along with seminal cases, such as: *Griswold v. Conn.*, 381 U.S. 479 (1965); *Olmstead v. U.S.*, 277 U.S. 438 (1928); *Stanley v. Ga.*, 394 U.S. 557 (1969); and *Poe v. Ullman*, 367 U.S. 497 (1961). *See, e.g.*, *Constitutional Law, The Supreme Court 2010 Term, Leading Cases*, 125 HARV. L. REV. 172, 237 (2011).

91. *Nelson*, 562 U.S. at 156 (citing 5 U.S.C. § 552a(e)).

92. 429 U.S. at 591 (1977).

93. *Id.* at 597.

94. *See generally Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425 (1977).

95. *Id.* at 457–65.

96. *Nelson*, 562 U.S. at 156 (citing 5 U.S.C. § 552a(e)); *Whalen*, 429 U.S. at 601–02 (looking to state law protections against public disclosure).

97. *Infra* at Section VII.B: "The Timing: When and How Enforcement of Release Laws Should Occur."

candidate's private finances. In dicta, the *Nixon* Court acknowledged "matters concerned with family or personal finances" may have some constitutional protection if those papers are "unrelated to any acts done by [the President] in their public capacity."[98] Release laws bring this unanswered hypothetical to life.[99]

Courts must decide two significant issues to resolve the privacy hurdles. First, do presidential candidates' reasonable expectation of privacy allow them to avoid public dissemination of their finances?[100] Candidates certainly give up many privacy protections by entering the public arena,[101] but it is unclear how much privacy presidential candidates relinquish. For tax forms, reasonable expectations of privacy may be lowered because most candidates in recent history have voluntarily released the information.[102] Second, are a President's finances relevant to their role as President? As explored later, tax returns may provide critical information regarding whether a President has conflicts of interest impacting her ability to govern.[103] The release laws afford courts an opportunity to further clarify the parameters of the constitutional privacy interest[104]—and simultaneously address issues of massive importance to the Office of the President.

Notably, even if a constitutional privacy interest does not invalidate the release laws outright, courts will weigh a candidate's privacy interest when conducting the balancing test under the First and Fourteenth Amendments' "interwoven strands of liberty."[105]

98. *Nixon*, 433 U.S. at 457.

99. On July 12, 2019, during an oral argument for *Donald Trump, et al. v. Mazars USA, LLP* at the D.C. Circuit, a case involving a subpoena from the House Committee on Oversight and Government Reform seeking President Trump's accounting documents, Judge Neomi Rao alluded to this statement in *Nixon v. Administrator of General Services*. *See* 19-5142 (D.C. Cir. 2019) (transcript not yet available).

100. *Cf. Katz v. U.S.*, 389 U.S. 347 (1967).

101. *Cf. N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

102. Karen Yourish, *Clinton Released Her Taxes. Will Trump Follow This Tradition?*, N.Y. TIMES (Aug. 12, 2016), https://www.nytimes.com/interactive/2016/08/05/us/elections/presidential-tax-returns.html.

103. *Infra* at Section V: "State Justifications for Release Laws."

104. *Cf. Cal. Bankers Ass'n v. Schultz*, 416 U.S. 21, 78–79 (1974) (Powell, J., concurring) ("Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy."); *see NASA v. Nelson*, 562 U.S. 134, 160 (2011) (Scalia, J., concurring) (The late-Associate Justice Antonin Scalia, who was skeptical of the parameters of the constitutional right to privacy, argued that the Court cannot "invent a constitutional right out of whole cloth" without "tying it to some words of the Constitution.").

105. *Anderson*, 460 U.S. at 787–89.

### C. Punitive Burden for Noncompliance

In addition to assessing what a candidate must do to comply with a ballot access law, courts also factor in the punishment for noncompliance. Prior to *Term Limits*, some courts viewed state regulations as impermissible if they absolutely barred candidates from running for political office for noncompliance, but not if the laws permitted write-in or independent candidacies.[106] In *Jenness v. Fortson*, the Supreme Court upheld a law that placed a petition deadline on third-party candidates because it offered write-in candidacy as an alternative to inclusion on the ballot if the candidates failed to comply.[107] *Term Limits* assessed the low success rate of write-in candidates for congressional races, and rejected it as too formalistic to serve as a viable alternative to ballot access.[108]

For release laws, courts need to complete similar fact-finding about a presidential candidate's success of winning office without placement on the ballot. A presidential candidate may be more likely to win via write-in than a congressional candidate. Presidential candidates, especially of major political parties, would have higher name recognition. Furthermore, presidential candidates may still win with faithless electors who serve in the Electoral College,[109] whereas no such safety valve exists for congressional office.

Nonetheless, not placing a candidate's name on the ballot is a significant punishment to a candidate. Notably, it is a far greater punishment than that imposed by the Ethics in Government Act, where failure to submit a financial disclosure may lead to civil penalties at most.[110] Often, candidates are granted extensions.[111] The proposed release laws have offered no such

106. *See, e.g.*, *Hopfmann v. Connolly*, 746 F.2d 97, 103 (1st Cir. 1984) (defining qualifications only on whether the law fully disqualified candidates from obtaining office).

107. 403 U.S. 431, 440 (1971).

108. *Term Limits*, 514 U.S. at 831 n.45 (1995); *see also id.* at 829 (determining legislative intent to be to disqualify a candidate from holding office even if they could run as a write-in).

109. *See generally* Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215 (1994); Robert W. Bennett, *The Problem of the Faithless Elector: Trouble Aplenty Brewing Just Below the Surface in Choosing the President*, 100 NW. U. L. REV. 121 (2006).

110. 5 U.S.C.A. App. 4 § 104 (2007); *cf. U.S. v. Rose*, 28 F.3d 181, 186 (D.C. Cir. 1994); *U.S. v. Gant*, 268 F. Supp. 2d 29, 30 (D.D.C. 2003).

111. Richard Rubin, *What a Presidential Candidate's Financial Disclosures Do, and Do Not, Reveal*, BLOOMBERG (May 15, 2015, 3:00 AM), https://www.bloomberg.com/politics/articles/ 2015-05-15/what-a-presidential-candidate-s-financial-disclosures-do-and-do-not-reveal; Dave Levinthal (@davelevinthal), TWITTER (April 27, 2016, 6:24 AM) https://twitter.com/davelevinthal /status/725677061084446720 (E-mail from Brad C. Deutsch, Lead Counsel of Bernie Sanders Campaign, to Tracey Ligon, Federal Election Commission, requesting 45-day extension of deadline for filing Senator Sanders' personal financial disclosure report.).

leniency, requiring political candidates to release tax returns by a certain date or be excluded from the ballot.[112]

## V. State Justifications for Release Laws

The release law's justifications will be weighed against its burdens. Thus far, proponents of release laws have articulated broad social interests at stake, including educating voters, ensuring public confidence in the political system, and retaining honest officials.[113] These justifications echo the interests promoted by the Ethics in Government Act, which "w[as] designed to increase public confidence in the federal government, demonstrate the integrity of government officials, deter conflicts of interest, deter unscrupulous persons from entering public service, and enhance the ability of the citizenry to judge the performance of public officials."[114]

Because release laws will reveal more intimate details and punish more harshly than current disclosure laws in the Ethics in Government Act, the release laws need to more clearly particularize the interests at stake. Release laws, at root, seek to notify the electorate about potential conflicts of interest a candidate may have. For instance, it can inform the public as to the reasoning behind a candidate's policy position if the candidate owns extensive real estate and opposes closing interest deductions.[115]

These conflict of interest justifications implicate constitutional provisions with little case law: the Domestic and Foreign Emoluments Clauses. The Domestic Emoluments Clause forbids the President from accepting money—and other things of value—from state governments, while allowing for just compensation from the federal government.[116] The

112. *See, e.g.*, Presidential Tax Transparency and Accountability Act, S. 27, 2018-2019 Reg. Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB27.

113. *See, e.g.*, Mitchell Zuckoff, *Why We Ask to See Candidates' Tax Returns*, N.Y. TIMES (Aug. 5, 2016), https://www.nytimes.com/2016/08/06/opinion/why-we-ask-to-see-candidates-tax-returns.html?_r=0 ("The American people need to know if their president is a crook."); *see also* Gregory Krieg, *From Tweets to the Streets: Nationwide Anti-Trump 'Tax Day' Marches Came Together on Social Media*, CNN (Apr. 14, 2017, 3:16 PM), http://www.cnn.com/2017/04/14/politics/trump-tax-day-march-protests/ ("This is about transparency, ethics, and the basic function of democracy."); *Governor Gavin Newsom Signs SB 27: Tax Transparency Bill*, STATE OF CALIFORNIA (July 31, 2019), https://www.gov.ca.gov/2019/07/30/governor-gavin-newsom-signs-sb-27-tax-transparency-bill/.

114. *See U.S v. Oakar*, 111 F.3d 146, 148 (D.C. Cir. 1997) (citing S. Rep. No. 95-170, at 21–22 (1978), reprinted in 1978 U.S.C.C.A.N. 4216, 4237–38).

115. *See* Alan Rappeport, *Democrats See Opening in Tax Overhaul Fight: Trump's Own Deductions*, N.Y. TIMES (April 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/democrats-see-opening-in-tax-overhaul-fight-trumps-own-deductions.html.

116. U.S. CONST. art. II, § 1, cl. 7 (the President is prohibited from receiving "any other Emolument from the United States, or any of them").

Foreign Emoluments Clause forbids the President from accepting things of value from foreign governments, unless Congress consents.[117] The Clauses were relatively unexamined in constitutional law for many decades, but nonetheless, they exist to prevent "external influence"[118] over and "corruption"[119] of federal officials. The Framers feared that, without these Clauses, other governments might curry favor with United States' federal officeholders, which would undermine the republic.[120] Release of tax returns may reveal a candidate's financial entanglements with other sovereigns. Without this knowledge, a President could violate a constitutional provision with impunity. The Emoluments Clauses, therefore, offer states a constitutional hook to challenge conflicts of interest. And yet, courts have never had occasion until recently to understand the reach of these clauses and what they regulate.[121] Release laws provide a vehicle to flesh out these provisions.

### A. How State Justifications Cohere with Case Law

The interests proffered for release laws move beyond typical justifications for state regulation. Primarily, courts have found constitutional laws that target Election Day processes.[122] *Term Limits* acknowledged laws that sought to avoid voter confusion and lessen ballot overcrowding on Election Day.[123] For instance, *Term Limits* cited *Munro v. Socialist Workers Party*, a case in which a Socialist Workers Party candidate challenged a Washington statute that required minority-party candidates to receive 1% of the vote in the primary election to appear on the general election ballot.[124] The Court upheld the law, agreeing with the state's desire to avoid voter

117. U.S. CONST. art. I, § 9, cl. 8 ("no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State").

118. David Cole, *Trump is Violating the Constitution*, N.Y. REVIEW OF BOOKS (Feb. 23, 2017), http://www.nybooks.com/articles/2017/02/23/donald-trump-is-violating-the-constitution/#fn-1 (citing 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 389 (1987)).

119. *Id.* (citing 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 327 (1987)).

120. *See generally* Norman L. Eisen, et al., *The Emoluments Clause: It's Text, Meaning, and Application to Donald J. Trump*, BROOKINGS (Dec. 16, 2016), https://www.brookings.edu/research/the-emoluments-clause-its-text-meaning-and-application-to-donald-j-trump/.

121. *See, e.g.*, Sharon LaFraniere, *Judge Rejects Government's Request to Halt Emoluments Suit Against Trump*, N.Y. TIMES (June 25, 2019), https://www.nytimes.com/2019/06/25/us/politics/trump-emoluments-lawsuit.html.

122. *Term Limits*, 514 U.S. at 834.

123. *Id.*

124. 479 U.S 189 (1986).

confusion that may arise from an Election Day ballot with too many candidates.[125]

In *Anderson v. Celebrezze*, the Supreme Court struck down a March filing deadline for independent candidates as prohibitively early given that many campaign changes could occur between March and the November election, but nonetheless, it hinted at a state interest beyond Election Day processes to "foster[] informed and educated expressions of the popular will in a general election."[126] *Anderson*'s justification for voter education could be expanded to justify the release laws. In *Anderson*, the Court wanted to provide voters with enough time to become familiar with candidates so that voters recognized the options available to them on the ballot.[127] Release laws go beyond *Anderson*: seeking to educate the electorate about the candidates' specific finances, and not just the candidates' names. But *Anderson*'s justification could be the opening thread of precedent for states to justify release laws.

In addition to the *Anderson* ruling, the Ninth Circuit, in *Joyner v. Mofford*, upheld a state law that sought to prevent abuse of office before and after an election.[128] *Joyner* reviewed an Arizona statute preventing state officials from running for federal office unless they were serving their final year in their elected position.[129] The court upheld the law, acknowledging that Arizona had an interest in ensuring state officials would not be corrupted by donations for their federal candidacy.[130] The court worried a losing candidate of a federal election could provide favors to federal campaign donors from her state office.[131] The court upheld the Arizona law, finding it primarily regulated Arizona officeholders, and tangentially regulated federal candidates.[132] Unlike the law in *Joyner*, release laws do not primarily regulate state officials—an inherent power of state government. Nonetheless, both the law in *Joyner* and release laws share a justification in ending corruption, and, as will be explored now, states may have a special prerogative to ensure the President takes office without significant conflicts of interest.

125. *Id.* at 196.

126. 460 U.S. 780, 796 (1983).

127. *Id.* at 796–97.

128. 706 F.2d 1523 (9th Cir. 1983).

129. *Id.* at 1525.

130. *Id.* at 1532.

131. *Id.* at 1532 n.10 (speculating that a Board of Supervisor may receive donations from persons who contribute knowing they will be rewarded with zoning decisions if the candidate is to lose her federal race).

132. *Id.* at 1531.

## VI. States as Gatekeepers

States may have a stronger claim regulating access to the presidency than access to a congressional seat. Per the Constitution, states are a "gatekeeper" deciding who may occupy the White House.

*Term Limits* wrongfully overlooked how broadly states may regulate presidential elections. In *Term Limits*, despite addressing a law only targeting *congressional* candidacies, the Majority offhandedly noted that states retain the same limited powers in presidential elections as in congressional elections.[133] It may be true—as *Term Limits* mentioned—that states have no greater "reserved powers" emanating from the Tenth Amendment for presidential elections than congressional elections.[134] But textually, via the Electoral College, states have been delegated much greater power for presidential elections.

Surprisingly, the breadth of power is unsettled. Three decades before *Term Limits*, Justice Potter Stewart argued the states had very broad discretion in establishing qualifications because of the powers delegated to them in Article II.[135] Stewart's argument has not been properly settled. This Article will explore the inherent uncertainty of the Electoral College that leads to a clash between the Constitution's text and *Term Limits*' structural analysis—and the need for courts to resolve this dispute in order to assess the constitutionality of release laws.

### A. Textual Delegation

#### *1. How Much Power Has Been Given?*

The Constitution's text contains three notable differences in state power between Article I for congressional elections and Article II for presidential elections: the textual interpretation of "manner," the scope of federal oversight, and the delegation to different entities.[136]

133. *Term Limits*, 514 U.S. at 803–04 (quoting 1 Story § 627) ("Representatives and Senators are as much officers of the entire Union as is the President. States thus 'have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president . . . It is no original prerogative of state power to appoint a representative, a senator, or president for the union.'").

134. *Id.*; *see also supra* at Section II: "The Background Case Law: *U.S. Term Limits, Inc. v. Thornton*."

135. *Williams*, 393 U.S. at 48–51 (1968) (Stewart, J., dissenting) (finding that a state can set qualifications so long as the law does not violate the Fifteenth, Nineteenth, or Twenty-Fourth Amendments).

136. U.S. CONST. art. I, § 4, cl. 1 ("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 Place of chusing [sic] Senators."); U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and

As explained earlier, ballot access cases wrestle over the definition of "manner"—as it determines how broadly states may regulate elections.[137] In Article I, "manner" is cabined by "times" and "places."[138] Regulating the "time" and "place" of an election is strictly an administrative matter related to an election procedure. Under the canon of construction *noscitur a sociis*—advising that a word in a list must be read in light of its corresponding words[139]—it is correct to read "manner" in conjunction with "time" and "place," and thus, to permit narrow regulations of Election Day processes in Article I.[140] In Article II, however, "manner" sits alone.[141] On its own, "manner" carries a broad meaning: "a way in which a thing is done or happens."[142] It must be given greater force than its more cabined use in Article I.[143]

Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.").

137. *Supra* at Section III.A: "A Class of Candidates: Inherent Qualities Targeted"; *see, e.g.*, *Term Limits*, 514 U.S. at 832 (1995) (addressing petitioner's interpretation of "manner" within U.S. CONST. art. I, § 4, cl. 1); The Founders debated how broadly "manner" should be read, with some believing it was given broad import. *See, e.g.*, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 49–50 (J. Elliot ed., 1836) (Massachusetts ratifying convention debating the breadth of "manner"); *see id.* at 326–29 (New York ratifying convention debating the breadth of "manner").

138. U.S. CONST. art. I, § 4, cl. 1 ("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 Place of Chusing Senators.") (emphasis added)).

139. *See U.S. v. Yates*, 135 S. Ct. 1074, 1085–86 (2015) (interpreting "tangible object" to be limited to objects used to record and preserve information—and not to include a fish—because the phrase came at the end of a list alongside "record" and "document").

140. *See, e.g.*, *Cook v. Gralike*, 531 U.S. 510, 511–12 (2001) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)) ("[M]anner . . . encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud, 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."); *see also supra* at Section V.A: "How the State Justifications Cohere with Case Law" (discussing state justifications pertaining to Election Day).

141. *See* U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .").

142. Oxford Dictionary (2019), https://www.lexico.com/en/definition/manner.

143. *Cf. Russello v. U.S.*, 464 U.S. 16, 23 (1983) (quoting *U.S. v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *cf.* Akhil R. Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); *see generally* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflection on Free-form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1223 (1995).

Furthermore, Article I provides a congressional veto of any state regulation.[144] James Madison wanted to empower the federal government to check state governments. As he put it:

> The policy of referring the appointment of the House of Representatives to the people and not to the Legislatures of the States, supposes that the result will be somewhat influenced by the mode, This view of the question seems to decide that the Legislatures of the States ought not to have the [uncontrolled] right of regulating the times places & manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power.[145]

Article II has no such veto power.[146] The incongruence in federal oversight demonstrates that states have been delegated a different amount of power in Article II compared to Article I. It is unclear how far the Article II power stretches.

*2. To Whom Has the Power Been Delegated?*

Most importantly, the Constitution delegates the power to choose the President to the *state legislatures* and the power to choose Congressmen to the *people*. Article I provides that, "[t]he House of Representatives shall be composed of Members chosen every second year *by the People* of the several States."[147] Likewise, in the Seventeenth Amendment, "[t]he Senate of the United States shall be composed of two Senators from each State, elected *by the people* thereof."[148] On the other hand, in Article II, "[e]ach *State* shall appoint, in such Manner as the *Legislature* thereof may direct, a Number of Electors" and the electors then choose the President.[149] In choosing the President, shockingly, the people need not be involved necessarily.[150]

144. U.S. CONST. art. I, § 4, cl. 1 ("[T]he Congress may at any time by Law make or alter such Regulations.").

145. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 240 (1911), http://lf-oll.s3.amazonaws.com/titles/1786/0544-02_Bk.pdf.

146. U.S. CONST. art. II, § 1, cl. 2.

147. U.S. CONST. art. I, § 2, cl. 1 (emphasis added).

148. U.S. CONST. amend. XVII (emphasis added).

149. U.S. CONST. art. II, § 2, cl. 1 (emphasis added).

150. Since the mid-1800s, all states let their people choose the President, but the Constitution does not mandate such a system. *See* AKHIL R. AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 152–56 (2005).

*Term Limits* relied on "the people" directly choosing their congressmen.[151] As the Court summarized, "the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and *chosen directly, not by States, but by the people*."[152] Furthermore, the *Term Limits* Court looked to the history of choosing senators and observed senators used to be chosen by "the Legislature thereof,"[153] but now are chosen by direct election because of the Seventeenth Amendment.[154] As the Court conceded, prior to the Seventeenth Amendment, state legislatures maintained a greater "express delegation of power" in choosing senators.[155] Despite these observations, the Majority did not consider its implications for Article II, which still grants the power to the state legislatures. It is unclear, therefore, how *Term Limits* applies to the Qualifications Clauses' exclusivity when Article II—and not Article I—is at issue.

*3. How Has the Power Been Used?*

State legislatures have exercised greater delegated power in presidential elections throughout our history. In 1892, in *McPherson v. Blacker*, the Court acknowledged "plenary authority" for states to choose the process by which electoral votes would be given.[156] In doing so, it observed that the state legislatures retained absolute power—including directly choosing who received the electoral votes—in the first presidential election.[157] This continued for many more elections.[158] Based on this historical practice, as well as the Constitution's textual delegation, the Court concluded that Article

151. *Supra* at Section II: "The Background Case Law: *US Term Limits, Inc. v. Thornton*" (arguing that the Majority relied on the structural argument that people directly choose representatives to reach its conclusion).

152. *Term Limits*, 514 U.S. at 821 (emphasis added).

153. U.S. CONST. art. I, § 3, cl. 1.

154. *Term Limits*, 514 U.S. at 821.

155. *Id.* at 804 n.16.

156. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) ("The [C]onstitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and *leaves it to the legislature exclusively to define the method of effecting the object.*") (emphasis added); *see also Burroughs v. U.S.*, 290 U.S. 534 (1934) (granting plenary power to choosing the manner of appointment of electors under U.S. CONST. art. II, § 1).

157. *McPherson*, 146 U.S. at 8; *see also* Paul Boudreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ. L. REV. 195, 199 (2004) ("What is most striking about the limited [Founding] debate was the dominance of one position—a distrust of the "people" to elect the President.").

158. *McPherson*, 146 U.S. at 8–9.

II "convey[s] the broadest power of determination" to the states.[159] *Bush v. Gore* echoed *McPherson*'s reading, with all sides in *Bush* acknowledging the federal government must take state's legislative election schemes "as they come."[160]

### B. The Constitution's Text and History Conflict with *Term Limits*' Focus on Uniformity

Yet, despite this textual and historical support giving broad power to states in choosing the President,[161] such an outcome clashes with the structural analysis from *Term Limits*. This clash arises from an internal tension in the Constitution: it has separated who chooses the President from whom the President represents.[162] The President is chosen by 50 separate sovereigns, but represents all Americans at once.

This incongruence invokes *Term Limits*' concern about the fragmentation of election laws.[163] In *Term Limits*, the Court feared disunity of campaign laws would hurt the representation of all people.[164] Arguably, a "patchwork"[165] of laws would be even more worrisome in choosing the President than choosing Congressmen. It is one thing for the State of Arkansas to limit who can become an Arkansas Senator; it is quite another for Arkansas to limit who becomes President—or more accurately, for Arkansas to limit who wins its six electoral votes, and thus impact who becomes President. The negative externalities from one state's laws are amplified when choosing one position that governs all fifty states.[166] As

159. *Id.* at 13.

160. 531 U.S. 98, 123 (2000) (Stevens, J., dissenting); *see also id.* at 148 (Breyer, J., dissenting) (arguing that state constitutional provisions regulate the state legislature as well); *see also id.* at 113 (Justice Rehnquist arguing that a federal question is raised if the state departs significantly from its legislative process.); *see also* Richard L. Hasen, *How States Could Force Trump to Release His Tax Returns*, POLITICO.com (Mar. 30, 2017), https://www.politico.com/magazine/story/2017/03/donald-trump-tax-returns-release-214950 (noting that *Bush v. Gore*'s focus on state power in electing the president bolster release laws).

161. *See* U.S. CONST. art. II, § 1, cl. 2, cl. 4 (In Article II, there are a few limits to state power in the Electoral College, including how many electors each state receives, who may be an elector, and when the electors must vote.).

162. *Cf.* Heather Lardy, *The Constitutional Limits of Democratic Choice: US Term Limits Inc. v. Thornton*, 25 ANGLO-AM. L. REV. 376, 391 (1996) (analyzing the political theory for electing congressmen).

163. *See, e.g.*, *Term Limits*, 514 U.S. at 803 ("Representatives and Senators are as much officers of the *entire* Union as is the President.") (emphasis added).

164. *Id.* at 822.

165. *Id.* at 780.

166. Danielle Lang argues that relying on state power to uphold release laws would hurt democracy. *See* Danielle Lang, *Candidate Disclosure and Ballot Access Bills: Novel Questions on Voting and Disclosure*, 65 UCLA L. REV. DISC. 46, 53 (2017) ("By relying on state plenary authority over presidential electors to justify the disclosure law, advocates would be opening a

noted in *Anderson v. Celebrezze*, "in the context of the presidential election, state-imposed restrictions implicate a uniquely important national interest . . . [f]or the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation."[167] Justice Thomas, despite generally arguing for broad state powers in *Term Limits*, also addressed increased negative externalities for presidential elections and concluded Arkansas cannot set qualifications for the President.[168]

Notably, the negative externalities may be lessened with the enactment of release laws. If one state releases a candidate's returns, the information could then be disseminated to all fifty states. Therefore, even if a state requires a different amount of information be released than a neighboring state, the net result will be national uniformity because all voters will ultimately have access to the same information.[169] Nonetheless, the release laws serving as a barrier to the presidential ballot—as opposed to their effect in releasing information—maintains the uniformity concerns articulated in *Term Limits*.

The Fourteenth Amendment also serves as a catalyst for uniformity. The Electoral College does not run afoul of the Fourteenth Amendment's "one person, one vote" rule,[170] but adding qualifications may violate other Fourteenth Amendment principles. *McPherson*'s observation that states have plenary power—made in 1892 during the post-Reconstruction expansion of states' rights—narrowly read the Fourteenth Amendment, as "not . . . radically chang[ing] the whole theory of the relations of the state and federal governments to each other."[171] Such a reading of the Fourteenth Amendment is inaccurate today.[172]

'Pandora's box,' in which states could interfere with the democratic process by choosing how the state's presidential electors will be selected based on something altogether different than the popular vote in the state. For those hoping to improve our democratic system through transparency, the risks of this approach are not worth the reward.") (citations omitted).

167. *Anderson*, 460 U.S. at 794–95 (footnote omitted).

168. *Term Limits*, 514 U.S. at 861 (Thomas, J., dissenting) ("Even though the Arkansas Legislature enjoys the reserved power to pass a minimum-wage law for Arkansas, it has no power to pass a minimum-wage law for Vermont. For the same reason, Arkansas may not decree that only Arkansas citizens are eligible to be President of the United States; the selection of the President is not up to Arkansas alone, and Arkansas can no more prescribe the qualifications for that office than it can set the qualifications for Members of Congress from Florida. But none of this suggests that Arkansas cannot set qualifications for Members of Congress from Arkansas.").

169. *But see* Eric T. Tollar, *Playing the Trump Card: The Perils of Encroachment Resulting from Ballot Restrictions*, 51 SUFFOLK. U. L. REV. 695, 717 (2018) (discussing negative spillover effect from one state passing a release law).

170. *See Sanders v. Gray*, 372 U.S. 368, 380–81 (1963).

171. *McPherson v. Blacker*, 146 U.S. 1, 12 (1892).

172. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964).

Furthermore, the Fourteenth Amendment's Due Process Clause cautions against additional qualifications. As Justice Harlan argued, the Electoral College is a state institution, and as such, it must hear from all persons who want to support a candidate.[173] Qualifications kicking a candidate off the presidential ballot would prevent the people from being heard. But these arguments have never been cemented into Supreme Court case law. Instead, states are left retaining an undefined amount of power in choosing the President.

Given the ambiguity between text, history, and structure emanating from the Electoral College, release laws offer a new opportunity to establish the power states have in choosing the President.

## VII. States as the Refuge of Last Resort

Even if states do not obtain absolute power in choosing the President, release laws expose a vacuum of curbing presidential corruption within the Constitution's structure, and states can argue they are the best-positioned constitutional actors to fill the void. In other words, states are the refuge of last resort for disclosure as a means to prevent conflicts of interest in the nation's highest office. To assess the structural gaps, this Article will analyze *who* should enforce presidential conflicts of interest as well as *when* and *how* enforcement should occur.

### A. The Institutional Actor: Who Should Enforce Release Laws

States stand guard to police presidential corruption. To understand their power, it is best to start with the other constitutional actors' weaknesses. The Executive Branch cannot be expected to police the President, as that office serves over the entire branch.[174]

The Judiciary is also in a poor position to police presidential conflicts of interest. Plaintiffs harmed by presidential corruption face significant hurdles in the courts. It is difficult to establish Article III standing, especially when the extent of conflicts is unknown. In fact, the United States Court of Appeals for the Fourth Circuit recently dismissed a lawsuit filed by the District of Columbia and Maryland against President Trump for Emoluments violations because the plaintiffs lacked standing.[175] Even if a plaintiff could

173. *See Williams*, 393 U.S. at 42 (Harlan, J., concurring).

174. U.S. CONST. art. II, § 1, cl. 1.

175. *In re Donald J. Trump*, No. 18-2846 (4th Cir. July 10, 2019), http://www.ca4.uscourts.gov/opinions/182486.P.pdf. On September 13, 2019, however, the Second Circuit found that a restaurant owner and restaurant organization had standing to allege President Trump violated the Emoluments Clauses. *See Citizens for Responsibility and Ethics in Washington, Restaurant Opportunities Centers United, Inc., Jill Phaneuf, and Eric Goode v. Donald J. Trump*, No. 18-474 (2d. Cir. Sept. 13, 2019).

establish constitutional standing, courts may cite a prudential concern against ruling on a "question[] of broad social import."[176] Furthermore, a court may rule that the Emoluments Clauses do not provide a private cause of action.[177] Additionally, courts may invoke the political question doctrine by interpreting the Constitution as textually committing the policing of presidential conflicts of interest to Congress and not to the courts.[178] Furthermore, courts may believe there are no clear, judicially enforceable rules to apply for assessing whether a conflict of interest exists.[179] Given these barriers, Article III is poorly positioned to curb corruption in the White House.

Congress, unlike the other two federal branches, is better positioned to police presidential conflicts of interest. If states are able to mandate tax return release as a precondition for getting on the ballot, presumably, so too could Congress.[180] Furthermore, congressional committees with tax law jurisdiction—particularly, the House Committee on Ways and Means and the Senate Committee on Finance—could request to view the returns in closed session, as the Ways and Means Committee has done for President Trump's returns.[181]

But Congress is inhibited from policing presidential conflicts of interest in two ways. First, many conflict of interest statutes do not apply to the

176. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 387 (3rd ed. 2000) (quoting *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 99–100 (1979)) (acknowledging courts may avoid deciding an issue, especially when "no individual rights would be vindicated").

177. *In re Donald J. Trump*, No. 18-2846, at *24 (4th Cir. July 10, 2019), http://www.ca4.uscourts.gov/opinions/182486.P.pdf (expressing skepticism that the Emoluments Clauses provide a cause of action).

178. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 366–68 (3rd ed. 2000) (discussing the political question doctrine generally); *cf. Nixon v. U.S.*, 506 U.S. 224, 238 (1993) (ruling that the impeachment power is textually committed to Congress); *see also* Josh Blackman, *Larry Tribe Calls My Emoluments Clause Analysis a 'Linguistic Sleight of Hand'*, JOSH BLACKMAN'S BLOG (Jan. 26, 2017), http://joshblackman.com/blog/2017/01/26/larry-tribe-calls-my-emoluments-clause-analysis-a-linguistic-sleight-of-hand/ (advancing the argument that the Foreign Emoluments Clause is textually committed to Congress because Congress can, if it chooses, consent to the president receiving foreign emoluments).

179. As constitutional scholars have recently focused on the Emoluments Clauses, many have disagreed on what precisely constitutes an "emolument," and on the differing scope between the Domestic Emoluments Clause and the Foreign Emoluments Clause. Courts may find themselves ill-suited to draw such lines with complicated financial information, especially given the Emoluments Clauses' dearth of case law. *See, e.g.*, Jonathan H. Adler, *Does the Emoluments Clause Lawsuit Against President Trump Stand a Chance*, WASH. POST, (Jan. 23, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/23/does-the-emoluments-clause-lawsuit-against-president-trump-stand-a-chance/?utm_term=.4289d78ce4eb.

180. *See, e.g.*, George K. Yin, *Congressional Authority to Obtain and Release Tax Returns*, 154 TAX NOTES 1013 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2927048 (analyzing constitutionality of a congressional release law).

181. 26 U.S.C.A. § 6103(f)(1) (Westlaw through P.L. 116-53).

President because of structural impediments.[182] For example, laws requiring executive officials to divest financial holdings do not apply to the President;[183] nor do laws forbidding other executive employees from receiving supplemental compensation.[184] Congress cannot require such obligations of the President without interfering with the Separation of Powers.[185] Second, for the congressional checks that could apply to the President—including a potential release law or committee subpoena—Congress has failed to act. Senator Ron Wyden of Oregon introduced a national release law, but it has not moved out of the Senate.[186] Without a federal release law, Congress is left with subpoena and oversight of the President once the people have voted him into office. The release laws offer a far more effective preventative measure.

### B. The Timing: When and How Enforcement Should Occur

A prophylactic disclosure of conflicts during the campaign is stronger than post-inauguration enforcement. The two potential remedies post-inauguration—a mandate that the President divest or face impeachment—have severe deficiencies. First, the Department of Justice, Office of Legal Counsel has advised that it is unconstitutional to require the Vice President to divest from his finances.[187] This opinion would almost certainly apply to the President. Second, impeachment faces high hurdles, and provides a stark remedy not clearly appropriate. Furthermore, solutions after the people chose their President create further distrust amongst different political groups.[188]

182. Of course, even though conflict of interest statutes do not apply to the President, the Constitution's Emoluments Clauses still apply to the President.

183. 18 U.S.C.A. § 202; *see also* Julie Bykowicz & Mark Sherman, *Why Conflict of Interest Rules Apply Differently to the President*, PBS NEWSHOUR (Nov. 30, 2016, 4:47 PM), http://www.pbs.org/newshour/rundown/conflict-interest-rules-apply-differently-president/ ("What's a serious matter for a second-term congressman with a small business has no equivalent for a president with a multibillion-dollar empire.").

184. 18 U.S.C. § 202 (2014); 18 U.S.C. § 209 (2004).

185. *See* JACK MASKELL, MEMORANDUM: CONGRESSIONAL RESEARCH SERVICE ON CONFLICT OF INTEREST AND "ETHICS" PROVISIONS THAT MAY APPLY TO THE PRESIDENT (Nov. 22, 2016), https://fas.org/sgp/crs/misc/conflict.pdf.

186. Editorial Board, *An Antidote to Donald Trump's Secrecy on Taxes*, N.Y. TIMES (Dec. 12, 2016), https://www.nytimes.com/2016/12/12/opinion/an-antidote-to-donald-trumps-secrecy-on-taxes.html.

187. LAURENCE H. SILBERMAN, MEMORANDUM FOR RICHARD T. BURRESS, OFFICE OF THE PRESIDENT (Aug. 28, 1974), https://fas.org/irp/agency/doj/olc/082874.pdf.

188. *Cf.* Fenit Nirappil, *Blue-State Lawmakers Want to Keep Trump Off 2020 Ballot Unless He Releases Tax Returns*, WASH. POST (Jan. 3, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/01/03/blue-state-lawmakers-want-to-keep-trump-off-2020-ballot-unless-he-releases-tax-returns/ (lawmaker calling release laws "sour grapes over the election").

Release laws, on the other hand, offer a simpler solution: Resolve the issue before a candidate takes office and let the conflicts be judged at the ballot box by the voters. As James Madison acknowledged while opposing the Alien and Sedition Acts, "the right of freely examining public characters and measures, and of free communication thereon" is "the only effectual guardian of every other right."[189] Release laws build on this principle.

## VIII. Tailoring: How it All Comes Together

Bringing it all together, release laws offer a chance for courts to clarify the level of scrutiny applied to ballot access laws. Courts have never applied a uniform level of scrutiny.[190] Often, the level of scrutiny applied seems determined by whether the law targets a "substantive" characteristic or a fundamental right.[191] Release laws do not target a substantive characteristic nor a fundamental right, but the privacy interests and uniformity concerns for electing the president make it likely courts will apply a scrutiny more demanding than rational basis.[192]

States need to clarify their justifications for the release laws. Unfortunately, with tax return release, there is a lingering problem for states: they do not know what is in a return until it is disclosed. Before then, it is all conjecture about potential conflicts or corruption. Nonetheless, states can still articulate how each portion of a return could bolster its justifications. States should carefully delineate what information has a legitimate justification. For instance, states must justify how the release of a candidate's effective tax rate or charitable deductions serve an interest related to a candidate's future conduct in office, and not simply serve as political fodder.[193]

189. James Madison, *Report on the Virginia Resolutions* (Jan. 1800), http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html.

190. *See Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992) (rejecting strict scrutiny, and instead applying "a more flexible standard" that "weigh[s] 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'") (quoting *Anderson*, 460 U.S. at 788–89).

191. *See, e.g.*, *Williams*, 393 U.S. at 31 (1968) (requiring the state show a compelling interest to protect independent candidates); *Bullock*, 405 U.S. at 147 (requiring a showing of necessity for a filing fee law that would harm indigent candidates).

192. *See* Louis Bernard Jack, *Constitutional Aspects of Financial Disclosure under the Ethics in Government Act*, 30 CATH. U. L. REV. 1, 593–94 (1981) (arguing overbreadth analysis from the First Amendment context should apply in privacy analysis).

193. *See* Editorial Board, *'We the People' Demand Mr. Trump Release His Tax Returns*, N.Y. TIMES (Jan. 24, 2017), https://www.nytimes.com/2017/01/24/opinion/we-the-people-demand-mr-trump-release-his-tax-returns.html ("Releasing the returns would provide important insight into Mr. Trump's finances and businesses. They would reveal if he is as wealthy as he claims to be,

### A. Slippery Slope

Resolving these open questions is important because a slippery slope is lurking. If release laws like the one in California are found constitutional, states will likely propose laws requiring release of many documents, such as school transcripts or medical records.[194] Like tax returns, these documents have been relevant to the electorate in recent years and contain information protected from public disclosure.[195]

School transcripts and medical records also flip the current political valence.[196] In 2012, President Trump sought President Obama's college applications and transcripts.[197] Four years later, when running for office, he suggested Secretary Clinton and he release their health records.[198] To avoid partisan politics in determining the constitutionality of laws that require release of information, courts will have to ensure the state's justifications are properly tailored to the type of information released. Medical information, for example, seems to burden a person's privacy interest more than financial information, and it is unclear what constitutionally germane or illegal activity would be disclosed from a medical record. Law school transcripts may inform the electorate how well a candidate did in constitutional law, but

what his effective income tax rate is (he said during the campaign that not paying taxes meant he was smart) and how much he gives to charity."); *see, e.g.*, David A. Fahrenthold, *Trump Promised Millions to Charity. We Found Less Than $10,000 Over 7 Years*, WASH. POST (June 28, 2016), https://www.washingtonpost.com/politics/trump-promised-millions-to-charity-we-found-less-than-10000-over-7-years/2016/06/28/cbab5d1a-37dd-11e6-8f7c-d4c723a2becb_story.html?utm_term=.059d33106436.

194. Eric T. Tollar, *Playing the Trump Card: The Perils of Encroachment Resulting from Ballot Restrictions*, 51 SUFFOLK. U. L. REV. 695, 726–27 (2018) ("However, obtaining tax returns by way of state ballot restrictions could easily open the door to perverse results . . . We must ask ourselves if we are willing to transform ballot restrictions from procedural roadblocks designed to prove a candidate's political viability, into proverbial crowbars used to pry loose information that some simply want from a candidate. It begins with tax returns but could quickly lead to drug tests and medical histories. Or birth certificates.").

195. *See, e.g.*, 5 U.S.C § 552a; 26 U.S.C. § 1232g; 45 C.F.R. § 164.524.

196. *See, e.g.*, Russell Goldman, *Donald 'Bombshell' Fails to Blow Up*, ABC NEWS (Oct. 24, 2012), http://abcnews.go.com/Politics/OTUS/donald-trump-fails-drop-bombshell-offers-cash-obama/story?id=17553670 ("Donald Trump today pledged $5 million to a charity of President Obama's choice, provided the president makes public his college applications and transcripts . . . ."); Dan Merica, *Clinton Campaign Releases New Health Information*, CNN, (Sept. 15, 2016, 12:55 AM), https://www.cnn.com/2016/09/14/politics/clinton-campaign-releases-new-health-information/index.html ("Hillary Clinton's campaign released additional medical information Wednesday after questions about her health intensified. . . .").

197. Russell Goldman, *Donald 'Bombshell' Fails to Blow Up*, ABC NEWS (Oct. 24, 2012), http://abcnews.go.com/Politics/OTUS/donald-trump-fails-drop-bombshell-offers-cash-obama/story?id=17553670.

198. Dan Merica, *Clinton Campaign Releases New Health Information*, CNN, (Sept. 15, 2016, 12:55 AM), https://www.cnn.com/2016/09/14/politics/clinton-campaign-releases-new-health-information/index.html.

it does not seem that such information can be tailored to a more compelling justification to require aspiring officeholders to release their grades. Nonetheless, an ambitious state could argue medical reports and transcripts tie into the Twenty-Fifth Amendment's assurances that a President is able "to discharge the powers and duties of his office."[199] Like release laws, these questions provide no easy answers. But they demonstrate the need for courts to ensure the interests at stake are tailored to the burdens—and for further clarity on the definition of qualification and the states' power in regulating presidential elections.

## IX. Conclusion

On April 15, 2017, thousands of Americans marched in protest to demand that President Trump release his tax returns.[200] Taking to the streets has been one of many avenues used by Americans to demand access to their President's financial information. Another avenue offered in at least 25 states, and passed in California, requires presidential candidates to release their tax returns in order to be placed on the state's presidential ballot.[201] Beyond the temporal politics, these laws invoke constitutional ambiguities, including the meaning of the Qualifications Clauses, the application of the First and Fourteenth Amendments' protection of candidates' access to the ballot, the reach of the right to privacy, the significance of the Emoluments Clauses, the breadth of power to states to conduct presidential elections, and the role states have in policing federal corruption. The release laws provide a vehicle to resolve urgent constitutional uncertainties that extend well beyond today's political fight.

199. U.S. CONST. amend. XXV.

200. Greg Allen, *Protesters Use April 15 to Demand Trump's Tax Returns*, NPR (April 15, 2017), https://www.npr.org/2017/04/15/524122918/protesters-use-april-15-to-demand-trumps-tax-returns.

201. Alexi McCammond, *The Big Picture: The State Efforts to Keep Trump off the 2020 Ballot*, AXIOS (June 24, 2018), https://www.axios.com/states-tax-return-laws-presidential-2020-trump-88e84cce-7214-409d-b4c7-a24aad919bdb.html.