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DAVIS V. FEC: THE ROBERTS COURT'S CONTINUING ATTACK ON CAMPAIGN FINANCE REFORM

Richard Briffault*

In *Davis v. FEC*,¹ decided on the last day of the October 2007 Term, a closely divided Supreme Court invalidated the so-called Millionaires' Amendment, which was a provision added to the Federal Election Campaign Act ("FECA") as part of the Bipartisan Campaign Reform Act ("BCRA") of 2002 to make it easier for Senate and House candidates to raise private contributions when they run against an opponent who uses a substantial amount of personal wealth to pay for his or her campaign.² From the reform perspective, the loss of the Millionaires' Amendment was not of great moment. The Amendment was not part of the original McCain-Feingold and Shays-Meehan reforms at the heart of BCRA. Many observers had expressed concern about the Amendment's arguably pro-incumbent bias. Furthermore, the Amendment had had very little impact on elections, including those races in which opponents of self-financing candidates could have taken advantage of its provisions.³

But *Davis* has seriously troubling implications for the future of campaign finance reform. First, it extends and deepens the Supreme Court's anti-campaign finance reform trend. For the third time in the three years since Justice Alito replaced Justice O'Connor, who had generally voted for reform measures, the Court struck down or sharply limited a reform measure.⁴ Two of those three decisions were by five-four votes, with Justice

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1. 128 S. Ct. 2759 (2008).

2. The *Davis* case dealt only with 2 U.S.C. § 441a-1(a), the provision of the Millionaires' Amendment dealing with fundraising by candidates for the House of Representatives, and did not directly address 2 U.S.C. § 441a(i) which applies to Senate elections, but the logic of the decision plainly applied to both. *Id.* at 2766. A month after the decision, the Federal Election Commission announced that *Davis* precluded enforcement of both the House and Senate provisions. See Fed. Election Comm'n., *Federal Election Commission's Public Statement on the Supreme Court's Decision in Davis v. FEC*, <http://www.fec.gov/press/press2008/220080725millionaire.shtml> (July 25, 2008). The agency subsequently repealed all its rules intended to enforce both House and Senate versions of the Amendment. 73 Fed. Reg. 79597 (Dec. 30, 2008).

3. See Jennifer A. Steen, *Self-Financed Candidates in Congressional Elections 2* (U. Mich. Press 2006) [hereinafter Steen, *Congressional Elections*]; Jennifer A. Steen, *Self-Financed Candidates and the "Millionaires' Amendment"*, in *The Election after Reform: Money, Politics, and the Bipartisan Campaign Reform Act 2004*, 204–18 (Michael J. Malbin ed., Rowman & Littlefield 2006) [hereinafter Steen, *Millionaires' Amendment*].

4. The two prior decisions were *Randall v. Sorrell*, 548 U.S. 230 (2006), in which the Court invalidated Vermont's expenditure and contribution limits, and *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2653, 2659 (2007), which held that the First Amendment requires a sweeping as-applied exception to the federal ban on the use of corporate and union treasury funds to pay for electioneering communications. The Court had sustained that ban against a facial challenge less than four years earlier, when Justice O'Connor was on the Court, in

Alito and Chief Justice Roberts in the majority for all three. In the two earlier cases, the majority was fragmented and unable to produce a single majority opinion. *Davis* marks the first time this new anti-reform majority managed to join in a single majority opinion and the first time the Roberts Court flatly held unconstitutional a federal campaign finance law.

Second, the tone of Justice Alito's majority opinion was sharply critical of one of the longstanding underpinnings of reform—the goal of reducing the role of economic inequality in elections. Although the Court had previously held that controlling the electoral consequences of wealth inequality could not justify limits on spending, this was the first time the Court indicated that equality in campaign financing is not a “legitimate government objective” at all.⁵ Justice Alito contended that any legislative attempt to revise election law to “level[] electoral opportunities” for candidates is an inherently “dangerous” effort “to influence the voters’ choices.”⁶

Finally, although *Davis* did not deal with the public funding of candidates, the decision calls into serious question the constitutionality of a provision in many state public funding laws that relaxes public funding spending limits or offers candidates additional public funds when they run against high-spending privately-funded opponents. Such measures—sometimes known as “trigger” or “fair fight” laws—have been seen as crucial to persuading candidates to accept public funding and the spending limit that always accompanies public subsidies. Without the option of raising and spending above the public funding spending limit when running against a high-spending candidate, few serious candidates would accept public funding. Nearly all of the lower federal courts that, prior to *Davis*, had heard challenges to state laws triggering a release from the spending limit or the provision of additional public funds in response to high levels of opposition funding upheld those laws.⁷ But *Davis*, which cited the one lower federal court that went the other way,⁸ suggests that these state laws may now be in serious constitutional difficulty. Indeed, in a decision handed down a few months after *Davis* a federal district court determined that Arizona's law violated the First Amendment, although it declined to enjoin the use of the trigger provision in the 2008 election due to the lateness of the suit.⁹

Davis is thus an important milestone in the Roberts Court's ongoing challenge to campaign finance regulation. It is likely to embolden reform opponents to mount new legal attacks on existing campaign laws as well as to make it difficult to adopt new ones, such as the provision of public funding of candidates. It is a particularly striking decision because virtually all of the previously invalidated campaign finance laws sought to limit the role of money in campaigns while the Millionaires' Amendment actually

McConnell v. FEC, 540 U.S. 93, 95 (2003).

5. *Davis*, 128 S. Ct. at 2773.

6. *Id.* at 2774.

7. See e.g. *Daggett v. Commn. on Govtl. Ethics & Elec. Pracs.*, 205 F.3d 445, 450 (1st Cir. 2000); *N.C. Right to Life Comm. v. Leake*, 524 F.3d 427, 432 (4th Cir. 2008); *Gable v. Patton*, 142 F.3d 940, 943 (6th Cir. 1998); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1546 (8th Cir. 1996); *Assn. of Am. Phys. & Surgeons v. Brewer*, 363 F. Supp. 2d 1197, 1202–03 (D. Ariz. 2005); *Green Party of Conn. v. Garfield*, 537 F. Supp. 2d 359, 391–92 (D. Conn. 2008).

8. *Davis*, 128 S. Ct. at 2772 (citing *Day v. Holahan*, 34 F.3d 1356, 1359–60 (8th Cir. 1994)).

9. *McComish v. Brewer*, No. CV-08-1550-PHX-ROS, slip op. at 8–9 (D. Ariz. Oct. 17, 2008).

sought to make it easier for some candidates to raise money. *Davis* indicates that in the view of the current Supreme Court even laws that expand, rather than contract, campaign money can be subject to a successful First Amendment challenge if they have the forbidden purpose of leveling the electoral playing field. That surely does not bode well for the future of campaign finance reform.

This article provides a brief analysis of *Davis v. FEC* and its consequences for campaign finance jurisprudence. Part I examines the Millionaires' Amendment, the issue of self-financed candidates, and the history of the *Davis* case. Part II analyzes Justice Alito's majority opinion, its determination that a law that relaxed the contribution restrictions for some candidates burdened the constitutional rights of others, and its determination that "leveling the playing field" by making it easier for a non-self-financing candidate to raise money could not justify the burden the Court found. Part III considers the implications of *Davis* for the trigger provisions of state and local public funding laws. Part IV concludes with an assessment of the campaign finance decisions of the Roberts Court thus far and what that they tell us about the likely future of campaign finance law.

I. THE ROAD TO *DAVIS V. FEC*

A. *The Millionaires' Amendment in Brief*

The central thrust of the so-called Millionaires' Amendment was to make it easier for House and Senate candidates to raise money when they run against a candidate who (a) commits a large amount of his or her personal funds to the race and (b) has more money on hand at the start of the election year than his or her opponents. Triggering the Amendment required, first, that a candidate declare the intent to spend more than a threshold amount—\$350,000 in a House race—in personal funds.¹⁰ At the time of enactment, \$350,000 was about 38 percent of the expenditures of the successful candidate in a contested House race.¹¹ The Amendment then required comparing the resources available to that candidate and any candidate seeking to take advantage of the Amendment to determine the "opposition personal funds amount ("OPFA")." Specifically, each candidate would determine the total amount of personal funds he or she has contributed to the campaign and then would add to that amount 50 percent of the total funds raised by the candidate during the year before the election. Only if a candidate's total of personal funds plus 50 percent of contributed funds was less than the total of the self-funded candidate's personal funds plus 50 percent of contributed funds could a non-self-funding candidate take advantage of the Amendment.

If a candidate running against the so-called "Millionaire"—and it is important to note that the "Millionaire" did not actually need to be a millionaire and needed to commit only \$350,000 and not \$1 million of his or her personal wealth to the race in order for the Amendment to be triggered—qualified for the Amendment, he or she would get three

10. For Senate candidates, the threshold was the sum of \$150,000 plus an amount equal to the voting age population of the state in question multiplied by \$0.04.

11. See Br. for Appellant at 53, *Davis*, 128 S. Ct. 2759.

benefits. First, the candidate was authorized to receive contributions from individuals that are much larger than the amounts FECA ordinarily permits. In House elections, candidates eligible to take advantage of the Amendment could receive contributions that were three times larger than the maximum contribution FECA ordinarily allows. At the time the Amendment was enacted in 2002, the ordinary ceiling was \$2000 so that candidates eligible to take advantage of the Amendment could receive contributions of up to \$6000. By the time the *Davis* decision was handed down in 2008, the statutory cost of living adjustment had raised the standard contribution cap to \$2300 and the Millionaires' Amendment allowance to \$6900.¹² Second, FECA caps the total amount of contributions any individual can make to all federal candidates during a two-year election cycle. In 2002, the cap was \$37,500 and in 2008, it was \$42,700.¹³ The Millionaires' Amendment enabled donors to disregard that aggregate cap in making contributions to eligible candidates. Third, although FECA limits political party expenditures in coordination with a candidate—in most House races in 2008 the limit was \$40,900¹⁴—the Amendment provided that a party could make an unlimited amount of coordinated expenditures with a candidate running against a "millionaire." A candidate running against a "millionaire" could take advantage of these relaxed contribution rules only so long as there was a gap between that candidate's war chest and the "millionaire's." Once the "millionaire's" opponent achieved financial parity, the ordinary contribution limits would resume.

To keep track of the financing of both self-funded candidates and their opponents, the Amendment provided for several new reporting requirements. First, every candidate was required, within fifteen days of announcing his or her candidacy, to file a statement with the Federal Election Commission ("FEC") declaring the amount of personal funds, if any, over \$350,000 he or she intended to spend. A candidate was then required to notify the FEC within 24 hours of actually crossing the \$350,000 personal funds spending threshold and, thereafter, to notify the FEC within 24 hours of every expenditure of \$10,000 or more of personal funds. An opponent of a self-financing candidate who took advantage of the law's relaxed contribution and coordinated expenditure limits was also required to notify the FEC within 24 hours of receiving contributions or coordinated expenditures that closed the war chest gap with the self-financing opponent.

B. The Origins and Limited Impact of the Millionaires' Amendment

The Millionaires' Amendment was adopted as part of BCRA, but it was not a component of the original McCain-Feingold/Shays-Meehan reform package. Indeed, the idea has been traced back to a proposal first put forward in 1987 by Senator Pete Domenici (R-New Mexico) to help make the opponents of self-financing candidates

12. See 72 Fed. Reg. 5294, 5295 (Feb. 5, 2007). For Senate races, the increase in contribution limits was more variable, depending on exactly how much money the "millionaire" committed to the race. Candidates running against the "millionaire" would have been eligible to receive individual contributions in amounts up to six times the standard contribution limit.

13. *Id.*

14. *Id.* at 5294. In states with a single House district, the ordinary party coordinated expenditure limit is double that amount. In 2008, that came to \$81,900. See 2 U.S.C. § 441a(d)(3).

more financially competitive.¹⁵ Fourteen years later, Domenici again moved his proposal, this time as an amendment to BCRA. As initially drafted, the Domenici Amendment would have lifted the contribution limits for the entirety of a campaign once a self-financing candidate spent more than the threshold amount of personal funds.¹⁶ Many reformers opposed such a complete elimination of limits regardless of the resources of the self-financing candidate's opponent. Noting the superior ability of incumbents to harvest campaign donations, they viewed Domenici's proposal as a "self-serving ploy by congressional incumbents to maintain their traditional advantages."¹⁷

As the reform community's initial reaction to the Domenici amendment indicates, the question of what to do about wealthy self-financed candidates presents a dilemma for reformers. On the one hand, the ability of the wealthy to commit unlimited personal resources to a campaign is a direct challenge to the ideal of political equality central to campaign finance reform. One goal of campaign finance reform is to reduce the role of private wealth in politics, so that campaign financing is less out of line with the one person, one vote principle at the heart of democratic elections. FECA originally sought to impose a \$50,000 limit on candidates' use of personal resources, but the Supreme Court in *Buckley v. Valeo*¹⁸ struck that down as a "substantial restraint on the ability of persons to engage in protected First Amendment expression."¹⁹ As a matter of current constitutional doctrine then, no limit can be placed on the ability of the wealthy to use personal resources for their own campaigns although their donations to other candidates can be capped. Indeed, one result of the interaction of FECA's contribution limits—which *Buckley* upheld as justified by the interest in preventing corruption and the appearance of corruption that results when candidates receive large private contributions for their campaigns—and *Buckley*'s invalidation of both spending limits and limits on the use of personal funds has been to increase the potential electoral role of the wealthy as candidates.

Wealthy individuals are spared the time and financial burdens of fundraising and can devote as much of their own money as they want to their campaigns. There is also evidence that the rise of self-funded candidates has made it more difficult for non-wealthy candidates to compete. A wealthy self-funded candidate's decision to enter a race can discourage other candidates without the same easy access to money from running. Moreover, the political parties now intentionally recruit wealthy candidates because they "can spend large sums of their own money to finance their Congressional races."²⁰ The tendency of wealthy candidates to clear the field, particularly in primary elections, reduces the choices available to voters.²¹ These developments give wealthy candidates an electoral advantage and create the appearance of a wealth test for office. And the election of self-funded candidates exacerbates the income and wealth gaps

15. Steen, *Congressional Elections*, *supra* n. 3, at 2.

16. See 147 Cong. Rec. S2449–2450 (daily ed. Mar. 19, 2001).

17. Steen, *Congressional Elections*, *supra* n. 3, at 2.

18. 424 U.S. 1 (1976).

19. *Id.* at 52 (footnote omitted).

20. Raymond Hernandez, *Short of Money, G.O.P. Is Enlisting Rich Candidates*, 157 N.Y. Times 1, 1 (Nov. 26, 2007). See Steen, *Congressional Elections*, *supra* n. 3, at 48–49.

21. See *id.* at 13–14, 48, 72, 154.

between elected officials and their constituents.

On the other hand, although self-funded candidates drive some other candidates from the field, their ultimate impact on electoral competition is ambiguous. Incumbents generally start out with significant advantages in terms of name recognition, campaign war chests, support from political action committees eager to have access to those in power, and, overall, a greater ability to raise contributions than most challengers. The option of self-financing enables at least some candidates—the wealthy—to be financially competitive with incumbents.²² As the leading study of self-financed candidates found, “extreme self-financers,” that is, candidates who committed \$500,000 or more of personal resources to campaigns in the 1992–2000 decade, “perform[ed] extraordinarily well in comparison to other challengers.”²³ Although they typically lost—as do most challengers—they were able to give incumbents tougher races than other, less wealthy challengers. And sometimes self-financing challengers prevailed: In 2000, three “extreme self-financers” ousted incumbent Senators²⁴—perhaps explaining the Senate’s approval of the Millionaires’ Amendment in the following Congressional session.

In addition, the solution to the self-financed candidate “problem” proposed by Senator Domenici and ultimately adopted by Congress—lifting contribution limits for other candidates—poses its own difficulties for reformers long committed to contribution limits as a means of curbing the influence of wealthy donors on elections and on public policy more generally. Relying on very large private contributions from wealthy donors to offset large amounts of self-funding from wealthy individuals hardly seems the ideal reform solution.

To deal with reformers’ concerns, the Domenici proposal was modified in several ways that became part of the enacted Millionaires’ Amendment. Contribution limits were relaxed and not dropped altogether, the benefit of relaxed contribution limits was limited to candidates whose total available funds were less than those of the self-funded candidate, and the contribution limits were required to return to standard levels once the war chest disparity was closed. Responding to the argument that the proposal would advantage incumbents, the Amendment was revised to require that the non-self-funding candidate’s resources be calculated in terms of donations received in the year before the election year—“the period when one would expect an incumbent to have the most significant fundraising advantage over a challenger.”²⁵ The war chest comparison was limited to just 50 percent of contributed funds but included 100 percent of personal funds because of the fundraising expenses incurred in raising contributed funds.²⁶

The Millionaires’ Amendment was on the books for just two rounds of Congressional elections—in 2004 and 2006—before it was invalidated by the Court. The leading study of the effect of the Amendment in 2004, by political scientist Jennifer A. Steen, found that it had very little impact on elections that year. Out of all of the

22. *Id.* at 93.

23. *Id.* at 114.

24. *Id.*

25. Br. of Amicus Curiae Com. Cause in support of Appellee at 9, *Davis*, 128 S. Ct. 2759.

26. *See id.* “[It] costs you 50 cents to raise a dollar, so about half of the money you raise goes into overhead of a campaign, the administrative costs of staff people, mailing out invitations, following up, making sure people are there.” *Id.* (quoting Sen. Durbin (D-IL) (citation omitted)).

House and Senate races in 2004, counting both primary and general elections, only 43 candidates in 39 distinct contests crossed the self-funding threshold trigger.²⁷ Ninety-three candidates were eligible to receive contributions in excess of the normal FECA contribution limits but only 56 did so.²⁸ Of those who took excess contributions, only 13 raised more than 10 percent of their total contributions from donations authorized by the Amendment, and 12 of those 13 candidates lost in the primary, none to the big spending self-financer.²⁹ No political party took advantage of the relaxation of the coordinated expenditure ceiling in any race.³⁰ Historically, the main significance of the Amendment may have been the boost it gave to the one candidate who received more than 10 percent of his contributions in amounts authorized by the Amendment and won his primary—Barack Obama. Running against self-funder Blair Hull in the Illinois Senate Democratic primary, Obama raised nearly one million dollars out of his total of \$4.6 million in itemized individual contributions—that is, contributions greater than \$200—under the Millionaires’ Amendment. But, as Professor Steen points out, the role of the Amendment in Obama’s primary victory is not clear given both the collapse of Hull’s campaign amid charges that he had abused his former wife and the fact that another primary contender received even more money in Millionaires’ Amendment donations than did Obama.³¹

On the other hand, if it is not clear that the Amendment did much to level the playing field for candidates running against “millionaires” in 2004, it does not appear that the Amendment provided the boost to incumbents that opponents of the Amendment had feared either. In most cases, incumbents running against self-financing challengers were unable to use the Amendment because their war chests exceeded the “opposition personal funds amount.” Only five incumbents in general elections were eligible to take advantage of the relaxed contribution limits, and only one actually did so. Representative Steve LaTourette (R-OH), challenged by a 26-year-old heiress who put \$1.7 million of her own money in her campaign, obtained \$135,000 in Millionaires’ Amendment contributions (out of total receipts of a little more than \$2 million).³²

There is no comparable independent academic study of the significance of the Amendment in the 2006 elections, but the FEC’s analysis is consistent with Professor Steen’s 2004 finding that the Amendment had little impact. The FEC reported that just 60 candidates triggered the Millionaires’ Amendment in 2004 and 2006 together; these candidates faced a total of 131 opponents; 110 of those opponents were eligible for Millionaires’ Amendment contributions but only 58 actually accepted the increased contributions the Amendment permitted. These 58 candidates raised \$8.6 million in increased contributions while their “millionaire” opponents spent a total of \$144 million

27. Steen, *Millionaires’ Amendment*, *supra* n. 3, at 209. The reason that there were fewer elections with self-funders than the number of self-funding candidates is that two or more self-funders faced off against each other in seven contests. *Id.*

28. *Id.* at 210.

29. *Id.* at 214.

30. *Id.* at 215.

31. *Id.*

32. Steen, *Millionaires’ Amendment*, *supra* n. 3, at 209, 212.

in personal funds.³³ Again, the Amendment also did little to benefit incumbents. In 2004 and 2006 together, only 11 House and Senate incumbents were challenged by self-financed candidates who triggered the Amendment, only six incumbents qualified to accept excess contributions, and only two actually accepted excess contributions.³⁴

C. *The Davis Litigation*

Jack Davis ran an unsuccessful campaign as the Democratic candidate for the 26th Congressional district in upstate New York in 2004. Davis's campaign was funded largely, albeit not exclusively, by more than \$1.2 million of his personal funds. Because he failed to file the required notice of his personal spending, his opponent incumbent Republican Representative Thomas Reynolds was not authorized to raise increased contributions. Subsequently, the FEC opened an investigation into Davis's failure to disclose his intent to spend more than the threshold amount of personal funds and ultimately proposed that he pay a \$251,000 penalty.

In 2006, Davis sought a rematch against Reynolds. This time he filed the required Statement of Candidacy and declared his intention to spend \$1,000,000 in personal funds in the general election. He also filed suit against the FEC, asking that the Millionaires' Amendment—including both the relaxation of contribution and coordinated expenditure limits and the additional reporting and disclosure requirements—be declared unconstitutional on its face. Before the case could be decided, Davis once again lost the election, by a narrow 52-48 margin, after spending \$2.3 million, "all but \$126,000 of which came from personal funds."³⁵ Although this time Representative Reynolds was eligible to take advantage of the relaxation of FECA's ordinary contribution limits, he did not raise any Millionaires' Amendment funds. He scarcely needed to do so. As chairman of the National Republican Congressional Committee, he was very well positioned to collect donations from others, and he ultimately raised \$4.2 million and spent \$5.1 million (including money on hand before the start of the campaign) without having to spend any personal funds.³⁶

In 2007, the three-judge panel of the United States District Court for the District of Columbia unanimously denied Davis's motion for summary judgment and granted the FEC's. Davis contended that the Amendment violated both the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment, but the three-judge panel rejected both arguments. The court concluded that because the Amendment "does not limit in any way the use of a candidate's personal wealth in his run for office,"³⁷ it placed no burden on political speech. The court also rejected Davis's argument that the Amendment coerces candidates into forgoing their First Amendment right to engage in self-financing. As the court noted, Davis presented "no evidence that self-financed candidates are not running for office or choosing not to self-finance or self-

33. *Jt. App.* at 88–89, *Davis*, 128 S. Ct. 2759.

34. *Id.* at 86.

35. *Davis*, 128 S. Ct. at 2767.

36. *Br. for Appellant* at 13, *Davis*, 128 S. Ct. 2759.

37. *Davis v. FEC*, 501 F. Supp. 2d 22, 29 (D.D.C. 2007).

financing less because of the Millionaires' Amendment."³⁸ Indeed, as the court pointed out, Davis himself "twice elected to self-finance," thus indicating that his free speech rights were not coerced or chilled.³⁹ The court also rejected the argument that the additional reporting requirements violated the First Amendment, noting that they were necessary to the effectiveness of the Amendment and merely accelerated the timing of certain disclosures as "all of the information required by the reporting provisions would eventually have to be disclosed to the FEC whether or not the Millionaires' Amendment ever applies."⁴⁰

The district court gave short shrift to the Fifth Amendment claim, explaining that the Constitution does not require Congress to treat all candidates exactly the same when there are salient differences among them: "[T]he reasonable premise of the Millionaires' Amendment is that self-financed candidates are situated differently from those who lack the resources to fund their own campaigns and that this difference creates adverse consequences dangerous to the perception of electoral fairness."⁴¹ Due to sharp differences in personal wealth, candidates "are not similarly situated in their abilities to fund a campaign from their own resources."⁴² According to the three-judge court, Congress's decision to treat this as a problem and attempt to address it by reducing the disparity in access to resources did not violate the Fifth Amendment.

The Roberts Court majority, however, took a very different view of Davis's claims.

II. DAVIS IN THE SUPREME COURT

The Supreme Court, in a 5-4 vote, with Justice Alito writing a majority opinion that was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas, reversed the district court and held that the Millionaires' Amendment violated the First Amendment.⁴³ In invalidating the law's relaxation of the standard federal contribution and party coordinated expenditure restrictions,⁴⁴ Justice Alito's opinion made two principal points. First, even though the Amendment did not limit Davis's ability to raise and spend his own funds on his campaign, the law nonetheless "impermissibly burden[ed] his First Amendment right to spend his own money for campaign speech."⁴⁵ Second, that burden could not be justified by any asserted interest in equalizing the

38. *Id.* at 31.

39. *Id.* (emphasis in original).

40. *Id.* at 32.

41. *Id.* at 33.

42. 501 F. Supp. 2d at 34.

43. The Court also rejected the FEC's arguments that Davis's claim was moot and that, because Rep. Reynolds had not taken advantage of the Millionaires' Amendment's relaxed contribution limits, he lacked standing to challenge the law. *Davis*, 128 S. Ct. at 2768–70. This portion of Justice Alito's opinion was joined by the entire Court. See *id.* at 2779 n. 4 (opinion of Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, joining in the Court's disposition of the mootness and standing issues while dissenting from its resolution of the First Amendment claim).

44. The majority opinion focused largely on the Amendment's relaxation of the contribution and coordinated expenditure restrictions for the opponents of self-financed candidates. Once the Court determined that the relaxation of restrictions was unconstitutional, the additional reporting and disclosure requirements intended to enable the Millionaires' Amendment to function were summarily found to be unjustified and, hence, unconstitutional as well. *Id.* at 2774–75.

45. *Id.* at 2771.

financial resources available to candidates because leveling the electoral playing field is simply not “a legitimate government objective.”⁴⁶ Although the Court relied exclusively on the First Amendment and declined to rule on Davis’s Fifth Amendment claim,⁴⁷ it was profoundly disturbed by what it saw as the law’s discriminatory regulation—“the unprecedented step of imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat”⁴⁸—in pursuit of equality. More generally, the majority opinion intimated hostility to campaign reform efforts, calling it “a dangerous business for Congress to use the election laws to influence the voters’ choices.”⁴⁹

A. *Defining the First Amendment Burden*

At the heart of the *Davis* case was the question of whether the Millionaires’ Amendment, which did not limit contributions to or expenditures by the self-financed candidate but simply made it easier for certain opponents of the self-financed candidate to raise money, burdens political speech. The three judges of the district court and the four dissenting justices in the Supreme Court said it did not. As Justice Stevens put it in his dissent, the Amendment “quiets no speech at all” and “[e]nhancing the speech of the millionaire’s opponent, far from contravening the First Amendment, actually enhances its core principles.”⁵⁰ However, the majority reasoned that, even though the law did not cap Davis’s spending, it did impose a “penalty” because it gave “fundraising advantages for opponents in the competitive context of electoral politics.”⁵¹

Surely, the dissent is right that the broad First Amendment value of a vigorous, hotly contested political debate that produces a better-informed electorate is not burdened, and is most likely advanced, by a law that permits more campaign spending, especially by the side that would otherwise have a harder time raising the funds necessary to make its case. But even if we focus on the speech interest of the self-financed candidate which is more directly protected by the First Amendment, it is still hard to see how his First Amendment rights are burdened in the absence of an outright limit on his spending. There might be a burden if the law so chilled the self-financed candidate that he drew back from spending personal funds above the threshold that triggered the law’s relaxation of contribution limits. But Davis was clearly not so chilled in either of his races against Reynolds. More generally, Professor Steen found no chilling effects on spending in the 2004 election. As she explained, “[s]elf-financing challengers either exceeded the thresholds by a large margin or stayed well beneath them.”⁵² There was not one challenger who self-financed up to the \$350,000 threshold and then stopped for fear of triggering a benefit for his or her opponent.

Alternatively, the Millionaires’ Amendment might arguably burden a self-

46. *Id.* at 2773.

47. 128 S. Ct. at 2775 n. 9.

48. *Id.* at 2774.

49. *Id.*

50. *Id.* at 2780 (Stevens, Souter, Ginsberg, Breyer, JJ., dissenting in part and concurring in part).

51. *Id.* at 2771–72 (majority).

52. Steen, *Millionaires’ Amendment*, *supra* n. 3, at 210.

financing candidate's First Amendment right if it somehow interfered with his ability to campaign or to communicate with the voters. There is a hint of this concern in the Court's reference to "advantages for opponents in the competitive context of electoral politics"⁵³ and the district court's acknowledgement of Davis's claim that "electoral politics may be a zero-sum game in which a benefit conferred on one candidate is a disadvantage to his opponent."⁵⁴ However, while an election may be "zero-sum" in the sense that only one candidate can be elected, it is not zero-sum from a free speech perspective. There is no scarcity of opportunity for campaign communications such that one candidate's additional spending reduces the opportunity for another candidate to get his message out. Increased campaign spending by the candidate aided by the Millionaires' Amendment did not limit the ability of the self-financing candidate to spend money on polling, focus groups, issues research, television ads, direct mail, or telephone calls, to recruit and deploy volunteers, or generally to present facts and arguments to the voters in support of her candidacy. That the voters might hear more from the self-financing candidate's opponents than they would have without the Millionaires' Amendment might in theory reduce the self-financing candidate's likelihood of success. But the Constitution does not protect his right to prevail, only his right to make his case without limit, and the Millionaires' Amendment in no way interfered with that.

The Millionaires' Amendment, thus, did not burden the self-financing candidate's First Amendment rights in any literal or empirical sense. The Amendment reflected the view that there was something improper—and deserving of a Congressional response—about the use of large amounts of personal wealth to pay for one's campaign. It also expressed Congress's concern about the consequences of the Court's decision in *Buckley* that the unlimited spending of personal wealth in support of one's own candidacy is constitutionally protected. Indeed, *Buckley* was central to *Davis*'s analysis. Justice Alito opened his discussion of the merits of the case with the statement that in *Buckley* the Court "soundly rejected a cap on a campaign's expenditure of personal funds to finance campaign speech," and he stressed that "*Buckley*'s emphasis on the fundamental nature of the right to spend personal funds for campaign speech is instructive."⁵⁵ In effect, the Court treated the Millionaires' Amendment as little more than a barefaced effort to circumvent *Buckley*'s holding. The real "burden" of the Amendment may have been not on candidate speech but on the Court's primacy in shaping campaign finance law.

Although the Millionaires' Amendment did not actually chill or limit self-financing, its enactment was a criticism of high levels of self-financing—a criticism underscored by the very "Millionaires' Amendment" phrase commonly used to describe it—and it burdened the right to engage in high levels of self-financing without a legislative response. However, although *Buckley* barred a limit on self-financing, there was no First Amendment right to engage in unlimited self-financing without any legislative response—at least until *Davis* was handed down. *Davis*, thus, actually expanded the personal spending right first found in *Buckley* by converting the loss of a

53. 128 S. Ct. at 2772.

54. 501 F. Supp. 2d at 30.

55. 128 S. Ct. at 2771.

campaign advantage into an unconstitutional burden.

B. Davis's Two Inequality Concerns

Even if the Millionaires' Amendment burdens the political speech of self-financing candidates that is not the end of the constitutional analysis. The Court has upheld a host of campaign finance laws—contribution limits,⁵⁶ reporting and disclosure requirements,⁵⁷ bans on contributions and expenditures by business corporations and unions⁵⁸—that burden First Amendment rights because the Court determined that those laws are properly tailored to promoting important governmental interests. The Millionaires' Amendment was proposed and defended as a means of partially leveling the electoral playing field by making it easier for non-wealthy candidates to run against personally wealthy opponents and, more generally, by diminishing the need for personal wealth in pursuing electoral office. For the *Davis* dissenters, “reducing the importance of wealth as a criterion for public office and countering the perception that seats in the United States Congress are available for purchase by the wealthiest bidder”⁵⁹ were important governmental interests justifying the Millionaires' Amendment's relaxation of FECA's standard contribution and coordinated expenditure restrictions.

The *Davis* majority, however, sharply disagreed, dismissing the “level[ing] [the] electoral opportunities” concept outright and, more generally, expressing a deep suspicion of legislative efforts to reform campaign finance practices to reduce the role of personal wealth in election campaigns. Justice Alito treated rejection of the leveling the playing field argument as directly mandated by *Buckley*.⁶⁰ However, all that the Court in *Buckley* said was that the “governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections” could not justify a *limit on spending*.⁶¹ Before *Davis*, the Court had never rejected equalization as a justification for campaign finance regulation *tout court* or held that there was no governmental interest in making it easier for less well-financed candidates to raise money. *Buckley*, in other words, had held that the First Amendment's protection of campaign expenditures precluded advancing equality by leveling down the spending of the more affluent but no Court decision, including *Buckley*, had barred a regulation intended to promote equality by leveling the resources of the less wealthy up.

Davis, however, appears to have done just that. Implicitly the Court held that the justifications for regulating campaign finance were limited to the prevention of corruption and the appearance of corruption—the governmental interests previously relied on for limiting contributions. Although Justice Alito's reliance on citations to prior Supreme Court opinions at this point made it appear that such a narrow definition of permissible campaign finance goals was required by Court doctrine, a close reading of

56. See e.g. *Nixon v. Shrink Mo. Govt. PAC*, 528 U.S. 377 (2000); *Buckley*, 424 U.S. at 19–38.

57. See e.g. *McConnell*, 540 U.S. at 194–202; *Buckley*, 424 U.S. at 60–84.

58. See e.g. *McConnell*, 540 U.S. at 203–11; *FEC v. Beaumont*, 539 U.S. 146 (2003); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654 (1990).

59. 128 S. Ct. at 2779–80 (Stevens, Souter, Ginsberg & Breyer, JJ., dissenting in part and concurring in part).

60. *Id.* at 2773 (majority).

61. 424 U.S. at 48.

the opinion discloses that Justice Alito was relying not on opinions of the Court, but on a dissenting opinion and a concurring opinion of Justice Thomas, a skeptic of campaign finance reform.⁶² The Court had never previously limited the permissible ends of campaign finance regulation simply to the prevention of corruption and the appearance of corruption. In particular, other governmental interests, such as improving voter information, have been relied on to justify other forms of campaign finance regulation, such as reporting and disclosure requirements.⁶³

Beyond this disputable reliance on precedent, Justice Alito's opinion indicated a sharp disagreement on the merits concerning the value of equalization as a campaign finance goal. Justice Alito treated equalization in the campaign finance context as a "dangerous" form of state paternalism. In his view, allowing the government to try to

'level electoral opportunities' has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of competing candidates for office. . . . Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election.⁶⁴

The argument that leveling the playing field usurps the role of the voters in choosing among candidates is entirely unpersuasive. Nothing in the Millionaires' Amendment takes away from the voters the "authority to evaluate the strengths of candidates competing for office." To the contrary, by making it easier for the self-financing candidate's opponents to raise money and campaign, the Amendment would have made it marginally easier for the voters to learn about the candidates and their platforms, to assess them, and to make an informed judgment concerning whom to vote for. Nor does making it easier for some candidates to raise money say anything about what Congress thinks *ought* to matter to voters' decisions, as Justice Alito implied. At most, it reflects Congress's judgment that the ability to raise money affects the ability of candidates to campaign.

And that is hardly an implausible judgment. In *Buckley*, the Court indicated that one factor in the review of contribution limits was whether a limit is so low that it prevents a candidate "from amassing the resources necessary for effective advocacy,"⁶⁵ and in *Randall v. Sorrell*, just two years before *Davis*, the Court struck down Vermont's contribution limits because they were so low that they threatened to "prevent[] challengers from mounting effective campaigns."⁶⁶ More generally, in sustaining the principal provisions of BCRA in *McConnell v. FEC* in 2003, the Court indicated it would defer to Congress's "particular expertise" in assessing the effects of campaign finance practices on the electoral process.⁶⁷

In *Davis*, however, the majority entirely dismissed the value of Congress's electoral expertise, both its sense that candidate personal wealth matters, and its belief that the impact of personal wealth on electoral opportunity is a problem. Justice Alito

62. *Davis*, 128 S. Ct. at 2773.

63. *Buckley*, 424 U.S. at 66–67.

64. *Davis*, 128 S. Ct. at 2773–74.

65. 424 U.S. at 21.

66. 548 U.S. at 249 (plurality).

67. 540 U.S. at 137.

minimized the electoral significance of candidate personal wealth, lumping it in with other factors when he wrote that “[d]ifferent candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name.”⁶⁸ Certainly, Justice Alito’s implication that legislation that addresses some sources of candidate strengths but not others may in practice fail to truly equalize electoral opportunities makes sense, although Congress has tried by legislation to place limits on both wealthy candidates and their wealthy supporters and the Millionaires’ Amendment balanced its response to self-financing candidates by denying any benefit to those candidates’ well-funded opponents. But it is hard to see why the Court’s extremely cursory pseudo-political science analysis of what factors count in campaign financing ought to displace Congress’s considered judgment.

Beyond the Court’s unsupported quasi-empirical judgments about what actually matters in a campaign, the Court clearly denied the legitimacy of Congressional efforts to improve the fairness of election campaigns by helping some candidates overcome the financial advantages enjoyed by others. Indeed, in a striking display of rhetorical jujitsu, Justice Alito suggested that the real inequality in *Davis* was not the millionaire candidate’s personal resources advantage over his less wealthy opponents, but the government’s action in providing more favorable contribution-raising rules for one candidate relative to another. Although the Court disclaimed reliance on equal protection arguments,⁶⁹ Justice Alito’s opinion surely sounded an egalitarian theme as it repeatedly expressed concern about “discriminatory fundraising limitations,”⁷⁰ “fundraising advantages for opponents,”⁷¹ “discriminatory contribution limits,”⁷² and “the unprecedented step of imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat.”⁷³ The inequality in question, of course, was not inequality of resources but unequal treatment by Congress of candidates with different access to resources.

Although there does seem to be something intuitively troubling about different rules for different candidates vying for the same seat, there is no reason for all such distinctions to be treated as unjustifiable discriminations. A ban on all differentiations would preclude, for example, a law that might allow challengers to take larger donations than incumbents. Given the built-in advantages that incumbents enjoy—the perquisites of office, the media attention to their work, and their ability to garner contributions—it is not clear why this should be presumptively invalid. Similarly, the provision of Minnesota’s public funding law that allows first-time candidates to spend 10 percent more than all other candidates for the same office⁷⁴ does not seem unreasonable given the obstacles, in terms of lack of name recognition and difficulty raising funds, that most first-time candidates face. If there is a significant difference in the abilities of different

68. 128 S. Ct. at 2774.

69. *Id.* at 2775 n.9.

70. *Id.* at 2771.

71. *Id.* at 2772.

72. *Id.*

73. *Davis*, 128 S. Ct. at 2774.

74. Minn. Stat. § 10A.25(2)(d) (2008).

candidates to compete effectively and if, as the Court indicated as recently as *Randall v. Sorrell*, the impact on effective competition is an important value in assessing campaign finance laws,⁷⁵ then some differentiation in the laws in order to promote competition ought to be permissible. Yet the absolutist language of Justice Alito's opinion could call Minnesota's extra spending authorization into question and, more generally, would appear to rule out variations in campaign finance laws that could enhance electoral competitiveness.

Nor, in practice, has the Court consistently adhered to Justice Alito's assertion that the election rules need to be the same for all candidates for the same office. In *Buckley*, for example, the Court upheld the provisions of the presidential public funding law that offer a large general election grant to candidates of major parties, a smaller grant to candidates of minor parties, and no pre-election grant at all to other candidates.⁷⁶ All are running for the same office, yet they are eligible for radically different amounts of public money—or no money at all—depending on the past electoral success of their parties. Looking to election law more generally, the Court has consistently upheld ballot access rules that give an automatic place on the ballot to the nominees of the major parties, thus enabling those candidates to avoid the time and cost of qualifying for the ballot for each election, while forcing independents and candidates of minor or new parties to run that difficult ballot access gauntlet.⁷⁷ This inevitably advantages major party candidates, yet, as the Court famously said in upholding such burdensome ballot access rules in *Jenness v. Fortson*⁷⁸ and in language quoted by *Buckley* in upholding the discrimination in the public funding law,⁷⁹ “[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.”⁸⁰

Justice Alito's declaration that “it is a dangerous business for Congress to use the election laws to influence the voters' choices”⁸¹ is belied by the Court's repeated validation of ballot access laws that discriminate between major party candidates on the one hand and minor party and independent candidates on the other. The states can differentiate between the two sets of candidates and make it easier for one group than the other to appear before the voters because of the state's asserted interest in “political stability.” As a result, according to the Court the state can “favor the traditional two-party system” and adopt laws that “temper the destabilizing effects of party splintering and excessive factionalism.”⁸² Surely this is a direct state effort to influence voters' choices, but Supreme Court majorities have repeatedly found such an effort to be unproblematic.

The real question, then, is not whether, consistent with the Constitution, campaign finance laws (or election laws more broadly) may differentiate among candidates and

75. 548 U.S. at 248, 253 (plurality).

76. 424 U.S. at 97–98.

77. See e.g. *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); cf. *Ark. Educ. TV Commn. v. Forbes*, 523 U.S. 666 (1998) (upholding exclusion of independent candidate from televised debate).

78. 403 U.S. 431 (1971).

79. 424 U.S. at 97–98.

80. *Jenness*, 403 U.S. at 442.

81. *Davis*, 128 S. Ct. at 2774.

82. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997).

treat candidates unequally. *Buckley* and the ballot access cases clearly indicate that Congress and the states may do so when that differentiation promotes a legitimate governmental purpose. The political stability advanced by reinforcing the traditional two-party system has been consistently treated as a legitimate governmental purpose. By enacting the Millionaires' Amendment Congress demonstrated that it thought that ameliorating the advantages that wealthy candidates enjoy was also a legitimate public purpose. The Court disagreed. Much as Justice Alito gave little weight to Congress's positive judgment about what matters in campaigns, he also rejected Congress's normative judgment that, in a democratic society, a candidate's ability to derive a campaign benefit from his or her personal wealth is a problem. While one might disagree with that judgment as a matter of political values, or, as the empirical evidence suggests, doubt whether the Millionaires' Amendment did much to address that problem, the issue at the heart of *Davis* was which institution—Congress or the Supreme Court—should decide these questions of campaign practice and democratic values. *Davis* held emphatically that these are questions for the Court—indeed, questions for the Court to answer without even according Congress the deference that *McConnell* had seemed to mandate.

In this Court's view, contribution limits that differentiate among candidates in order to ameliorate the campaign consequences of personal wealth differences are unjustified because there is simply nothing wrong with personal wealth differences having an effect on elections. Wealth inequality is not an issue that Congress can address either by limiting the ability of the wealthy to use their personal resources in elections or by crafting differential contribution rules that enable the non-wealthy to offset some of the advantages of personal wealth. It appears to be the Court's view that the advantage that personal wealth brings to some candidates in their campaigns is not a problem for our democratic electoral system at all.

III. *DAVIS* AND THE FUTURE OF PUBLIC FINANCING

The invalidation of the Millionaires' Amendment itself will have little direct effect on campaign finance law. No other jurisdiction has a measure like it, and the Amendment had little impact on federal elections during the two electoral cycles in which it was used. The *Davis* decision, however, has implications for a crucial form of campaign finance regulation—the provision of public subsidies to candidates. The decision casts a significant constitutional shadow over provisions in the public funding laws of nearly two dozen states and localities, thereby raising a substantial question about the future political viability of public funding.

The basic model of public funding, reflected both in the federal public funding law for presidential elections and in the many state and local public funding laws for state and local elections, is the provision of public funds to a candidate in exchange for his or her acceptance of a spending limit. In *Buckley*, the Supreme Court upheld that arrangement, finding that public funding serves the important public interests of "reduc[ing] the deleterious influence of large contributions on our political process, . . . facilitat[ing] communication by candidates with the electorate, and . . . free[ing]

candidates from the rigors of fundraising.”⁸³ The spending limit was considered a voluntarily accepted, hence constitutional, condition for the public subsidies.⁸⁴

Placing great value on the benefits of public funding, many states and localities provide candidates with additional incentives to participate in their public funding programs. One such inducement is the so-called contribution “cap gap,” which provides that a candidate who accepts public funding is allowed to accept larger private contributions than candidates who rely exclusively on private money. Cap gaps work in states in which public funds comprise just a portion of the funds that a candidate may spend, so that the candidate’s war chest consists of a combination of public and private funds, subject to an overall spending limit. In *Vote Choice, Inc. v. DiStefano*,⁸⁵ the United States Court of Appeals for the First Circuit upheld the cap gap provision of Rhode Island’s gubernatorial public funding law. Citing *Buckley*’s justifications for public funding, *Vote Choice* found that the state had a “valid interest” in persuading candidates to accept public financing and thus could structure its “package[] of benefits and regulatory requirements” accordingly.⁸⁶ As long as the benefits of public funding were not so great as to “coerce” candidates into the public funding program, a state could provide incentives.⁸⁷ The contribution “cap gap”—the general contribution limit of \$1000 from an individual or political action committee in a calendar year was doubled to \$2000 for a publicly funded candidate—did not “stray beyond the pale, creating disparities so profound that they become impermissibly coercive.”⁸⁸ Although another court, assessing Kentucky’s cap gap, found that quintupling the contribution ceiling from \$100 to \$500 for publicly funded candidates was too great a difference and thus unconstitutionally coercive,⁸⁹ the principle that some differential in the contribution ceilings is permissible as an inducement to candidates to accept public financing seemed well-established—at least prior to *Davis*.

Davis’s rejection of differential contribution ceilings for candidates “vying for the same seat” obviously poses a direct challenge to such cap gap laws.⁹⁰ *Davis*, however, is

83. 424 U.S. at 91. See also *Republican Natl. Comm. v. FEC*, 487 F. Supp. 280 (S.D.N.Y. 1980), *aff’d*, 445 U.S. 955 (1980).

84. *Buckley*, 424 U.S. at 57 n. 65.

85. 4 F.3d 26 (1st Cir. 1993).

86. *Id.* at 39.

87. *Id.* at 39–40.

88. *Id.* at 38.

89. *Wilkinson v. Jones*, 876 F. Supp. 916, 929–30 (W.D. Ky. 1995). The court noted that not only was there a five to one disparity in the contribution limits but the advantage for the publicly funded candidate was compounded by the fact that his or her contributions would be matched on a two to one basis by public dollars while the privately funded candidate would not, so that the “real impact of the disparity” would be fifteen to one. As a result, “[t]he incentive, or ‘carrot,’ offered to publicly-financed candidates” in the form of a higher contribution limit “in this instance is, in practical application, a ‘stick’ used upon privately-financed candidates” to force them into the public funding program. *Id.* The court also expressed the concern that the standard private contribution limit of \$100 per person per election was also unconstitutionally low in its own right and tantamount to a “penalty imposed upon privately-financed candidates.” *Id.* at 929.

90. *Davis*, 128 S. Ct at 2774. Cap gap provisions are not very common. Kentucky repealed its public financing law in 2004. See Ky. Sec. of St., *Changes to State Election Laws under Consideration*, <http://www.sos.ky.gov/secdesk/mediacenter/coverage/article37.htm> (updated Jan. 11, 2006). It appears that only Rhode Island’s and Oakland, California’s public financing laws provide publicly funded candidates with more generous private contribution ceilings than their non-publicly funded opponents. See Ctr. for Govtl. Stud., *Local Public Financing Charts: 2007* 12 (Nov. 2007) (available at <http://www.cgs.org>).

unlikely to be an insurmountable obstacle to these measures. As Justice Alito pointed out in distinguishing the Millionaires' Amendment from the public funding system upheld in *Buckley*, the combination of public funds and a spending limit means that candidates have a true choice among constitutionally acceptable options. A candidate who declines public funding because she is not willing to sacrifice her right to engage in unlimited spending is not made worse off by the law relative to her opponent who takes public funds, since the opponent has to accept a spending limit. So, too, with the cap gap, and unlike the Millionaires' Amendment, the candidate who declines public funding and thereby forgoes larger contributions is not necessarily put at a competitive disadvantage relative to her publicly funded opponent because the opponent still has to accept a spending limit. Put alternatively, whereas the Millionaires' Amendment operated only to help a "millionaire's" opponent to the "millionaire's" disadvantage, the cap gap is part of a package of provisions in a public financing law some of which help the candidate who takes public financing and some of which constrain that candidate. As a result, even after *Davis*, the cap gap might not be seen as necessarily burdening the First Amendment rights of the candidate subject to the lower limit so long as the lower limit itself is not so low as to be unconstitutional. A cap gap provision in a public financing program ought to be able to survive a *Davis* challenge at least in principle, although, as under pre-*Davis* precedent, the contribution limit disparity in a particular cap gap law might be so great as to be tantamount to coercing participation in the public financing program, which would be unconstitutional.

A more uncertain fate awaits a much more widely used inducement to participate in public funding—the so-called “trigger” or “fair fight” laws, which change the restrictions on publicly funded candidates in response to high levels of spending by privately-funded candidates not participating in the public funding program or by independent committees opposing the publicly funded candidate or supporting her opponent. Nearly two dozen states and localities have one or another version of these laws.⁹¹ In the simplest version, a trigger law lifts the spending ceiling off of a publicly funded candidate when expenditures by a non-participating candidate cross some threshold, such as the spending ceiling itself or a level near it. The publicly funded candidate would then be able to solicit and spend additional privately contributed funds.⁹² More complex versions both raise the spending ceiling and provide the publicly-funded candidate with some additional public funds—“rescue funds” in some states—proportionate to the spending of the non-publicly-funded opponent, up to some limit. Recognizing that high levels of independent spending may also affect the decision of a candidate whether or not to participate in a public funding program and be subject to a spending limit, some states also raise the spending limit and offer the additional funds in response to spending above a threshold amount by a hostile independent committee.⁹³

org/images/publications/pub_fin_local_2007.pdf).

91. See *id.* at 15–16 (trigger laws in eleven states).

92. See *Vote Choice, Inc.*, 4 F.3d at 30 n. 5; *Rosenstiel*, 101 F.3d at 1551; *Wilkinson*, 876 F. Supp. at 926–27.

93. *E.g. Daggett*, 205 F.3d at 451 (Maine law offers up to double the initial distribution of public funds); *N.C. Right to Life Comm.*, 524 F.3d at 433 (North Carolina law provides funds equal to two times the trigger threshold); *Assn. of Am. Phys. & Surgeons*, 363 F. Supp. 2d at 1200 (Arizona law authorizes payments up to

These laws are a response to the well-founded pragmatic concern that many candidates are unlikely to accept public funding with its spending limit unless there is some kind of escape hatch enabling them to respond to high levels of spending by non-participating opponents or independent committees. Indeed, given the unlimited ability of candidates to raise money, without some form of trigger relief the public funding spending limit could operate as a form of unilateral disarmament for the participating candidate. The absence of a trigger provision in the presidential election public funding law may be one of the reasons for the sharply decreasing level of participation in the program by major presidential candidates in recent years, as most dramatically illustrated by Barack Obama's decision to opt out in 2008.

Prior to *Davis*, virtually all the federal courts that heard challenges to state trigger laws—including the Courts of Appeals for the First,⁹⁴ Fourth,⁹⁵ Sixth,⁹⁶ and Eighth⁹⁷ circuits, as well as district courts in other circuits⁹⁸—upheld these laws. They found that neither the release from a spending limit nor the provision of additional public funds to a candidate burdened the First Amendment rights of the candidates or committees whose spending triggered those actions. They also determined that the provisions were justified by the goal of promoting the interests advanced by the public funding program. As the United States Court of Appeals for the First Circuit put it in upholding the trigger provision of Maine's law, non-participating candidates and independent committees “have no right to speak free from response.” Indeed, the court rejected the very idea “which equates responsive speech with an impairment to the initial speaker.”⁹⁹ Similarly, the Fourth Circuit emphasized, in upholding North Carolina's trigger provision, that non-participating candidates and independent committees “remain free to raise and spend as much money, and engage in as much political speech as they desire” so that the law did not burden their First Amendment rights. Indeed, in language foreshadowing that of the *Davis* dissent, the Fourth Circuit stressed that the distribution of additional public funds triggered by the spending of the privately funded candidates, “‘further, not abridges pertinent First Amendment values’ by ensuring that the participating candidate will have an opportunity to engage in responsive speech.”¹⁰⁰

Davis indicates that this way of thinking about First Amendment burdens is no longer good campaign finance law. Indeed, strikingly, Justice Alito cited the only pre-*Davis* case that had determined that a state trigger law necessarily chills the political speech of the campaign actor whose spending triggered the additional benefits for the publicly-funded candidate—the 1994 decision of an Eighth Circuit panel in *Day v. Holahan*.¹⁰¹ Although *Day* had been undermined by a later decision in its own

treble the amount of the original spending limit).

94. *Daggett*, 205 F.3d 445.

95. *N.C. Right to Life Comm.*, 524 F.3d 427.

96. *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998).

97. *Rosenstiel*, 101 F.3d 1544.

98. See e.g. *Assn. of Am. Phys. & Surgeons*, 363 F. Supp. 2d 1197; *Green Party of Conn.*, 537 F. Supp. 2d at 391.

99. *Daggett*, 205 F.3d at 464–65 (footnote omitted).

100. *N.C. Right to Life Comm.*, 524 F.3d at 437 (quoting *Buckley*, 424 U.S. at 93).

101. 34 F.3d 1356 (cited in *Davis*, 128 S. Ct. at 2772).

circuit,¹⁰² was treated as of dubious precedential value by other courts,¹⁰³ and was consistently rejected on the merits by other federal courts,¹⁰⁴ *Davis's* treatment of the Millionaires' Amendment, coupled with its explicit invocation of *Day*, indicate that it is likely that trigger laws will now be seen as creating a burden on First Amendment rights.

To be sure, that does not mean that they are unconstitutional. The justification for trigger laws differs from the Millionaires' Amendment's effort to equalize candidate resources. Although trigger laws are modestly egalitarian in effect, their purpose is not to equalize, but to promote the anti-corruption, fundraising-burden-reduction, and communication-facilitation goals that the Supreme Court cited in upholding public funding in *Buckley*. Trigger laws do that by reducing the disincentive to taking public funding posed by the threat of high spending by non-participating candidates and committees. Providing additional public funds or raising the spending limit might produce a somewhat more level playing field but only as a means of drawing skittish candidates into the public funding system rather than as an end in itself.

It is unclear whether saving the public funding system would be treated as a sufficiently important government interest to justify the arguable burden the additional public funds or the increased spending limit triggered by private spending places on the high-spending, non-publicly-funded candidate or independent committee. In *Day*, the Eighth Circuit panel did not directly address the importance of the justification because it found that at the time the Minnesota trigger provision at issue in the case was adopted candidate participation in Minnesota's public funding law was already near 100 percent so that the measure was not necessary to protect the public funding system.¹⁰⁵ The Supreme Court has found that public funding advances important public goals but only in the context of rejecting claims that the use of tax dollars to aid candidates does not advance the general welfare.¹⁰⁶ It is not clear whether the Court will agree that protecting public funding justifies the arguable burden that trigger measures place on high-spending, non-publicly-funded candidates and committees.

Davis is already beginning to affect public funding laws and proposals. A few months after *Davis* was handed down, a federal district court in *McComish v. Brewer* concluded that the Supreme Court's decision invalidated the trigger provision of Arizona's public funding law. The court acknowledged that, unlike the Millionaires' Amendment, the public funding trigger was justified by "a compelling state interest . . . of discouraging corruption" but that was not enough to save the law.¹⁰⁷ So, too, shortly after *Davis*, the Speaker of the New Jersey Assembly pulled a bill intended to expand a public funding program for state legislative elections, which included a trigger provision that had been running on a pilot basis in a handful of legislative districts. He concluded

102. *Rosenstiel*, 101 F.3d at 1555.

103. *E.g. Daggett*, 205 F.3d at 464 n. 25 ("the logic of the two cases is somewhat inconsistent"); *N.C. Right to Life Comm.*, 524 F.3d at 438 (after *Rosenstiel* "the *Day* decision appears to be an anomaly even within the Eighth Circuit").

104. *Daggett*, 205 F.3d at 464–65; *N.C. Right to Life Comm.*, 524 F.3d at 437–38.

105. 34 F.3d at 1361.

106. *Buckley*, 424 U.S. at 90–91.

107. *McComish*, slip op. at 7. Due to the lateness of the suit and the proximity to the November election, the court declined to enjoin the use of the trigger mechanism in 2008.

that those cases posed “insurmountable” obstacles to the trigger and thus to public funding.¹⁰⁸

The ultimate impact of *Davis* on these laws is, at this point, uncertain. In November 2008, the Supreme Court declined to grant a writ of certiorari to the Fourth Circuit decision upholding the provision of trigger funds as part of North Carolina’s public financing of judicial election candidates,¹⁰⁹ so the Court, at least, is not yet ready to face the issue directly. Nor is it certain that all trigger provisions will be treated as imposing the same burden on the First Amendment rights of the “triggerer.” Trigger laws that simply lift the public funding spending limit might have a better chance of survival since, not only do they permit more speech, but they do not involve the provision of any additional state assistance to a candidate in response to another candidate’s or committee’s spending. Laws that provide additional public funds are more vulnerable to the charge that they are being used to level the electoral playing field, although as long as they continue to impose a spending limit on the publicly funded candidate, it can still be argued that even these laws do not unduly favor those who take public funds.

Still, the constitutional status of these laws is now far more uncertain than before *Davis*. If trigger mechanisms, or some of them, prove to be constitutionally barred, that will surely make it more difficult both to get public funding adopted and to persuade candidates to take public funding when it is available. The inclusion of trigger mechanisms in all recently adopted state public funding laws—including Arizona, Connecticut, Maine, North Carolina and the New Jersey pilot program¹¹⁰—as well as in recent proposals to revise the presidential public funding system¹¹¹ and create one for Congressional candidates,¹¹² reflect the practical recognition that with non-participating candidates and independent committees potentially able to raise and spend funds without limit, a candidate who accepts public funds plus a spending limit may be putting himself at a considerable competitive disadvantage—indeed, may be committing the equivalent of electoral suicide. Without some form of trigger mechanism, a viable public funding program will require either a much larger public grant, a much higher spending limit, or both. Although there are good arguments to be made for either alternative, each is also likely to stir considerable opposition. Moreover, an additional benefit of the trigger system is that it channels additional public funds to, or allows higher spending in, precisely those hotly contested races where more money is particularly desirable. Larger public grants across the board, in particular, have the potential to waste public funds unnecessarily in noncompetitive races. Trigger provisions ought to be an option

108. PolitickerNJ.com, *Federal Court Effectively Kills NJ Clean Elections*, <http://www.politickernj.com/taxonomy/term/10783> (Sept. 2, 2008).

109. *Duke v. Leake*, 129 S. Ct. 490 (2008).

110. See Ctr. for Govtl. Stud., *supra* n. 90, at 15–16.

111. E.g. Presidential Funding Act of 2007, Sen. 2412, 110th Cong. (Dec. 5, 2007) (introduced by Sen. Feingold, cosponsored by Sens. Collins, Durbin, Clinton, Biden, Obama, Dodd, and Kerry); Presidential Funding Act of 2007, H.R. 4294, 110th Cong. (Dec. 5, 2007) (introduced by Rep. Price and co-sponsored by Reps. Arcuri, Castle, Doggett, Emanuel, Platts, Shays, and Van Hollen).

112. E.g. Fair Elections Now Act, Sen. 1285, 110th Cong. §511 (May 3, 2007) (introduced by Sen. Durbin, cosponsored by Sens. Specter, Feingold, and Obama) (payment of “Fair Fight Funds”); Fair Elections Now Act, H.R. 7022, 110th Cong. (Sept. 23, 2008) (introduced by Rep. Larson).

available to Congress, states, and local governments as they experiment with public funding programs and consider how to make them viable in a world of unlimited spending by privately funded candidates and independent interest groups.

The challenge to trigger mechanisms, and the concomitant threat to public funding, implicit in *Davis*, is unfortunate. Public funding is the campaign finance reform with the greatest potential to promote electoral competitiveness, reduce the role of private wealth in public elections, and dilute the impact of large campaign contributions on the decisions of elected officials, while expanding, not contracting, the resources available for campaign activity. A judicial decision that makes this reform less politically available constrains the possibilities of real campaign finance reform.

It would be ironic if the main consequence of a decision striking down a measure permitting more large private donations would be to hobble programs intended to reduce the role of private donations and promote public subsidies. On the other hand, given the Court's manifest hostility to promoting political equality as a justification for campaign finance regulation, *Davis*'s potential impact on public funding, while perhaps not expressly intended by the Court, might not be so ironic after all.

IV. CONCLUSION: THE EMERGING CAMPAIGN FINANCE JURISPRUDENCE OF THE ROBERTS COURT

With *Davis v. FEC* as the third major Supreme Court campaign finance decision in three years, the main elements of the Roberts Court's campaign finance jurisprudence are now clear. First, the Court is quite unsympathetic, if not hostile, to campaign finance reform. After a string of pre-Roberts and pre-Alito decisions in which the Court repeatedly rejected challenges to federal and state campaign finance laws,¹¹³ the Court has now upheld challenges and struck down or sharply narrowed campaign finance regulations three times in a row.

Second, consistent with and perhaps explaining the first point, the Court has displayed a heightened sensitivity to the possibility that campaign finance laws will burden First Amendment rights. In *Davis*, as already noted, the Court determined that relaxing the contribution limits for one candidate burdened a second one, even though the second one's fundraising and spending were in no way limited. Similarly, in *FEC v. Wisconsin Right to Life, Inc.*, the Court concluded that a federal law requiring corporations and unions to pay for their electioneering communications out of political action committee funds rather than treasury funds was an outright "ban" on corporate and union spending,¹¹⁴ and not the channeling mechanism that the Court in previous cases

113. See *McConnell*, 540 U.S. at 246 (upholding main provisions of BCRA, including soft money prohibitions, disclosure of electioneering communications, and ban on corporate and union electioneering communications); *Beaumont*, 539 U.S. at 163 (rejecting challenge to federal law banning contributions by corporations); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 437 (2001) (rejecting challenge to federal limits on party expenditures coordinated with party candidates); *Nixon*, 528 U.S. at 397–98 (rejecting claim that Missouri's contribution limits were unconstitutionally low). Writing before the more recent shift in the Court's approach, Professor Hasen called these cases "the [n]ew [d]eference [q]uartet." Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. Cal. L. Rev. 885, 886 (2005).

114. See *Wis. Right to Life*, 127 S. Ct. at 2659, 2669, 2671.

had found the requirement to be.¹¹⁵

Third, and consistent with the first two themes, departing again from the Supreme Court's prior respect for the political judgment of Congress, the Roberts Court gives little or no weight to the empirical findings and political values of elected decision-makers. Much as Justice Alito in *Davis* felt free to opine on the different roles of personal wealth and celebrity in affecting campaigns, the *Randall* plurality made its own empirical judgments about the likely effects of Vermont's low contribution limits in elections in that state.¹¹⁶ There is no trace of judicial modesty in these decisions.

This is in sharp contrast to the Roberts Court's other recent election law decisions. In 2008, the Court repeatedly upheld the constitutionality of controversial federal and state election laws, including most notably Indiana's voter identification law.¹¹⁷ The Court's greater deference to elected officials when it comes to laws arguably burdening voters' rights,¹¹⁸ insurgent candidates' rights,¹¹⁹ and political party autonomy¹²⁰ serves only to underscore how much the majority on the current Court is committed to going its own way, undeterred by the different approach of elected lawmakers, in the campaign finance area.

Davis adds its own particular note—the emphatic rejection of equality as a justification for campaign finance regulation. However, that is entirely consistent with *Randall*'s rejection of spending limits and *Wisconsin Right to Life*'s evisceration of the ban on corporate and union electioneering communications, even if those two earlier cases did not directly address the egalitarian dimensions of those restrictions.

Finally, the voting alignments in the Court are relatively consistent. Justices Stevens, Souter, and Ginsburg voted to uphold the reform measure under attack in all three cases. Chief Justice Roberts and Justices Scalia, Kennedy, Thomas and Alito were in the anti-reform majority in all three cases. Only Justice Breyer varied, being part of the majority that invalidated the Vermont expenditure and contribution limits in *Randall*, but dissenting in *Wisconsin Right to Life* and *Davis*.

To be sure, these decisions are not all of a piece. The plurality opinion in *Randall v. Sorrell* striking down the Vermont contribution limits stressed the implications of the low limits for competitiveness and “the electoral process” generally¹²¹ rather than their impact on the rights of donors or candidates. *Davis*, by contrast, said little about the impact of the Millionaires' Amendment on competitiveness per se, even though much of the commentary on the Amendment focused on the competitiveness effects of self-financed candidates.

So, too, both *Randall* and *Wisconsin Right to Life* were decisions by a fragmented

115. See e.g. *Beaumont*, 539 U.S. at 162; *McConnell*, 540 U.S. at 203–05. See also Richard Briffault, WRTL II: *The Sharpest Turn in Campaign Finance's Long and Winding Road*, 1 Alb. Govt. L. Rev. 101, 124–26 (2008).

116. *Randall*, U.S. at 253–62 (plurality). See also Richard Briffault, WRTL and *Randall*: *The Roberts Court and the Unsettling of Campaign Finance Law*, 68 Ohio St. L.J. 807, 828–38 (2007).

117. *Crawford v. Marion Co. Election Bd.*, 128 S. Ct. 1610, 1624 (2008).

118. *Id.*

119. *N.Y. St. Bd. of Elections v. López Torres*, 128 S. Ct. 791 (2008).

120. *Wash. St. Grange v. Wash. St. Republican Party*, 128 S. Ct. 1184 (2008).

121. 548 U.S. at 249 (plurality); Briffault, *supra* n. 116, at 829.

Court without a majority opinion. The anti-regulation group was divided between the decisive but more moderate bloc—composed of Chief Justice Roberts and Justices Breyer and Alito in *Randall*, and of just the Chief Justice and Justice Alito in *Wisconsin Right to Life*—and a more extreme group consisting of Justices Kennedy, Scalia and Thomas in *Wisconsin Right to Life* and Justices Scalia and Thomas and perhaps Justice Kennedy in *Randall*. In *Wisconsin Right to Life*, the more extreme group would have flatly invalidated the limits on corporate and union electioneering communications at issue, while the more moderate plurality—and hence the Court—was content to create a very large as-applied exception. In *Randall*, Justices Scalia and Thomas would have held that all contribution limits are unconstitutional¹²² and Justice Kennedy voiced his “skepticism” about them,¹²³ but the plurality reaffirmed the constitutionality of contribution limits in principle while invalidating the specific limits adopted by Vermont. In *Davis*, while it was theoretically possible for the anti-regulation bloc to have again divided, with some finding only specific features of the Millionaires’ Amendment objectionable¹²⁴ and others rejecting it categorically, for the first time in the current Court there was a unified five-justice majority joining a single opinion striking down a campaign finance law.

Although these cases represent a sharp turn in campaign finance jurisprudence from *McConnell* and earlier cases, the Roberts Court’s actions so far do not indicate a complete repudiation of campaign finance regulation. Instead, a majority of the Court seems willing to uphold the basic elements of the *Buckley* doctrine: contribution restrictions, disclosure requirements, and public subsidies to candidates are likely to remain constitutional, while expenditure restrictions are forbidden. The prevention of corruption and the appearance of corruption continues to justify restrictions on campaign activities even as equality is rejected. To be sure, *Buckley* may be read much more restrictively than in previous years, as *Randall*’s invalidation of low contribution limits and *Davis*’s treatment of a relaxed contribution limit for one candidate as tantamount to an expenditure limit for another suggest. And the scope of election-related speech subject to campaign finance regulation is likely to be read narrowly, as *Wisconsin Right to Life* indicates.¹²⁵ But, for the moment at least, a rollback of the basic structure of the campaign finance framework endorsed by *Buckley* is not clearly in the offing.

Where the extent of the hostility of the Roberts Court’s majority to campaign finance reform is most likely to be revealed is in cases that challenge campaign finance laws that extend or depart from *Buckley*’s basic approach. The constitutionality of the ban on corporate and union election advocacy expenditures upheld in *Austin v. Michigan*

122. 548 U.S. at 266–67 (plurality).

123. *Id.* at 265 (plurality).

124. For example, it could have been argued that the Amendment’s calculation of the “opposition personal funds amount” was fatally flawed because the law counted only those funds collected by the non-self-financing candidate in the year before the election. As a result, it did not consider funds accumulated in prior years, thus, providing a benefit to incumbents. So, too, the law counted only 50 percent of donated funds in determining the “opposition personal funds amount,” thereby arguably understating the non-self-financing candidate’s resources.

125. The constitutional limitation on the definition of election-related activity is likely to be at issue before the Supreme Court again in *Citizens United v. FEC*, No. 08-205 (oral argument heard March 24, 2009).

*Chamber of Commerce*¹²⁶ and reaffirmed in *McConnell v. FEC*¹²⁷ may be at risk, as is the constitutionality of the limits on contributions to political committees that make only independent expenditures and not campaign contributions.¹²⁸ Both test the meaning of the anti-corruption justification articulated in *Buckley*, as do the restrictions on the contributions of soft money to political parties that were also upheld in *McConnell*¹²⁹ and which are now once again under attack.¹³⁰ Rejecting the special restrictions on corporations and unions would be a major departure from existing law. Indeed, the outright ban on corporate contributions is our oldest federal campaign finance law. But those measures, as well as the soft money and electioneering communications regulations only just upheld in *McConnell* less than six years ago, do not fit easily with the approach of the current Court.

It is difficult to predict just where the Roberts Court's hostility toward campaign finance regulation will take it. Although new restrictions on campaign finance are likely to be greeted unsympathetically, it is unclear how far the Court would be willing to change the doctrinal status quo. The decisions in *Randall* and *Davis* may not have been mandated by precedent but they were surely consistent with the Court's precedent. The Court has yet to overturn a prior campaign finance decision, and it may very well appreciate the values of stability and predictability in the law. On the other hand, respect for precedent may not necessarily be a significant barrier to doctrinal change. *Wisconsin Right to Life* demonstrated that when the Court sees the law as unduly burdening political speech, it can effectively dismantle a precedent without literally overruling it by carving out a capacious as-applied exception.¹³¹ Whatever approach the Court takes, the next few years are likely to be a difficult constitutional environment for campaign finance reform.

126. 494 U.S. at 668–69.

127. 540 U.S. at 204–09.

128. *E.g. Speechnow.org v. FEC*, 567 F. Supp. 2d 70, 71 (D.D.C. 2008) (denying motion to grant preliminary injunction against enforcement of contribution limits on donations to committee that makes only independent expenditures).

129. 540 U.S. at 133–89.

130. *See e.g. Democratic Natl. Comm. Mot. to Intervene, Republican Natl. Conv. v. FEC*, No. 08-1953 (D.D.C. filed Jan. 29, 2009).

131. *See Briffault, supra* n. 115, at 113–29 (explaining how *Wisc. Right to Life*'s as-applied exception effectively gutted *McConnell*'s validation of BCRA's ban on the use of corporate and union treasury funds to pay for electioneering communications).

