

**DAVIS V. FEDERAL ELECTION  
COMMISSION: A FURTHER STEP  
TOWARDS CAMPAIGN FINANCE  
DEREGULATION AND THE  
PRESERVATION OF THE  
MILLIONAIRES' CLUB**

GRANT FEVURLY\*

*In the middle of the 2008 election cycle, the United States Supreme Court altered the permissible limits of campaign finance regulation by striking down the “Millionaire’s Amendment” in Davis v. Federal Election Commission. The struck provision attempted to equalize the resource differential between self-financing and non-self-financing candidates for electoral office by temporarily increasing the contribution limits for the non-self-financing candidates when those candidates who self-financed crossed a threshold amount of personal expenditures. Once the disparity between the two candidates equalized, the normal regulatory regime resumed effect.*

*While important for its own immediate implications to a number of public financing schemes across the country, the decision represents yet another assault by the Roberts Court on the campaign finance regulation mechanism in general. In only its third campaign finance decision, the Roberts Court has chipped away at both the trend of judicial deference to legislative judgment concerning campaign finance regulation and, the penultimate source of regulation itself, the Bipartisan Campaign Reform Act of 2002. Moreover, in Davis, Justice Alito’s majority opinion dealt a major blow to campaign finance reformers by unequivocally rejecting the validity of an equality rationale for regulation—opining instead that the prevention of actual or apparent corruption constituted the only permissible basis for campaign finance regulation.*

---

\* Juris Doctor candidate 2010, University of Colorado School of Law; Bachelor of Arts in Political Science, University of Colorado, 2006. I would like to take this opportunity to thank the editors of the *University of Colorado Law Review*, and specifically Kelly Crandall, for their suggestions and edits throughout the production process. This article benefits greatly from their assistance. Any mistakes are solely my own. I would also like to thank my family, and of course Megan, for their unwavering support during the rewrite process.

*This Note argues that the Court erred not only in its analysis of the issues presented in Davis, but in the sweeping language used to support its reasoning. Instead of providing an opportunity for less wealthy candidates to enter the political realm, the Court struck down the “Millionaire’s Amendment” as impermissibly imposing a restriction on the ability of a wealthy candidate to spend his or her money. While certainly not the Roberts Court’s last word on the subject, especially in light of the recent Citizens United v. Federal Election Commission case, the Davis decision is yet another move by the Court towards deregulation and preservation of the electoral status quo.*

|  |     |
|--|-----|
| INTRODUCTION.....  | 629 |
| I. A BRIEF HISTORY OF CAMPAIGN FINANCE<br>JURISPRUDENCE: CORRUPTION AND THE<br>CONTRIBUTIONS-EXPENDITURES DICHOTOMY..... | 631 |
| A. <i>Buckley and the Pre-BCRA Campaign Finance<br/>    Framework</i> .....  | 632 |
| 1. <i>The Post-Buckley Experience: Nixon and<br/>        Austin</i> .....  | 635 |
| a. <i>Nixon: The Height of Deference</i> .....   | 635 |
| b. <i>Austin: A Step Towards Equality</i> .....  | 638 |
| B. <i>McConnell and the Validity of McCain-Feingold</i> ...  | 641 |
| C. <i>The Roberts Court—A New Era?</i> .....   | 643 |
| II. <i>DAVIS V. FEC: A BROAD DECLARATION FOR A<br/>COMPLEX ANALYSIS</i> .....  | 645 |
| A. <i>The Mechanics of the Millionaire’s Amendment</i> ....  | 646 |
| B. <i>The Factual Background</i> .....   | 647 |
| C. <i>Justice Alito’s Majority Opinion</i> .....   | 648 |
| D. <i>Four Dissenting Justices</i> .....   | 651 |
| III. THE VALIDITY OF THE EQUALITY RATIONALE .....  | 654 |
| A. <i>Legal Precedent and Increasing the Marketplace<br/>    of Ideas</i> .....  | 654 |
| 1. <i>Prior Supreme Court Precedent</i> .....  | 655 |
| 2. <i>Prior Circuit Court Precedent</i> .....  | 657 |
| 3. <i>Analogous Electoral Law Precedent</i> .....  | 657 |
| B. <i>Academic Support</i> .....   | 660 |
| 1. <i>Protecting Democratic Processes</i> .....  | 660 |
| 2. <i>Equality as an Umbrella Concept</i> .....  | 663 |
| IV. UNINTENDED CONSEQUENCES?: THE RIPPLE EFFECTS<br>OF <i>DAVIS</i> .....  | 665 |
| A. <i>Broad Language and a Muddled Analysis</i> .....  | 666 |
| B. <i>Future Ramifications—A Blow to Reformers</i> .....   | 669 |
| CONCLUSION .....   | 673 |

## INTRODUCTION

*Large personal fortunes were not a prerequisite that our Founding Fathers envisioned for being a public servant. The creators of our government never intended for big bank accounts to be the key to ensuring many years in office. That was to be a decision for the voters.*

—Representative Shelley Moore Capito (R–W. Va.)<sup>1</sup>

In 2002, Congress finally succeeded in passing the first comprehensive campaign finance reform legislation since the Watergate era.<sup>2</sup> The Bipartisan Campaign Reform Act of 2002<sup>3</sup> (“BCRA”) attempted to strengthen campaign finance regulation by addressing the major shortcomings of the current campaign finance reform scheme while simultaneously introducing several novel requirements. One of these requirements, section 319(a), commonly referred to as the “Millionaire’s Amendment,” sought to address the sometimes massive funding disparities between candidates.<sup>4</sup> In 2000, the election cycle directly preceding the passage of the legislation, candidates for the United States House of Representatives and Senate loaned themselves more than \$175 million in campaign funds, with forty-one of those individuals self-financing more than

---

1. 148 CONG. REC. 1381 (2002) (statement of Rep. Capito).

2. Yoav Dotan, *Campaign Finance Reform and the Social Inequality Paradox*, 37 U. MICH. J.L. REFORM 955, 964 (2004). For an in-depth discussion of the history of campaign finance legislation, including failed initiatives, see generally Kirk J. Nagra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 FORDHAM L. REV. 53 (1987); Samuel M. Walker, Note, *Campaign Finance Reform in the 105th Congress: The Failure to Address Self-Financed Candidates*, 27 HOFSTRA L. REV. 181 (1998); and Audra L. Wassom, Comment, *Campaign Finance Legislation: McCain-Feingold/Shays-Meehan—The Political Equality Rationale and Beyond*, 55 SMU L. REV. 1781 (2002).

3. The Bipartisan Campaign Reform Act of 2002 is also commonly referred to as the “McCain-Feingold” or “Shays-Meehan” Act in light of the bill’s respective Senate and House sponsors. The Library of Congress, Summary of H.R.2356 (Feb. 14, 2002), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR02356:@@D&summ2=m&>.

4. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 [hereinafter BCRA] (codified as amended in various sections of the United States Code, but mainly focused within Title 2). The BCRA amended the Federal Election Campaign Act of 1971 (“FECA”). For the sake of clarity, section numbers refer to the legislation as passed. Thus, the Millionaire’s Amendment will be identified by name or as § 319, not by its codification at 2 U.S.C. § 441a-1 (2006).

\$500,000 each.<sup>5</sup> The Millionaire's Amendment sought to remedy this seemingly insurmountable wealth and resource differential by allowing those candidates facing self-funded opponents to receive both contributions from individuals in excess of statutory limits as well as unlimited "coordinated party spending"—expenditures made via the national party or its affiliates in coordination with the individual candidate and his or her campaign.<sup>6</sup>

The Millionaire's Amendment found its way into the BCRA through floor amendment in both chambers of Congress, sponsored by Representative Capito (R–W. Va.) in the House and Senators Domenici (R–N.M.), DeWine (R–Ohio), Durbin (D–Ill.), and several others in the Senate.<sup>7</sup> Its purpose, according to Senator DeWine, was to "counteract the [public's] perception that 'someone today who is wealthy enough can buy a seat' in Congress."<sup>8</sup> The Millionaire's Amendment sought to accomplish this by giving "the non-wealthy candidate the opportunity to get his or her message out," thereby increasing overall levels of political speech without punishing the self-financing candidate.<sup>9</sup> Yet, precisely because of the Millionaire's Amendment's grounding in this equalization rationale, the Supreme Court held in *Davis v. Federal Election Commission*<sup>10</sup> that the provision violated the First Amendment.

Largely dismissed by legislators<sup>11</sup> and some political scientists<sup>12</sup> as an insignificant development, the *Davis* decision

---

5. Jennifer A. Steen, *The "Millionaire's Amendment," in LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT . . . MEETS POLITICS* 159, 159 (Michael J. Malbin ed., 2003).

6. BCRA § 319.

7. See 148 CONG. REC. 1381 (2002) (House) and 147 CONG. REC. 3977 (2001) (Senate).

8. *Davis v. Fed. Election Comm'n*, 501 F. Supp. 2d 22, 25 n.2 (D.D.C. 2007) (quoting 147 CONG. REC. S2547 (daily ed. Mar. 20, 2001) (statement of Sen. DeWine)).

9. *Id.* Senator McCain even remarked that the Amendment "was intended to 'mitigate the countervailing risk that [contribution limits] will unfairly favor those who are willing, and able, to spend a small fortune of their own money to win elections.'" *Id.* (quoting 148 CONG. REC. S2142, S2538 (daily ed. Mar. 20, 2002) (statement of Sen. McCain)).

10. 128 S. Ct. 2759, 2773–75 (2008).

11. Senator Russ Feingold, one of the bill's main sponsors, released a statement the day the decision was handed down stating: "I opposed the millionaire's amendment in its initial form and I never believed it was a core component of campaign finance reform." Press Release, Senator Russ Feingold, Statement of U.S. Senator Russ Feingold on the Supreme Court's Decision on the Millionaire's Amendment (June 26, 2008), available at <http://feingold.senate.gov/record.cfm?id=306010>.

symbolizes something greater to the campaign finance reform movement: another step by the Roberts Court towards deregulating the campaign finance reform scheme.<sup>13</sup> The decision reverses the Supreme Court's recent trend towards legislative deference, declines to address inconsistencies with existing precedent, and fails to offer adequate guidance to legislators grappling with the complexities of campaign finance reform.

Part I of this Note provides an overview of campaign finance legislation and historical trends in the Court's approach to questions of free speech and political spending. Part II examines the factual context and reasoning behind the Court's decision in *Davis*, while Part III discusses the validity of the political equalization rationale as a compelling state interest and concludes with an analysis of the erroneous reasoning of Justice Alito's majority opinion. Part IV examines the possible short- and long-term consequences of the *Davis* decision for both the federal and state electoral systems, specifically addressing the current ongoing litigation in several states with schemes analogous to that at issue in *Davis*. Finally, Part V suggests several implications of the Court's decision for campaign finance reformers.

I. A BRIEF HISTORY OF CAMPAIGN FINANCE JURISPRUDENCE:  
CORRUPTION AND THE CONTRIBUTIONS-EXPENDITURES  
DICHOTOMY

The ramifications of *Davis* are best understood in light of the Court's prior campaign finance jurisprudence. Accordingly, this Part begins with a description of *Buckley v. Valeo*—the Court's landmark decision in the campaign finance arena—and how it has been interpreted in the three decades since its issuance. Subsection B turns to the passage of the BCRA and the Court's response. Finally, Subsection C addresses how Justices Roberts and Alito have changed the direction of the Court with regard to campaign finance regulation, specifically through the first two Roberts Court decisions to address this area.

---

12. Eliza Newlin Carney, *Campaign Finance Laws Under Siege*, THE NAT'L J., July 28, 2008, at Rules of the Game, [http://www.nationaljournal.com/njonline/rg\\_20080728\\_5842.php](http://www.nationaljournal.com/njonline/rg_20080728_5842.php).

13. See *infra* Part IV.

A. *Buckley and the Pre-BCRA Campaign Finance Framework*

The Supreme Court's landmark decision in campaign finance jurisprudence occurred in 1976 in *Buckley v. Valeo*,<sup>14</sup> in which the Court interpreted the recently enacted Federal Election Campaign Act Amendments of 1974 ("FECA"). FECA sought to place limits on the size of campaign contributions and expenditures, provide for disclosure and transparency in the election process, and create a system of public financing of campaigns.<sup>15</sup> This legislation necessarily implicated First Amendment issues, including freedom of expression and freedom of association, in the context of political speech.<sup>16</sup> Almost immediately after FECA's passage, a group of ideologically diverse plaintiffs (including, among others, a presidential candidate, an incumbent senator up for re-election, the Mississippi Republican Party, and the New York Civil Liberties Union) filed a comprehensive challenge to the legislation, seeking a declaratory judgment and an injunction against enforcement of FECA's major provisions.<sup>17</sup> The suit named as defendants the Secretary of the United States Senate, the Clerk of the House of Representatives, the Federal Election Commission, the Attorney General, and the Comptroller General.<sup>18</sup> In a *per curiam* opinion, the Court attempted to provide extensive interpretative guidance as to the exact constitutional limits on campaign finance regulation for the first time. In construing FECA, the *Buckley* Court sharply delineated between contribution limits and expenditure limits, thereby creating an analytical dichotomy and corresponding standards of review—ostensibly strict scrutiny for both, but arguably something less

---

14. 424 U.S. 1 (1976).

15. *Id.* at 6–7.

16. The First Amendment provides, in pertinent part, that "[c]ongress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. FECA ostensibly violates these provisions—for example, a cap on a contributor's ability to donate to a campaign, in the abstract sense, prevents said contributor from fully expressing his or her support for that candidate (through the conduit of money) and further prevents him or her from associating to the extent desired (again through monetary ties) with that candidate.

17. *Buckley*, 424 U.S. at 7–9.

18. *Id.* at 8.

stringent for contribution limitations—that still persists.<sup>19</sup> The limit on contributions ultimately withstood scrutiny<sup>20</sup> because it entailed only a “marginal restriction upon the contributor’s ability to engage in free communication,”<sup>21</sup> while the limit on expenditures failed because of its “substantial rather than merely theoretical restraints on the quantity and diversity of political speech.”<sup>22</sup>

The Court found justification for the distinction between contribution and expenditure limits in the compelling governmental interest of avoiding corruption or the appearance of corruption in campaigns, candidates, and elected officials.<sup>23</sup> In the contribution context, “[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.”<sup>24</sup> In other words, while the regulation entailed a restraint on First Amendment guarantees such as freedom of association, the governmental interest on the other side of the equation, that of avoiding corruption, was compelling enough to maintain the scheme’s constitutionality.

---

19. *See id.* at 19–23. In other areas of the opinion, the Court sustained the campaign disclosure requirements and public financing for presidential campaigns (stressing the voluntariness of the system) and struck down the manner in which the Federal Election Commission (“FEC”) was organized. *See id.* at 60–142.

20. There is some debate as to the standard of review employed by the *Buckley* Court. Many commentators view the case as one in which the strictest First Amendment review was applied to all of the limitations; the fact that the cases relied upon by the Court in the opinion employed strict scrutiny explicitly, and the fact that the Court rejected a lesser standard of review merely “because the limitations applied to ‘speech plus’ rather than ‘pure speech,’ ” support this view. Marlene Arnold Nicholson, *Political Campaign Expenditure Limitations and the Unconstitutional Condition Doctrine*, 10 HASTINGS CONST. L.Q. 601, 607–08 (1983). But the Court also scrutinized some of the limitations more closely than others, giving credence to the interpretation that the level of scrutiny was selected on a sliding scale. This interpretation is borne out through the *Buckley* Court’s emphasis on the inadequacy of the proffered rationales rather than the seriousness of the burden. *See id.* For purposes of this Note, the precise standard of review is a secondary issue noted, but not discussed. Rather, the emphasis is on the validity of the equality rationale itself and its sufficiency, or lack thereof, to justify the Millionaire’s Amendment. Moreover, in the *Davis* decision, the Millionaire’s Amendment is conceptualized as an expenditure cap, thus making it subject to strict scrutiny review. *See infra* Part III.

21. *Buckley*, 424 U.S. at 20–21. This concept is also commonly referred to as “speech by proxy.”

22. *Id.* at 19.

23. *Id.* at 26–27.

24. *Id.* “Of almost equal concern,” the opinion continues, “is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.” *Id.* at 27.

On the expenditures side, however, the Court held that the asserted interest in preventing corruption lacked weight when balanced against the competing free speech interest.<sup>25</sup> First, a person cannot corrupt him- or herself by spending his or her own money since, in so doing, he or she reduces dependence on outside contributions and coercive pressures.<sup>26</sup> Consequently, an expenditure by a third party, who is completely independent from a candidate, should not secure improper commitments from that candidate because this type of spending lacks the close, coordinated relationship normally present when a donor contributes to a campaign.<sup>27</sup> Second, the *Buckley* majority held that limiting campaign expenditures is tantamount to directly limiting speech because such a limit necessarily reduces the “number of issues discussed” and “the size of the audience reached.”<sup>28</sup> The expenditure restriction is, therefore, at heart a political speech restriction, and such a restriction is unconstitutional unless narrowly tailored to meet a compelling governmental interest. Since preventing corruption was an inapposite justification and no other interests asserted within FECA were sufficiently compelling, the Court held the expenditure restriction unconstitutional.<sup>29</sup>

In this political speech context, the Court also dismissed the equalization rationale—defined as the interest in equalizing the relative ability of individuals and groups to influence the outcome of elections—as unknown to the First Amendment, and therefore not a sufficiently compelling governmental interest:

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . . [Its] protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.<sup>30</sup>

---

25. *See id.* at 45–48.

26. This is commonly referred to as “direct speech.”

27. *Buckley*, 424 U.S. at 47, 53. The Court also noted that “[t]he interest in alleviating the corrupting influence of large contributions is served by the Act’s contribution limitations and disclosure provisions rather than by § 608(c)’s campaign expenditure ceilings.” *Id.* at 55.

28. *Id.* at 19.

29. *Id.* at 46–49, 58–59.

30. *Id.* at 48–49. The Court went on to note, however, that:



Accordingly, the *Buckley* Court indicated that the only interest sufficiently compelling to justify government regulation was the prevention of corruption or the appearance of corruption. Yet, while this rationale was sufficient to uphold contribution limits, the Court deemed it irrelevant and insufficiently compelling to justify expenditure limitations. After *Buckley*, however, the Court expanded its definition of “corruption,” thus broadening the scope of permissible regulation and moving towards greater deference to legislative judgment about campaign finance matters.<sup>31</sup>

### 1. The Post-*Buckley* Experience: *Nixon* and *Austin*

In the decades after the *Buckley* decision, the Court often faced the problem of how to effectuate its judgment while simultaneously tempering it to the realities of an increasingly political society and a never-ending election cycle.<sup>32</sup> These dual needs ultimately resulted in greater deference to legislative and regulatory judgments, signaling an era of pragmatism with regards to the campaign finance problem. Two cases, *Nixon v. Shrink Missouri Government PAC*<sup>33</sup> and *Austin v. Michigan Chamber of Commerce*,<sup>34</sup> exemplify this trend—the former demonstrating the Court’s tremendous deference to legislative judgments concerning contribution levels, and the latter illustrating the Court’s expanding conception of what qualifies as a compelling governmental interest on the expenditures side.

#### a. *Nixon: The Height of Deference*

In *Nixon*, the Court confronted a challenge to Missouri’s variable contribution limits, which ranged from a \$275 maximum for individual contributions to candidates for state repre-

---

[t]here is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate’s message to the electorate. Moreover, the equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.

*Id.* at 56–57.

31. See *infra* text accompanying notes 26–52.

32. Society is increasingly political in the sense of the never-ending campaign, the twenty-four hour ideological news channel, and the record number of new and younger voters on the national stage.

33. 528 U.S. 377 (2000).

34. 494 U.S. 652 (1990).

sentative to “a high of \$1,075 for contributions to candidates for statewide office.”<sup>35</sup> The Court, in a 6–3 decision, sustained the regulations on a noticeably thin evidentiary record: the state presented an affidavit from a legislator, several “newspaper accounts of large contributions supporting inferences of impropriety,” and the results of a popular vote on a campaign finance ballot initiative.<sup>36</sup> Justice Souter, writing for the majority, noted that “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”<sup>37</sup> Justice Breyer embraced this sweeping deference to the legislature in his concurrence: “Where a legislature has significantly greater institutional expertise . . . the Court in practice defers to empirical legislative judgments—at least where [elections remain competitive and incumbents do not] insulate themselves from effective electoral challenge.”<sup>38</sup>

More importantly, the majority modified the definition of the corruption rationale to include more than just a *quid pro quo* or the appearance of one:

In speaking of “improper influence” and “opportunities for abuse” in addition to “*quid pro quo* arrangements,” we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money “to influence governmental action” in ways less “blatant and specific” than bribery.<sup>39</sup>

The Court further found that the contribution limits did not preclude candidates from raising funds sufficient to run effective campaigns, thereby satisfying the constitutional objection that the limits were too low.<sup>40</sup> Thus, as the Court held in *Buckley*, “restrictions on contributions require less compelling justification” to withstand constitutional scrutiny than do restrictions on independent spending.<sup>41</sup> These definitional changes signified the Court’s willingness to interpret corruption broad-

---

35. *Nixon*, 528 U.S. at 382–83.

36. *Id.* at 393–94.

37. *Id.* at 391.

38. *Id.* at 402 (Breyer, J., concurring).

39. *Id.* at 389 (quoting *Buckley v. Valeo*, 424 U.S. 1, 27–28 (1976)).

40. *Id.* at 395–96.

41. *Id.* at 387.

ly, thereby allowing structural concerns otherwise tangential to a traditional conception of corruption—the deal struck in a smoky backroom to pay for play—to be encompassed within its language. Concern over a seat being for sale to the highest bidder thereby became a matter of legislative judgment, all within the language of contributions and permissible campaign finance regulation.<sup>42</sup> Essentially, the *Nixon* Court reconceptualized “corruption” to include situations beyond *quid pro quo* arrangements, which, when coupled with increased deference to the legislature to police such corruption, demonstrated the Court’s willingness to adapt the *Buckley* precedent to the needs of an ever-advancing society. This deference encroaches on the strong language laid down in *Buckley*, which held that corruption, or its appearance, was the only legitimate concern for regulation. Justice Breyer lent credence to this more expansive view in his concurrence, perhaps the most doctrinally important part of the *Nixon* decision, when he set forth an egalitarian “participatory self-government” theory of campaign finance regulation: “[R]estrictions upon the amount any one individual can contribute to a particular candidate seek to protect the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action.”<sup>43</sup>

According to Justice Breyer, political contributions are a matter of First Amendment concern not because the money itself is speech, but because the money enables future speech—thus, both political association and political communication interests are at stake when discussing contribution limits.<sup>44</sup> Moreover, as Justice Breyer continued, the integrity of the electoral system also depends on regulation. “[B]y limiting the size of the largest contributions, [contribution] restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process.”<sup>45</sup> Restrictions on contributions not only facilitate this electoral integrity rationale, but also indirectly preserve the political association and communication concerns espoused by de-regulators: they “seek to build public

---

42. In 2003, for example, at least forty of the nation’s one hundred senators were millionaires, lending credence to the Senate’s nickname of the Millionaires’ Club. Sean Loughlin & Robert Yoon, *Millionaires Populate U.S. Senate*, CNN.COM, June 13, 2003, <http://www.cnn.com/2003/ALLPOLITICS/06/13/senators.finances/>.

43. *Nixon*, 528 U.S. at 401 (Breyer, J., concurring).

44. *Id.* at 400.

45. *Id.* at 401.

confidence in [the electoral] process and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes."<sup>46</sup> In other words, Justice Breyer argued that as long as the limits set by Congress are not too low to achieve these regulatory objectives,<sup>47</sup> limiting contributions better approximates the goal of achieving an active electorate, in terms of both candidates and the voting public. Conversely, leaving candidates to their own cunning and guile without regulation allows them to receive large contributions that do not accurately reflect their support in the community and could actually stifle speech by rendering the majority's voice, in absolute numbers, meaningless.<sup>48</sup>

*b. Austin: A Step Towards Equality*

Even on the expenditures side, the Court showed some willingness in the post-*Buckley* years to allow legislative restrictions or prohibitions, specifically in the context of corporations. In so doing, it expanded the conception of compelling governmental interests to include a form of equality in the campaign finance context. For example, in *Austin v. Michigan Chamber of Commerce*,<sup>49</sup> the Court confronted a provision of the Michigan Campaign Finance Act that prohibited corporations from making independent expenditures on behalf of candidates for state elections unless made from a segregated fund (a fund specifically designated for political activity and kept separate from a corporation's general account).<sup>50</sup> The *Austin* Court, in another 6-3 decision, upheld the restriction due to the unique benefits the corporate structure confers upon corporations—benefits “such as limited liability, perpetual life, [and] favorable treat-

---

46. *Id.* Justice Breyer cites for support other restrictions on speech that have been held constitutional “in order to prevent a few from drowning out the many.” *Id.* at 402. For example, “the Constitution tolerates numerous restrictions on ballot access” and Article I, Section 6 provides every Member of Congress with “an equal opportunity to express his or her views” during debate. *Id.*

47. *See infra* Part I.C.

48. Thus, a candidate with money will always remain “competitive” with any other candidate simply by being able to purchase television and radio time, hire more employees, make more phone calls, etc.

49. 494 U.S. 652 (1990).

50. *Id.* at 654–55. This provision was modeled on a similar requirement in FECA that required corporations and labor unions to use segregated funds to finance independent expenditures made in federal elections. 2 U.S.C. § 441b (2006).

ment of the accumulation and distribution of assets” that facilitate the amassing of large treasuries.<sup>51</sup> These benefits would allow corporations, if unregulated, “to obtain ‘an unfair advantage in the political marketplace’ ” by using resources accrued in the economic marketplace.<sup>52</sup> Such advantages, however, “‘are not an indication of popular support for the corporation’s political ideas. . . . The availability of [economic] resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.’ ”<sup>53</sup> Moreover, even within a corporation, support for a particular candidate may not adequately represent the views of the shareholders of the corporation.<sup>54</sup> “Corporate wealth,” the Court held, “can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.”<sup>55</sup>

Doctrinally, *Austin* remains an important case because it demonstrates an expanding conception of compelling governmental interests and the weight these interests carry with regard to expenditures.<sup>56</sup> The Court again paid heed to *Buckley*’s language relating to preventing corruption or the appearance of corruption, but it went further, noting that Michigan’s regulation aimed at a different type of corruption in the political arena—namely “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>57</sup> This language does not mean that the provision “equalizes” the relative influence of speakers on elections by mandating equivalent quantities of speech. Rather, “it ensures that expenditures reflect actual public support for the political ideas espoused by

---

51. *Austin*, 494 U.S. at 658–60.

52. *Id.* at 659 (quoting *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)).

53. *Id.* (quoting *Mass. Citizens for Life, Inc.*, 479 U.S. at 258).

54. *Id.* at 663. This is an important consideration because such shareholders may have an economic disincentive for disassociating with the corporation, thus allowing the corporation’s political views to continue unabated, apparently with widespread “support.”

55. *Id.* at 660.

56. *Nixon* was decided ten years after *Austin* and dealt with the rationale for sustaining variable contribution limits, not expenditure restrictions. See *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000).

57. *Austin*, 494 U.S. at 660.

corporations,”<sup>58</sup> thereby theoretically neutralizing the variable of wealth and tethering support for the corporation’s views to other factors. Scholars describe the importance of this reasoning: “This concern, now recognized by the Court, implicitly, if not explicitly, invokes the constitutional right to cast a meaningful vote and to run for office on an equal basis, rights which form the bedrock of democratic governance and which were largely ignored in the *Buckley* decision.”<sup>59</sup>

This same logic can be applied to the millionaire candidate: the millionaire’s money presumably was acquired through mergers, investments, start-ups, and family inheritance, not as a result of political success.<sup>60</sup> Thus, at the start of a campaign, or even during the course of it, the millionaire is competitively advantaged, even if he or she should turn out to otherwise be a poor candidate. By allowing challengers greater opportunities to compete with the millionaire’s financial advantages, legislators are not trying to “equalize” the influence of speakers, but instead are trying to ensure that success in the electoral arena is dependent on factors other than massive amounts of money.<sup>61</sup> The desired goal is equality in the opportunity to run a campaign and have one’s voice heard, not equality in the result.<sup>62</sup> In post-*Buckley* jurisprudence, justification exists for this type of argument. Not only did the Court move away from its pronouncements in *Buckley*, but it also granted a high level of deference to the legislature’s judgments and expanded the definition of corruption to include concerns more precisely placed in an equality rationale.<sup>63</sup>

---

58. *Id.*

59. Audra L. Wassom, Comment, *Campaign Finance Legislation: McCain-Feingold/Shays-Meehan—The Political Equality Rationale and Beyond*, 55 SMU L. REV. 1781, 1787 (2002) (quoting JAMIN B. RASKIN & JOHN BONIFAZ, *THE WEALTH PRIMARY: CAMPAIGN FUNDRAISING AND THE CONSTITUTION* (1994)).

60. See generally Justice Alito’s discussion of the various strengths of candidates in the *Davis* opinion, *infra* Part II.B.

61. While the precise correlation between money and electoral success is subject to debate, and the number of wealthy candidates who spend exorbitant amounts of their own money on a campaign only to find defeat is more than a statistical anomaly (for example, Steve Forbes’ presidential run, Pete Coors’ senate run, etc.), a certain amount of resources are required simply to participate or be a part of the discussion in the first place. The gate-keeping function of campaign costs thus limits the field at the outset, thereby increasing the importance of money as well as the probability that wealth is the most important factor in a campaign.

62. In the sense of socially engineering a desirable ratio of certain types of politicians in different economic or social classes: X percent rich, Y percent blue collar, etc.

63. Discussed and elaborated in Part III, *infra*.

### B. McConnell and the Validity of McCain-Feingold

Congress finally succeeded in passing the BCRA in 2002 after six years of failed attempts.<sup>64</sup> The process began in the late 1990s, when campaign finance abuses were brought to the forefront, goading Congress into action.<sup>65</sup> Reformers in Congress took care to draft the law and develop the legislative history, within the *Buckley* framework, to demonstrate to the Court that this legislation was about more than just regulation technicalities—rather, that it was about “the healthy functioning of our democracy and citizen participation in our democracy.”<sup>66</sup> The BCRA introduced a number of changes to campaign finance regulation designed to ameliorate the problems engendered by the post-*Buckley* experience,<sup>67</sup> including raising the individual contribution limit to \$2,000 per election and indexing it to inflation for the first time; barring corporations and unions from spending general treasury funds on “electioneering communications” or advertising for specific candidates close to elections so as to close the express-advocacy versus issue-advocacy loophole;<sup>68</sup> implementing heightened disclosure requirements for those electioneering communications; and bar-

---

64. DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW: CASES AND MATERIALS 790 (4th ed. 2008).

65. See *id.* (citing *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 129–32 (2003)) (discussing the rise of “soft money” and the ability of contributors to circumvent FECA’s limitations).

66. Victoria S. Shabo, Comment, “*Money, Like Water . . .*: Revisiting Equality in Campaign Finance Regulation After the 2004 “Summer of 527s,” 84 N.C. L. REV. 221, 235–38 (2005) (quoting Remarks of Roger Witten, in *Lessons Learned from McConnell v. FEC: An Analysis by Key Participants in this Historic Supreme Court Case*, at 9 (Jan. 14, 2004), available at <http://www.campaignlegalcenter.org/attachments/1200.pdf>).

67. Many commentators subscribe to the hydraulic theory of regulation. Simply put, this theory states that plugging one regulatory loophole will only open another elsewhere. For good summaries of this theory as it relates to the unintended consequences of campaign finance legislation, see Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1400–11 (1994); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1705–08 (1999).

68. “Electioneering communications” are those communications that refer to a clearly identified candidate for public office, distributed shortly before an election for that candidate’s office, and are targeted to the relevant electorate. In the pre-BCRA formulation, the express-advocacy/issue-advocacy conflict was often referred to as the “magic words” test (i.e., does an advertisement contain the words “vote for,” “elect,” “support,” etc.?). Under FECA, as interpreted by the courts, advertisements containing such “magic words” were regulated because of their express advocacy, while all other advertisements were deemed “issue advocacy,” and were immune from regulation. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 43 (1976).

ring various practices related to the raising of soft (i.e., unregulated) money.<sup>69</sup>

Immediately upon President Bush signing the bill into law, a number of groups and individuals, including Senator Mitch McConnell (R-Ky.), brought a facial challenge to the statute in federal court.<sup>70</sup> The cases were consolidated and the Supreme Court issued its decision in December 2003 in *McConnell v. Federal Election Commission*.<sup>71</sup> Ultimately, the Court, in a number of splintered opinions, upheld most of the BCRA, including the soft money and electioneering communication provisions.<sup>72</sup> The opinion also further relaxed the definition of corruption, as Professor Briffault describes:

Although the Court had previously made clear that corruption was not limited to outright vote-buying, the Court's language of undue influence had nonetheless focused on the effects of large contributions on government decision-making. By focusing on special access, *McConnell* reframed the corruption analysis from the consideration of the impact of contributions on formal decisions to their effect on the *opportunity to influence* government actions.<sup>73</sup>

Thus, while *McConnell* was not a paradigm-shifting, doctrinally significant case, it did continue the trend of deference to the legislature, as described and demonstrated above. Accordingly, "*McConnell* was a ringing endorsement of the deferential approach the Court had taken to campaign finance regulation beginning with *Shrink Missouri*."<sup>74</sup> This newfound deference, however, proved to be short-lived.

---

69. See ROBERT BAUER, MORE SOFT MONEY, HARD LAW: THE SECOND EDITION OF THE GUIDE TO THE NEW CAMPAIGN FINANCE LAW (2004) (describing the statute's intricacies).

70. LOWENSTEIN, *supra* note 64, at 794.

71. 540 U.S. 93 (2003).

72. See *id.* at 93–110 (syllabus recounting the various holdings and opinions of the Court).

73. Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELEC. L.J. 147, 162–63 (2004); cf. Lillian R. BeVier, *McConnell v. FEC: Not Senator Buckley's First Amendment*, 3 ELEC. L.J. 127, 136 (2004) ("The *McConnell* Court . . . [defined] corruption even more broadly than it did in *Shrink Missouri* or *Colorado II*. . . . Thus, in sustaining BCRA's soft money ban, the *McConnell* majority effectively discarded two aspects of *Buckley*. It discarded its premise of distrust and it discarded its implicit commitment strictly to supervise the conception of corruption that would permit Congress to restrict campaign speech.").

74. LOWENSTEIN, *supra* note 64, at 852.



C. *The Roberts Court—A New Era?*

The complexion of the Court changed when Justices Roberts and Alito (both of whom harbored strong views regarding the propriety of campaign finance regulation<sup>75</sup>) replaced Chief Justice Rehnquist and Justice O'Connor, respectively. Although the Roberts Court had only decided two campaign finance cases by the time it considered *Davis*, the pronouncements in those cases were explicit enough to signal a shift in campaign finance jurisprudence—a Court tightening its regulatory grip and deferring less to legislative judgments about the scope of permissible campaign finance regulation.<sup>76</sup>

The first case, *Randall v. Sorrell*,<sup>77</sup> concerned the constitutionality of Vermont's campaign finance system, specifically, the variable contribution limits that restricted individuals' contributions to candidates for statewide office.<sup>78</sup> Justice Breyer, writing for a plurality and announcing the judgment of the court, held the contribution limits to be unconstitutionally low.<sup>79</sup> While the Court acknowledged that it had "no scalpel to probe" the precise or desired contribution limits necessary to achieve the statute's ends, it noted that distinctions in degree can amount to differences in kind; correspondingly, there is a lower bound to such limits that signify "danger signs" for the ability of a challenger to mount an effective campaign against an incumbent.<sup>80</sup> Five factors led the Court to this conclusion: 1) the record suggested that the contribution limits would significantly restrict the amount of funding available for challengers to run competitive campaigns,<sup>81</sup> 2) the statute's insistence

---

75. See *infra* note 210.

76. See Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007); *Randall v. Sorrell*, 548 U.S. 230 (2006).

77. 548 U.S. 230 (2006).

78. *Id.* at 238. For example, an individual was prohibited from contributing to candidates for statewide office in an amount greater than \$400 every two-year general election cycle, from contributing more than \$300 to state senatorial candidates, and from contributing more than \$200 to state representative candidates. *Id.* None of these limits were indexed to inflation. *Id.* The case also involved the constitutionality of mandatory expenditure limits, but the Court rather summarily struck them down as indistinguishable from those at issue in *Buckley*. *Id.* at 245.

79. *Id.* at 253.

80. *Id.* at 248–49.

81. Justice Souter noted in his dissent the extensive record detailing the ability of candidates to run effective campaigns, including testimony from a prior gubernatorial candidate and legislators themselves. Justice Souter concluded that the contribution limits were constitutional because they were not so radical as to

that political parties abide by exactly the same limits as those established for individuals threatened harm to the right to associate in a political party, 3) the statute's treatment of volunteer expenses as contributions aggravated the problem, 4) the limits were not adjusted for inflation, and 5) no special justification that might warrant a limit so low as to bring about the serious associational and expressive problems incidental thereto could be found.<sup>82</sup>

Justice Thomas, in his dissent, noted that the *Randall* decision "places this Court in the position of addressing the propriety of regulations of political speech based upon little more than its *impression* of the appropriate limits."<sup>83</sup> At least one commentator has suggested that the inconsistency with the *Nixon* case may have been a result of Justice Breyer's desire to keep the two newest Justices from joining the far-right positions of Justices Thomas and Scalia—a compromise decision of sorts.<sup>84</sup> More importantly, the case, when combined with the Court's next campaign finance decision, *Federal Election Commission v. Wisconsin Right to Life, Inc.*,<sup>85</sup> is representative of the Roberts Court's pattern of quietly chipping away at restrictions, a process that amounts to deregulation by misdirection.<sup>86</sup>

In *Wisconsin Right to Life, Inc.*, the Court confronted an as-applied challenge to section 203 of the BCRA—a section upheld in *McConnell*—that made it a federal crime for any corporation to use general treasury funds to broadcast, shortly before an election, any communication that names a federal candidate for elected office and is targeted to the electorate.<sup>87</sup> The Court, in a 5-4 decision, held section 203 unconstitutional as applied to the communications in question.<sup>88</sup> Chief Justice Roberts first found that the speech at issue was not the "functional equivalent" of express campaign speech because it was susceptible to a reasonable interpretation other than as an appeal

---

render political association ineffective, mute the sound of a candidate's voice, or make contributions pointless. *Id.* at 284–86 (Souter, J., dissenting).

82. *Id.* at 253–61.

83. *Id.* at 267.

84. See Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law after Randall v. Sorrell*, 68 OHIO ST. L.J. 849, 876–77 (2007).

85. 127 S. Ct. 2652 (2007).

86. Carney, *supra* note 12 (quoting Paul S. Ryan, an attorney for the Campaign Legal Center).

87. *Wis. Right to Life, Inc.*, 127 S. Ct. at 2658–59.

88. *Id.* at 2659.

to vote for or against a specific candidate.<sup>89</sup> As such, the considerations that justify the regulation of campaign speech do not apply to the regulation of genuine issue ads. Chief Justice Roberts concluded, “[e]nough is enough. Issue ads like [Wisconsin Right to Life’s] are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them. To equate [these] ads with contributions is to ignore their value as political speech.”<sup>90</sup>

As these cases illustrate, the deference to legislative judgment that marked the previous two decades is gone. With the *Wisconsin Right to Life, Inc.* decision, the Roberts Court reverted to the earlier, more precise definition of the corruption rationale, as demonstrated by its emphasis on *quid pro quo* corruption.<sup>91</sup> The ruling not only reversed the course set forth in the *McConnell* decision three years before, but it also “opened ‘a fairly sizeable loophole’ in the McCain-Feingold law.”<sup>92</sup> Together, these decisions represent a movement towards deregulation. As Professor Hasen has warned, “we could well be looking at a situation where the only campaign finance laws that are constitutional are disclosure laws and voluntary public financing systems.”<sup>93</sup> It was in this context that the *Davis* case came to the Court, and it is this context that gives the decision greater meaning not only for analytical purposes, but also for understanding the shifting jurisprudence of the Court.

## II. *DAVIS V. FEC*: A BROAD DECLARATION FOR A COMPLEX ANALYSIS

Turning to the *Davis* decision, the first two subsections of this Part begin by giving procedural and factual context to the case. Subsection C then describes Justice Alito’s majority opinion and the suspect reasoning he used to hold the Millionaire’s Amendment unconstitutional. This Part concludes in Subsection D with a look at the dissenting Justices and their primary disagreements with the majority.

---

89. *Id.* at 2667.

90. *Id.* at 2672.

91. *See id.*

92. Carney, *supra* note 12 (quoting Paul S. Ryan, an attorney for the Campaign Legal Center).

93. *Id.* (quoting Richard L. Hasen, Loyola Law School).

A. *The Mechanics of the Millionaire's Amendment*

Federal law limits the amount of contributions individual donors can make during two-year election cycles.<sup>94</sup> Currently, that limit stands at \$2,300 for contributions to individual candidates and \$42,700 for aggregate contributions to candidates and their committees, indexed to inflation.<sup>95</sup> Furthermore, a candidate may not accept general-election coordinated (i.e., joint) expenditures by national or state political parties in excess of a specified, population-dependent limit. For states with more than one House seat, that limit is currently \$40,900.<sup>96</sup> Section 319(a) of the BCRA alters this scheme for House elections, however, when a candidate's expenditure of personal funds exceeds \$350,000, as calculated through a formula known as the Opposition Personal Funds Amount ("OPFA").<sup>97</sup> The modified scheme allows opponents of the self-financing candidate to receive individual contributions at three times the normal limit (thus, \$6,900 instead of \$2,300, thereby allowing individuals who have reached the contribution limit to contribute further) and to receive coordinated party expenditures without limit.<sup>98</sup> This modified scheme remains in place until parity is attained, i.e., the non-self-financing candidate's receipts exceed the OPFA, at which time the normal limits resume effect.<sup>99</sup>

In order to facilitate compliance with these provisions, section 319(b) requires increased disclosures from self-financing candidates.<sup>100</sup> This scheme, while complex and laden with paperwork, creates multiple safeguards to ensure compliance with the Millionaire's Amendment. First, within fifteen days of entering a race, a candidate must file a "Declaration of Intent"

---

94. 2 U.S.C. § 441a(c) (2006).

95. See 2 U.S.C. §§ 441a(a)(1)(A), (c); §§ a(a)(3)(A), (c) (2006).

96. Price Index Increases for Expenditure and Contribution Limitations, 72 Fed. Reg. 5294–301 (Feb. 5, 2007).

97. BCRA, Pub. L. No. 107-155, 116 Stat. 81, § 319(a). "To calculate the OPFA, the opponent determines the amount of personal funds spent by each candidate (i.e., the self-financed candidate and himself), adds 50% of the total funds raised by each candidate during the year prior to the election, and compares the totals." *Davis v. Fed. Election Comm'n*, 501 F. Supp. 2d 22, 26 (D.D.C. 2007) (citing 2 U.S.C. § 441a-1(a)(2)). A similar provision also exists for Senate campaigns. *Id.* at 25 n.1.

98. *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2766 (2008) (citing 2 U.S.C. §§ 441a-1(a)(1)(A)–(C) (2006)). The self-financing candidate remains subject to the normal contribution limits. *Id.*

99. *Id.* (citing 2 U.S.C. § 441a-1(a)(3) (2006)).

100. *Id.*

revealing the amount of personal funds in excess of \$350,000 that the candidate anticipates spending during the course of the campaign.<sup>101</sup> Second, the self-financing candidate must file an “Initial Notification” within twenty-four hours of actually crossing the \$350,000 threshold.<sup>102</sup> Third, the self-financing candidate must file “Additional Notification(s)” within twenty-four hours of “making or becoming obligated to make each additional expenditure of \$10,000 or more using personal funds.”<sup>103</sup> All the notifications must be filed not only with the FEC, but also with all other candidates for the seat and their respective national parties.<sup>104</sup> Conversely, the non-self-financing candidate and his or her committee must also provide notice that the OPFA has passed the \$350,000 mark to the FEC and the national and state committees of that candidate’s party.<sup>105</sup> The non-self-financing candidate must also provide the appropriate entities notice, within twenty-four hours, when the additional contribution receipts exceed the OPFA and the campaign finance scheme returns to its normal state.<sup>106</sup>

### *B. The Factual Background*

Jack Davis, a Democratic candidate for the House of Representatives from New York’s 26<sup>th</sup> Congressional District, mounted two unsuccessful bids for Congress in 2004 and 2006, losing both times to the incumbent candidate.<sup>107</sup> During the course of both elections, Davis primarily self-funded his campaign, spending nearly \$1.2 million of his own money in 2004 and nearly \$2.2 million in 2006.<sup>108</sup> In March 2006, during his

---

101. *Id.* (citing 2 U.S.C. § 441a-1(b)(1)(B) (2006)). Candidates not intending to cross the threshold may simply declare an intent to spend no personal funds. *Id.* (citing 11 C.F.R. § 400.20(a)(2) (2008)).

102. *Id.* (citing 2 U.S.C. § 441a-1(b)(1)(C) (2006)).

103. *Id.* at 2767 (citing 2 U.S.C. § 441a-1(b)(1)(D) (2006)).

104. *Id.* (citing 2 U.S.C. § 441a-1(b)(1)(E) (2006)).

105. *Id.* (citing 11 C.F.R. § 400.30(b)(2) (2008)). Parties must also notify the FEC and their respective candidates within twenty-four hours of making expenditures that exceed the normal limit for coordinated party expenditures. *Id.* (citing 11 C.F.R. § 400.30(c)(2) (2008)).

106. *Id.* (citing 11 C.F.R. § 400.31(e)(1)(ii) (2008)). Any money remaining from the asymmetrical contribution limits that is not spent by the candidate must be returned. *Id.* at 2766 (citing 2 U.S.C. § 441a-1(a)(4) (2006)).

107. *Id.* at 2767.

108. *Id.* In 2006, Davis also raised \$126,000 in various campaign contributions. Ironically, Davis’ opponent in this election spent no personal funds and also failed to utilize the increased contribution limits available to him, adhering instead to the normal contribution limits. *Id.*

2006 campaign, Davis filed a Statement of Candidacy with the FEC, declaring that “he intended to spend \$1 million in personal funds during the general election,” thus triggering the higher contribution limits of the Millionaire’s Amendment.<sup>109</sup> Shortly thereafter, “the FEC’s general counsel notified [Davis] that it had reason to believe that [Davis] had violated [section] 319 by failing to report personal expenditures during the 2004 campaign,” and sought to reach “a conciliation agreement under which Davis would pay a substantial civil penalty.”<sup>110</sup> Seeking to avoid the consequences of crossing the personal funds threshold, Davis filed suit against the FEC questioning the constitutionality of the provision and seeking to enjoin its enforcement during the 2006 election cycle.<sup>111</sup> A three-judge panel for the United States District Court for the District of Columbia ultimately rejected Davis’s claims on the merits, and granted summary judgment for the FEC.<sup>112</sup> Davis then invoked the BCRA’s provisions for direct appellate review in the Supreme Court.<sup>113</sup>

### C. Justice Alito’s Majority Opinion

Justice Alito, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas, noted at the outset of his opinion that if “[section] 319(a) simply raised the contribution limits for all candidates, Davis’[s] argument would plainly fail,” because no constitutional basis exists for attacking contribution limits as too high.<sup>114</sup> Even “[w]hen contribution limits are challenged as too restrictive, [the Court has] extended a measure of deference to the judgment of the legislative body that enacted the law.”<sup>115</sup> The Millionaire’s Amendment falls in between these two ends of the spectrum, as it imposes a temporarily asymmetrical contribution system in hopes of leveling the electoral playing field, thereby differentiating it from the tradi-

---

109. *Id.*

110. *Id.* at 2771.

111. *Id.* The FEC reached an agreement with Davis, thereby tolling the statute of limitations period for an FEC enforcement action related to the 2004 violations until resolution of the suit. *Id.*

112. *See* Davis v. Fed. Election Comm’n, 501 F. Supp. 2d 22, 34 (D.D.C. 2007).

113. *Davis*, 128 S. Ct. at 2768.

114. *Id.* at 2770. Justice Alito also addressed the procedural issues of jurisdiction, standing, and mootness at the beginning of his opinion, but these issues are beyond the scope of this Note and thus will not be addressed. *See id.* at 2768–70.

115. *Id.* at 2771.

tional “too restrictive” analysis that informed the Court’s decisions in *Randall* and *Nixon*.<sup>116</sup> While Justice Alito correctly acknowledged that the Court “ha[s] never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other,”<sup>117</sup> it is also true that no contribution scheme similar to that created by the Millionaire’s Amendment had ever been considered by the Court. Somewhat surprisingly, then, Justice Alito grounded his argument for striking down section 319 not in equal protection language,<sup>118</sup> but rather on the basis of a *Buckley*-like First Amendment restriction on expenditures: “[W]e agree with Davis that this scheme impermissibly burdens his First Amendment right to spend his own money for campaign speech.”<sup>119</sup>

Justice Alito’s opinion then proceeded to frame the issue as a cap on expenditures rather than contributions because “it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right [to spend one’s own money]. Section 319(a) requires a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.”<sup>120</sup> This, the majority concluded, indirectly establishes a limit on personal expenditures contrary to Court precedent.<sup>121</sup> Such a choice, Justice Alito rather elusively reasoned, “is not remotely parallel” to the choice between voluntary public financing in exchange for an agreement to abide by specified expenditure limitations and forgoing that public financing right, a choice that was held constitutional in *Buckley*.<sup>122</sup>

---

116. See discussion *supra* Parts I.B, I.C.

117. *Davis*, 128 S. Ct. at 2771.

118. Facially, an argument could be made that the scheme treats similarly situated individuals (i.e., candidates for office) differently. As the dissent argues, however, a wealthy, self-financed candidate and a non-wealthy, contribution-dependent candidate are not similarly situated, thus making the equal protection argument inapposite to the constitutionality of the Millionaire’s Amendment. See *infra* note 139. In any event, the majority did not address this issue and thus the appropriateness of the equal protection rationale is left unresolved.

119. *Davis*, 128 S. Ct. at 2771. See Part V, *infra*, for a discussion as to the implications of this decision to proceed on First Amendment analytical grounds.

120. *Id.*

121. *Id.* at 2772. A candidate has a First Amendment right to engage in the discussion of public issues, and any caps on personal expenditures that hinder such discussion impose a substantial restraint on that constitutional right. See *Buckley v. Valeo*, 424 U.S. 1, 19–20 (1976).

122. *Davis*, 128 S. Ct. at 2772. As noted in Subsection C of this Part III, *infra*, the candidate retains the same choice in both instances—whether and how much to spend—and declining to accept public financing or to limit spending so as to avoid application of the Millionaire’s Amendment does not curtail this right. As

Describing the scheme from the expenditures viewpoint allowed the majority to conclude that section 319(a) “imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech,” a burden that cannot withstand constitutional scrutiny unless justified by a compelling state interest.<sup>123</sup> Leveling electoral opportunities for candidates of different personal wealth, the majority held, does not constitute a legitimate governmental objective.<sup>124</sup> In support of this holding, Justice Alito quoted with approval *Buckley*’s declaration that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”<sup>125</sup> To do so would have “ominous implications because it would permit Congress to arrogate the voters’ authority to evaluate the strengths of candidates competing for office.”<sup>126</sup> Alito reasoned that leveling electoral opportunities would necessarily involve Congress in impermissible line-drawing as to what “strengths should be permitted to contribute to the outcome of an election.”<sup>127</sup>

Moreover, Justice Alito’s proposed solution to the problem of expenditure inequalities impugned, through circuitous reasoning, the well-established anti-corruption rationale for limiting contributions. By relying on the expenditure-versus-contribution dichotomy established by *Buckley*, the majority dismissed the government’s contention that the Millionaire’s Amendment “is justified because it ameliorates the deleterious effects that result from the tight limits that federal election law places on individual campaign contributions and coordinated

---

Justice Stevens noted in his dissenting opinion, “[t]he self-funder retains the choice to structure his campaign’s financing as he pleases . . . . In neither event is his engagement in the political process in any sense impeded.” *Id.* at 2780 n.6 (Stevens, J., dissenting).

123. *Id.* at 2772 (majority opinion).

124. *Id.* at 2773. The Court stated in dictum that the same argument would apply, and the same result would be reached, even if section 319(a) were characterized as a contribution rather than an expenditure limit. *Id.* at 2772 n.7. However, the Court does not provide any reasoning or analysis for that assertion.

125. *Id.* at 2773 (quoting *Buckley*, 424 U.S. at 48–49).

126. *Id.*

127. *Id.* at 2774. Since some candidates are wealthy, some are celebrities, some have a well-known family name, and so on, determining which traits should be permitted to contribute to the outcome of elections would require Congress, and not the voters, to make value judgments about candidates for public office—a slippery slope, according to Justice Alito. *Id.*



party expenditures.”<sup>128</sup> Instead, if the limits truly do distort the electoral process and feed a public perception that wealthy people can buy seats in Congress, then “the obvious remedy is to raise or eliminate those limits.”<sup>129</sup> And in light of the majority’s disposition of section 319(a), it necessarily held that the added disclosure requirements enacted to implement that provision were unconstitutional as well.<sup>130</sup> Exactly how to raise or eliminate contribution limits without lessening the effectiveness of the corruption rationale remains noticeably absent from the opinion. The Court’s movement toward deregulation and a reexamination of the principles of the campaign finance regime, however, is quite clear.

#### *D. Four Dissenting Justices*

Justice Stevens’ dissent<sup>131</sup> notes at the outset that it “cannot be gainsaid that the twin rationales at the heart of the Millionaire’s Amendment [reducing the importance of wealth and making elections more competitive for non-millionaires] are important Government interests.”<sup>132</sup> Indeed, the Court has long recognized the strength of “an independent governmental interest in reducing both the influence of wealth on the outcomes of elections, and the appearance that wealth alone dictates those results.”<sup>133</sup> From a purely empirical standpoint, section 319(a) serves to assist the non-self-financing candidate in making his or her voice heard while quieting no speech at

---

128. *Id.* Justice Alito fails to acknowledge, however, that the “problem” of regulation is heavily tempered by the *Buckley* decision in the first place.

129. *Id.*

130. *Id.* at 2775. Also due to the disposition of the case, the Court never addressed Davis’s equal protection claim. *Id.* at n.9.

131. The following discussion excludes his views in Part I of the dissent, which he writes only for himself, and in which he argues for the reversal of *Buckley*’s prohibition on expenditure limits. *See id.* at 2778–79. That topic remains outside the scope of this Note, but has been the subject of much academic debate. For an excellent summary and analysis of the competing sides in the *Buckley* debate, see generally J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 611 (1982), and Eugene Volokh, *Freedom of Speech and Speech about Political Candidates: The Unintended Consequences of Three Proposals*, 24 HARV. J.L. & PUB. POL’Y 47 (2000).

132. *Davis*, 128 S. Ct. at 2779–80 (Stevens, J., dissenting).

133. *Id.* at 2781 (citing analogous Supreme Court precedent for the proposition that “[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market,” *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969), and then extending its logic to the context of individual wealth).

all: it “in no way mutes the voice of the millionaire, who remains able to speak as loud and as long as he likes in support of his campaign.”<sup>134</sup> In that sense, it actually advances the First Amendment’s core principles in allowing voters to make informed choices.<sup>135</sup> The Millionaire’s Amendment, even if it does burden some First Amendment rights, is also sufficiently tailored<sup>136</sup> to attain its end: equalization of the electoral playing field by offering an equal opportunity to compete, not by guaranteeing equality in results.<sup>137</sup> For example, the OPFA ensures that a candidate “who happens to enjoy a significant fundraising advantage against a self-funded opponent does not reap a windfall as a result of the enhanced contribution limits,” because once parity is achieved, the candidate becomes ineligible for contributions above the normal maximum.<sup>138</sup>

Justice Stevens also explicitly adopted the reasoning of the district court’s opinion,<sup>139</sup> in which Circuit Judge Griffith established the proper mode of analysis for a First Amendment facial challenge—Davis, the plaintiff, had the burden to show that the provision punishes a substantial amount of protected free speech.<sup>140</sup> In that regard, the district court concluded that the challenge “fail[ed] at the outset” because the Amendment does not burden the exercise of political speech: it “places no restriction on a candidate’s ability to spend unlimited amounts

---

134. *Id.* at 2780.

135. *See id.* at n.5 (“In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.” (quoting *Buckley*, 424 U.S. at 14–15)).

136. Tailoring ensures that a law is limited to achieving the particular governmental interest at stake in the least intrusive way possible (in the sense of infringing on otherwise protected constitutional rights). In other words, it prevents the law in question from using disproportionate means to achieve its end(s)—from using a sledgehammer to crack a nut.

137. *Id.* at 2780–81 (Stevens, J., dissenting).

138. *Id.* at 2781–82. Consider as well Professor Sunstein’s comments concerning political equality: “[T]here is no good reason to allow disparities in wealth to be translated into disparities in political power. A well-functioning democracy distinguishes between market processes of purchase and sale on the one hand and political processes of voting and reason-giving on the other.” Sunstein, *supra* note 67, at 1390.

139. *Davis*, 128 S. Ct. at 2778 (Stevens, J., dissenting). Justice Stevens’s opinion also included a section on Davis’s equal protection argument, which the majority did not address. He concluded that “[i]t blinks reality to contend that the millionaire candidate is situated identically to a nonmillionaire opponent,” and that “the ‘Constitution does not require Congress to treat all declared candidates the same,’” thereby dismissing the equal protection argument. *Id.* at 2782 (internal citations omitted).

140. *Davis v. Fed. Election Comm’n*, 501 F. Supp. 2d 22, 27–28 (D.D.C. 2007).

of his personal wealth to communicate his message to voters, nor does it reduce the amount of money he is able to raise from contributors.”<sup>141</sup> Only if one assumes that the self-financing candidate would restrict his or her spending in order to prevent the Millionaire’s Amendment from coming into effect could the argument be made that speech is “restricted.” This in turn requires the further assumptions that money actually is speech, and that self-financing candidates are actually changing their spending to avoid application of this Amendment. As *Davis* makes clear, there has been no showing that speech was restricted, or that millionaires were opting not to run (or to run less vigorously) because of this Amendment.<sup>142</sup> Moreover, even if some speech is tangentially affected, providing the opportunity to actually run a campaign in the first place overrides the self-financing candidate’s interest in maximizing the quantity of his or her campaign speech, thereby making only a “large” quantity of campaign speech acceptable. The Amendment also does nothing to affect the quality of the underlying speech. Simply put, and only with the aforementioned assumptions, the Amendment merely results in slightly less speech, not a dearth of speech or content-restricted speech.

Rather, as the district court pointed out, the provision is analogous to other forms of campaign finance regulation that courts have consistently upheld against First Amendment challenges, as discussed *infra* in Part III, Subsection A.<sup>143</sup> The Amendment’s conferral of a benefit on the non-self-financing candidate does not penalize or chill the speech of the self-financing candidate—at most, it is merely a denial of that specific benefit.<sup>144</sup> Moreover, no court has found an unconstitutional burden on a candidate’s First Amendment right to pursue elective office when the “disadvantage is the result of the candidate’s choice to fund his campaign from one of several permissible funding sources.”<sup>145</sup> In that regard, the district court also noted that *Davis* failed to offer evidence that self-financing candidates are not running for office, are choosing

---

141. *Id.* at 29.

142. *Id.* at 31.

143. *Id.* at 29 (citing, among other cases, *Daggett v. Comm’n on Gov’t Ethics & Election Practices*, 205 F.3d 445, 464–65 (1st Cir. 2000)). *Daggett* involved a campaign financing statute “that provided public matching funds to candidates participating in public financing scheme when independent expenditures were made against him or on behalf of his non-participating opponent.” *Id.*

144. *Id.* at 30.

145. *Id.*

not to self-finance, or are self-financing less because of the Millionaire's Amendment.<sup>146</sup> Therefore, even if Davis's contentions about the effects of allowing the non-self-financing opponent to receive greater contributions (and thus a greater corrupting influence of special interest money) are true, he failed to show how an opponent's campaign, if funded by corrupting money, had a "chilling effect on his mostly self-financed campaign."<sup>147</sup>

### III. THE VALIDITY OF THE EQUALITY RATIONALE

The most important doctrinal development of the *Davis* decision is its rejection of equalization as a compelling governmental interest for the purposes of campaign finance regulation. However, as detailed in Subsection A of this Part, prior case law routinely accepts the equality rationale, and the Court's expanding definition of corruption came to encompass the equalization rationale. This is not a surprising development since the rationale attains so many of the goals of campaign finance regulation, among them increased political communication, a robust marketplace of ideas, and the promotion of broad-based, grassroots support. Subsection B of this Part examines academic support and theories for the equality rationale apart from its basis in case law.

#### A. *Legal Precedent and Increasing the Marketplace of Ideas*

Recent Supreme Court and circuit court precedent, as well as several analogous areas of law, support the inference that equality, despite the *Davis* Court's broad assertion to the contrary, constitutes a compelling governmental interest.<sup>148</sup>

---

146. *Id.* at 31.

147. *Id.* at 32. The district court also upheld the disclosure requirements as analogous to others upheld in *McConnell* and rejected Davis's Fifth Amendment claim by noting, as Justice Stevens did, that the statute does not treat similarly situated entities differently. *Id.* at 32–34. As the *Buckley* Court stated, "sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Buckley v. Valeo*, 424 U.S. 1, 97–98 (1971).

148. The Millionaire's Amendment addresses a type of equality different from that propagated by many scholars. For example, Professor Foley argues for equal financial resources for all voters (perhaps through a subsidy system):

[P]ermitting wealthy citizens to use their wealth in electoral politics biases the electoral process in favor of their political objectives and against the political objectives of the poor. This bias contradicts the premise,

Equality, in the sense of providing the equal opportunity for members of the public to participate in the political realm as candidates or elected officials, serves to protect against the undue influence that aggregations of wealth can have on the electoral process—whether they be in the form of contributions, independent expenditures, or even in the coffers of the candidates themselves. Subsection One of this Part details prior Supreme Court precedent concerning the equality rationale and its implicit acceptance. Subsection Two then turns to an examination of prior circuit court precedent and its much more explicit approval of that rationale. Finally, Subsection Three examines the validity of the equalization rationale in the electoral context outside of campaign finance regulation, and its applicability by analogy to the campaign finance sphere.

### 1. Prior Supreme Court Precedent

In terms of prior precedent, the *Austin* decision, discussed *supra* Part I.A.1.b, upheld a statute designed to combat “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>149</sup> Furthermore, in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*,<sup>150</sup> the Court, while granting an exception for a corporation

---

stated above, that the electoral process should not be affected by whatever distribution of wealth exists in society at election time. In order to eliminate this bias, the Constitution should guarantee that all voters receive equal financial resources for the purpose of participating in electoral politics.

Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1204 (1994). However, this remains a distinct issue from that before the Court in *Davis*. The Millionaire’s Amendment does not seek to equalize outcome or “level the playing field” by raising individuals to the same financial resources as the wealthiest few or vice-versa, it simply attempts to provide the *opportunity* for some to compete in the system in the first place. Its chosen method of doing so, allowing for increased contributions, does not necessarily remedy the problem, but it does serve as an important first step in increasing the potential candidate pool: even if one person chooses to run in the face of astronomical campaign costs, the Millionaire’s Amendment remains justified as a theoretical matter.

149. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990). While dealing explicitly with the corporate form, the reasoning is still applicable to the funding disparity issues between candidates. In such reasoning, the self-funded candidate is the “corporation” that has the ability to dominate the electoral conversation for reasons unrelated to political success.

150. 479 U.S. 238 (1986).

to allow independent spending from corporate treasury funds (due to the ideological nature of the organization), commented that the “concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas.”<sup>151</sup> Moreover, in *Red Lion Broadcasting Co. v. FCC*,<sup>152</sup> while addressing and upholding several components of the FCC’s “fair coverage” requirements, the Court explained that “[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market.”<sup>153</sup> Finally, the Court’s opinion in *Nixon*,<sup>154</sup> described in Part I.A, recognized that “Congress could constitutionally address the power of money ‘to influence governmental action’ in ways less ‘blatant and specific’ than bribery.”<sup>155</sup> In doing so, Congress “seek[s] to build public confidence in [the electoral] process and broaden the base of a candidate’s meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes.”<sup>156</sup>

In sum, the language of the pre-Roberts Court acknowledges the importance of frank discussion and public participation in the election context and recognizes that restrictions on contributions, corporate spending, and media coverage can further this goal. While reform enacted for less-than-noble means, such as incumbent protection, remains a concern,<sup>157</sup> reform enacted for noble means garners a fairly high degree of legislative deference.<sup>158</sup> Moreover, the language used—indicating a larger concern with undue influence from large amounts of wealth—signals governmental interests beyond *quid pro quo* arrangements, as discussed below.

---

151. *Id.* at 257.

152. 395 U.S. 367 (1969).

153. *Id.* at 390. This conception of the First Amendment makes possible a marketplace of ideas because more individuals (i.e., potential candidates) are invited to join the conversation in the first place. One cannot dispute that diversity of ideas is at the heart of our democratic polity. Monopolization of the conversation by a select few negates such a marketplace.

154. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000).

155. *Id.* at 389 (quoting *Buckley v. Valeo*, 424 U.S. 1, 28 (1971)).

156. *Id.* at 401 (Breyer, J., concurring).

157. Especially considering that legislators have job protection to worry about when they change the rules of the electoral game.

158. This assumption is based on the post-*Buckley*, pre-BCRA experience. Moreover, nothing in the passage of the Millionaire’s Amendment or in its application tends to suggest that Congress’s motivation in passing the legislation was in bad faith.

## 2. Prior Circuit Court Precedent

Similarly, prior circuit court precedent, dealing with situations closer to that at issue in *Davis*, also supports equalization ideals. For example, in *Daggett v. Commission on Government Ethics & Election Practices*,<sup>159</sup> the First Circuit upheld a statute that provided public matching funds to candidates who participated in a public financing scheme when independent expenditures were made against them or on behalf of their non-participating opponents.<sup>160</sup> In *Gable v. Patton*,<sup>161</sup> the Sixth Circuit upheld a provision in a statute that provided for two-to-one public matching funds for candidates who agreed to limit campaign expenditures and also waived the expenditure limit when a non-participating opponent raised funds in excess of that amount.<sup>162</sup> Likewise, in *Rosenstiel v. Rodriguez*,<sup>163</sup> the Eighth Circuit upheld a “waiver” provision that raised an expenditure limitation for candidates accepting public financing when a privately financed opponent spent in excess of the limit.<sup>164</sup> Finally, in *Vote Choice, Inc. v. DiStefano*,<sup>165</sup> the First Circuit upheld a statute that permitted candidates who agreed to accept public funding and limit their expenditures to accept double the individual contribution limit from donors, while limiting non-participating opponents to a normal \$1,000 contribution.<sup>166</sup> These cases represent a concern with the fundamental fairness of elections and, hence, the ability and willingness of legislatures to create remedies appropriate to that fundamental problem. In these cases, when self-financing or privately-funded opponents threatened to undermine a candidate’s ability to effectively run a campaign, such a candidate could receive more matching funds, make more expenditures, or even receive larger contributions.

## 3. Analogous Electoral Law Precedent

The equality rationale also remains consistent with the Court’s holdings in other areas of election law besides cam-

---

159. 205 F.3d 445 (1st Cir. 2000).

160. *Id.* at 464–65.

161. 142 F.3d 940 (6th Cir. 1998).

162. *Id.* at 948–49.

163. 101 F.3d 1544 (8th Cir. 1996).

164. *Id.* at 1551.

165. 4 F.3d 26 (1st Cir. 1993).

166. *Id.* at 39.

paign finance. For example, Professor Strauss illustrates how the “one person, one vote,” requirement in the redistricting context provides a nearly identical example:

We do not think of [this requirement] as an example of reducing the speech of some to enhance the relative speech of others . . . . When legislatures were malapportioned, rural voters had a more effective voice than urban voters. Reapportionment reduced their influence to enhance the relative influence of others.”<sup>167</sup>

Professor Strauss goes on to aptly state that “[i]f equalization is a legitimate (in fact mandatory) reason for rearranging voter rights, it is not clear why it is an illegitimate reason for rearranging other rights to political participation.”<sup>168</sup> Thus, Congress’s attempts to increase the relative influence of the poor to allow those individuals to run for office should they so desire is similar to increasing the relative influence of urban voters through redistricting,<sup>169</sup> so the same equalization analysis should apply. Furthermore, unlike the redistricting process, which actually alters the comparative influence of certain voters, the Millionaire’s Amendment reduces the relative influence of wealthy individuals in only the most indirect of ways, if at all. The provision comes into play only if certain conditions are met: the wealthy individual spends in excess of \$350,000, the wealthy individual runs against an individual with a poor fundraising record, and the non-self-financing candidate takes advantage of the provision and uses the money to further his or her “speech.”<sup>170</sup> Even then, as an empirical matter, the Millionaire’s Amendment may not diminish the wealthy individual’s influence.<sup>171</sup>

Similarly, the equality rationale presumptively furthers the goal of safeguarding voter confidence by bringing less wealthy candidates into governance, thereby both reducing the per-

---

167. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1383 (1994).

168. *Id.*

169. Redistricting increases one’s ability to express his or her preferences at the polls because it levels the playing field as between urban and rural voters. Similarly, a poor candidate increases his or her ability to express his or her preferences as a candidate when the cost differential is taken out of the equation. In neither situation is the expression required, but the opportunity is available.

170. See 2 U.S.C. § 441a-1 (2002); *Davis v. Fed. Election Comm’n*, 128 S. Ct. 2759, 2766 (2008).

171. See *supra* Part II.A.



ception of Congress as a haven for millionaires and legitimizing its actions as representative of the people's wishes. The Court has strictly enforced other electoral statutes designed to protect voters' confidence. For example, in *Crawford v. Marion County Election Board*,<sup>172</sup> the Court upheld an Indiana law that required government-issued photo identification in order to vote, in part because it helped to safeguard voter "confidence 'in the integrity and legitimacy of representative government.'" <sup>173</sup> This interest is important "because it encourages citizen participation in the democratic process. . . . [T]he 'electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.'" <sup>174</sup> Similarly, the electoral system cannot inspire public confidence and public participation in the democratic process if the electorate views the legislature as being for sale to the highest bidder, out of the hands or control of ordinary citizens. As long as there is a perception that the U.S. Senate is the "Millionaires' Club," equalization legislation like the Millionaire's Amendment is appropriate.

Ironically, where free speech concerns override the equality rationale, the primacy of free speech interests actually silences the voices of potential candidates. This view, as propagated by Justice Alito's opinion,<sup>175</sup> erects additional barriers to entry—or, rather, reestablishes conditions prior to 2002—that shield the largely oligarchic candidate pool from alternative types of candidates, including those who are not career politicians, trust-fund recipients, or celebrities. If individuals are unable to overcome these barriers to entry and become candidates, their speech is, it seems, unworthy of protection. On the other hand, monetary contributions seem to merit more serious protection to the Court. Even if self-funded candidates do lose "speech" through increased competition, however, the purpose of the First Amendment and its protections are still served by the Millionaire's Amendment, the ultimate goal of which is to amplify speech by increasing the quantity of speech and the quantity of speakers.

---

172. 128 S. Ct. 1610 (2008).

173. *Id.* at 1620 (citation omitted).

174. *Id.* (citation omitted).

175. *See supra* text accompanying notes 119–29.

### B. Academic Support

Even to the extent that precedent rejects the equality rationale (as *Davis* purported to do), many commentators, as a theoretical matter, believe it remains appropriate. Their reasoning sheds light on the Court's oversimplification of the equality and corruption rationales and demonstrates, through the use of case studies and experience with the campaign finance system, that the two interests cannot be isolated from one another. Indeed, distinguishing the two rationales is an exercise in artificiality. Commentators' arguments in support of the equality rationale tend to fall into one of two distinct categories: 1) the protection of democratic processes, a form-based argument;<sup>176</sup> and 2) equality as an umbrella concept that necessarily includes lesser rationales such as corruption prevention and abuse of process.<sup>177</sup> Each will be discussed in turn.

#### 1. Protecting Democratic Processes

Audra L. Wassom embodies the first democratic-process argument. She maintains that "the Supreme Court is too narrow in its view of the First Amendment,"<sup>178</sup> suggesting instead that two previously unrecognized bases exist to uphold and justify campaign finance reform measures—protection of the democratic process and political equality.<sup>179</sup> Protection of the process of elections necessarily leads to and enhances the interests advanced by the equality rationale. Moreover, Wassom thoroughly canvasses other form-based arguments in support of the equality rationale.<sup>180</sup> One commentator she quotes argues that, at some level, spending money no longer constitutes a communicative function because it instead reflects economic

---

176. See, e.g., Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. 1729, 1763–64 (2001); Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627, 1646 (1999) ("The most important step to ensure such equality [in the sense of political capital] is preventing vastly unequal expenditures of money in campaigns [that buys access and artificially influences the system]."); Shabo, *supra* note 66, at 226.

177. See, e.g., Strauss, *supra* note 167, at 1392; Sunstein, *supra* note 67, at 1392 (asserting that political equality is a time-honored goal in America and, in some ways, a generalization of the interest in preventing corruption and the appearance of corruption).

178. Wassom, *supra* note 2, at 1797.

179. *Id.*

180. *Id.* at 1800.

power that the government may regulate (at least within limits).<sup>181</sup> To the extent that only the wealthy can afford to run for office in the face of spiraling campaign costs, “then a lack of equality in representation results.”<sup>182</sup> Wassom also quotes Professor Briffault, another proponent of the form-based rationale, who adds that campaign finance law should aim to “‘reduce the tension between the goal of equal voter influence over election outcomes and the unequal influence of wealthy individuals and interest groups . . . .’”<sup>183</sup> Briffault continues that “‘when extreme inequalities of wealth bear directly on campaign financing and spending, as they currently do, the norm of voter equality is undermined.’”<sup>184</sup> According to Wassom and Briffault, resource differentials in elections implicate the democratic process itself. The governmental interest in preventing such an abuse of process is nothing short of compelling and should, therefore, justify regulation aimed at rectifying the imbalance.

One way for the Court to “recognize the equality rationale” and to prevent abuse of the democratic process “is to depart from the false idea that money is speech.”<sup>185</sup> Wassom, for instance, urges the importance of such action because “[t]he power of money also harms democracy by influencing who chooses to enter public service. According to Robert Kuttner, ‘you cannot have true representative government without free expression, and you cannot have it if money trumps votes.’”<sup>186</sup> The equality rationale thus serves to protect the competitiveness of elections over time and to provide voters with a reason to go to the polls by assuaging the view that an election has a predetermined outcome.<sup>187</sup> Accordingly, under this view, the Court should read the First Amendment as a bulwark of democracy and err on the side that benefits democracy itself as opposed to

---

181. *Id.* at 1799–1800 (citing Alan B. Morrison, *Watch What You Wish For: The Perils of Reversing Buckley v. Valeo*, 9–36, THE AMERICAN PROSPECT, Jan.–Feb. 1998, <http://www.prospect.org/print/V9/36/morrison-a.html>).

182. *Id.* at 1800. Wassom further notes that “[t]he cost of running a campaign for Congress is phenomenal and has reached the point where ‘people of ordinary means can barely dream of holding congressional office.’” *Id.* (citation omitted). This has led to an overrepresentation of the wealthiest few in Congress. *Id.*

183. *Id.* at 1801 (quoting Briffault, *supra* note 176, at 1763–64).

184. *Id.* (quoting Briffault, *supra* note 176, at 1763–64).

185. *Id.* at 1803; *see supra* text accompanying notes 39–43.

186. Wassom, *supra* note 2, at 1804 (quoting Robert Kuttner, *Rescuing Democracy from “Speech,”* 9–36, THE AMERICAN PROSPECT, Jan.–Feb. 1998, [http://www.prospect.org/cs/articles?article=rescuing\\_democracy\\_from\\_speech](http://www.prospect.org/cs/articles?article=rescuing_democracy_from_speech)).

187. *Id.* at 1805. Even if voters wish to vote for non-self-funded candidates, the current system often denies them that option (at least with mainstream candidates) because of the lack of such candidates in the prototypical situation.

construing its technical meaning: “[The] deep structure [of the First Amendment] tells us that, when more than one candidate for First Amendment autonomy protection exists in a democracy case, the Court should privilege behavior that benefits democracy rather than behavior that saps its vitality.”<sup>188</sup> Those democratic ideals are delineated in the structure of the First Amendment, which moves from protecting internal conscience (religion clause) to individual expression (speech), community discussion (press), action (assembly), and finally, formal political activity (petition).<sup>189</sup> This roadmap provides an analytical tool essential to a rights-protective analysis of legislation. For example, the Millionaire’s Amendment broadens the applicable political speech at any given time by increasing the number of campaigns which can be run, thereby increasing community involvement and discussion, and finally culminating in action—voting, election of the candidate, proposal of legislation, etc. The equality rationale amplifies democratic ideals by introducing notions beyond the line and letter of the text or any unimaginative technical interpretations thereof.<sup>190</sup>

Other variations on this democratic process line of reasoning also exist. For instance, while not expressly advocating for the adoption of the equality rationale, Victoria Shabo canvasses both the practical and legal consequences of reevaluating the Court’s campaign finance rationales.<sup>191</sup> Shabo acknowledges at the outset that, arguably, the *McConnell* Court’s supposition that negative perceptions of large donors could jeopardize the willingness of voters to take part in civic life “is not tied as much to the appearance of corruption as to a sense of [individual] disempowerment that results when wealthy people disproportionately fuel the content of the debate.”<sup>192</sup> In other words, large contributions and the democratization of political participation do not exist in harmony with one another.<sup>193</sup> Hence, a critical goal of campaign finance law must be to foster the belief among all citizens that their engagement in the political process makes a difference.<sup>194</sup>

---

188. *Id.* at 1806 (quoting Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055, 1070 (1999)).

189. *Id.*

190. *See id.* at 1806.

191. *See Shabo, supra* note 66, at 266–74.

192. *Id.* at 247.

193. *Id.*

194. *Id.* at 248.

For example, while little empirical data exists detailing the exact correlation between campaign finance laws and democratic participation, a majority of the American public appears to view large campaign contributions negatively.<sup>195</sup> Moreover, policymakers themselves have acknowledged that “average citizens feel that their views count less than those of campaign contributors.”<sup>196</sup> This sentiment adds another, more general dimension to the resource-differential argument which necessarily implicates the Court’s concern with the appearance of corruption at a systemic level. Accordingly, the concept of equality itself may have constitutional significance—with regard to guarantees of a republican form of government, free speech, and the opportunity to be heard in a public forum—in the context of campaign finance regulation. For example, the Court’s treatment of the issue in *McConnell* suggested that “the government interest in promoting a healthy participatory democracy might warrant greater regulation in the area of campaign finance and signaled its deference to Congress in determining appropriate solutions.”<sup>197</sup> Thus, recognition of the constitutional dimension of equality would serve to protect the processes of democracy by allowing broader legislative solutions and a more comprehensive regulatory mechanism.

## 2. Equality as an Umbrella Concept

The second line of argument taken by commentators—that equality represents an overarching concept that necessarily includes rationales already accepted by the Court—is embodied by Professor David A. Strauss and his argument that corruption and the appearance of corruption are symptoms of underlying political inequality.<sup>198</sup> That is, “corruption—understood as the implicit or explicit exchange of campaign contributions for official action—is a derivative problem. Those who say they are concerned about corruption are actually concerned about two other things: inequality and the nature of democratic politics.”<sup>199</sup> Thus, regardless of the contribution-expenditure dichotomy, immense aggregations of wealth have the potential to

---

195. *Id.* at 252–54. Political science research has found, however, that efficacy and political participation are positively correlated. *Id.* at 256.

196. *Id.* at 257.

197. *Id.* at 264.

198. See generally Strauss, *supra* note 167.

199. *Id.* at 1370.

subvert the electoral process in many different forms and at many different stages. The overarching concept of equality, rather than a specific focus on corruption, has greater remedial power, and, moreover, separating the two concerns is decidedly artificial. “The task of campaign finance reform,” according to Professor Strauss, “is not so much to purify the democratic process as to try to save it from its own worst failings.”<sup>200</sup> This view, while also process-protective, focuses not on the impact of wealth on the electoral process (a mere symptom of a larger syndrome), but on the disease itself: inequality. Thus, Professor Strauss’ view is more holistic than the Court’s limited cause-and-effect view of wealth and corruption.

Hence, there is a desire for open communication and competitive elections to act as a check on massive aggregations of wealth and interest-group politics. Professor Strauss illustrates his point by assuming equality for the sake of argument: since “campaign contributions are valuable only as a means to get votes, rewarding a legislator with a contribution is, in important ways, similar to the unquestionably permissible practice of rewarding her with one’s vote.”<sup>201</sup> Assuming equality, “the real problem of ‘corruption’ through campaign contributions is not the problem of conventional corruption; the problem is not that representatives sell their offices and betray the public trust for personal financial gain.”<sup>202</sup> Rather, the problem is that campaign contributions simply heighten problems endemic to any form of representative government—more so in an unequal system that has degenerated from the pursuit of public interests into conflicts between interest groups.<sup>203</sup> Thus, according to Professor Strauss, campaign finance reform involves issues much larger, and more complex, than reformers like to think.<sup>204</sup> Accordingly, he warns reformers that Congress cannot be turned loose to promote “equality” without a “reasonably precise definition of what equality is” and without knowing the depth of the problem.<sup>205</sup> Only then will reformers be able to forecast just how effective reform actually will be.<sup>206</sup> Ultimately, Strauss demonstrates the problems with the vague language the Court has employed to address campaign finance

---

200. *Id.*

201. *Id.* at 1373.

202. *Id.* at 1375.

203. *Id.*

204. *Id.* at 1379.

205. *Id.* at 1386–88.

206. *Id.* at 1389.

issues. Imprecise judicial language allowed courts prior to the *Davis* decision to bring equality in through the back door under the guise of “corruption,” and tempered decisions about permissible and impermissible regulation.<sup>207</sup> It also explains in part why reformers typically invoke equality-based arguments to justify their legislation, as combating corruption is a piecemeal rationale that only answers part of the problem.

Nevertheless, both lines of reasoning explored above demonstrate equality’s importance to campaign finance reform, and why it is, or should be, considered a compelling governmental interest for First Amendment purposes. Perhaps nothing demonstrates this importance better than considering the ramifications of its rejection: within months of the *Davis* decision, as described below, several state and local campaign finance schemes became constitutionally suspect.

#### IV. UNINTENDED CONSEQUENCES?: THE RIPPLE EFFECTS OF *DAVIS*

*Davis* dealt a blow to reformers because of its broad language and categorical rejection of the equality rationale as a compelling state interest. At the outset, the FEC acted quickly to comply with the Court’s decision. As an immediate first step, it precluded enforcement of the Millionaire’s Amendment for all House races and, by implication, all Senate races as well.<sup>208</sup> By some estimates, the provision could have applied to over thirty House races in the 2008 election cycle.<sup>209</sup> Beyond the immediate impact, however, the decision reflects Chief Justice Roberts’s and Justice Alito’s long-standing views concerning campaign finance regulation, both as lawyers in the Reagan

---

207. See Dotan, *supra* note 2, at 1012 (arguing that campaign speech differs from other forms of speech because the interests justifying regulation are more pressing, and that such regulation is “likely to be much more limited than in other areas in which economic disparities influence the political realm”).

208. *FEC Issues Statement on Supreme Court’s Decision in Davis v. FEC*, US FED. NEWS, July 25, 2008, available at 2008 WLNR 14003657. The FEC also completed action via dismissal on six pending enforcement actions: Jack Davis for Congress, James E. Pedersen and Pedersen 2006, Yarmuth for Congress, Kirk for Congress Committee, James Oberweis and Oberweis for Congress, and Chris Hackett for Congress (all but Pedersen concerned House elections). *FEC Completes Action on Six Enforcement Cases*, US FED. NEWS, Sept. 23, 2008, available at 2008 WLNR 18120341.

209. Russ Maddox & Jeff Milchen, Editorial, *Justices Allow Wealthy Candidates to Outspend Their Rivals*, ANCHORAGE DAILY NEWS, July 14, 2008, at B5.

administration and as lower appellate court judges.<sup>210</sup> Thus, this action not only continues the trend of the Roberts Court's chipping away at campaign finance regulations without explicitly stating so,<sup>211</sup> it also represents a complete break with the Court's relatively recent trend of deference to legislative judgment and serves to confound the analysis in an already complex arena.

Subsection A of this Part examines the logic of the *Davis* opinion and offers some suggestions as to why Justice Alito framed the issue in the case as an expenditure cap rather than a contribution limitation and why he used the language that he did in declaring the provision unconstitutional. Subsection B then examines the implications of the decision for current and future reform and looks at a few cases directly endangered by the result in *Davis*.

#### A. *Broad Language and a Muddled Analysis*

The biggest problem with the *Davis* opinion comes from its lack of logical reasoning. Professors Elmendorf and Foley describe the opinion as “all makeweight,” omitting any discussion “of the extent to which the Millionaire’s Amendment discriminates in favor of non-self-financing candidates,” or of how the Amendment, as implemented, practically and substantially interferes with the self-financing candidate’s ability to get his or her message across by spending his or her own funds.<sup>212</sup> Instead, Justice Alito writes with generalized language, asserting that the Amendment imposes a “penalty” on any candidate who

---

210. Marcia Coyle, *Man in the Middle: Justice Kennedy Continues His Role as Pivotal Vote on a Divided Court*, 29 NAT'L L.J. 48, at 6 (2008). According to Professor Kmiec, neither Justice was ever “fond” of the Court’s decision in *Buckley* and both favor deregulation. *Id.* This is not to say that campaign finance deregulation does not have potential benefits for the electoral system—most notably a strict defense of First Amendment rights that could signal both the Court’s broader protection of constitutional rights generally as well as respect for the system by dropping all pretense as to the ability to regulate or control the flow of money in elections. However, those arguments lie largely beyond the scope of this Note’s consideration of themes in campaign finance reform and the legitimacy of the equality rationale as a compelling governmental interest. For a thorough analysis of the possible disadvantages of regulation generally, see Sunstein, *supra* note 67, at 1400–11 (arguing, for example, that campaign finance legislation may entrench incumbents, increase secret gifts, and hinder campaign finance activity).

211. See *supra* note 73 and accompanying text.

212. Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL RTS. J. 507, 526 (2008).



chooses to exercise First Amendment rights and that self-financing candidates shoulder a special and potentially significant burden.<sup>213</sup> Professors Elmendorf and Foley conclude that the decision to apply strict scrutiny “really turned on the formal asymmetry of campaign contribution limits under the Millionaire’s Amendment, not their practical consequences for effective speech by self-funders.”<sup>214</sup>

This is part of a larger, implicit movement on the part of the Court to “identify simple, generalizable indicators of the likelihood that the restriction at issue is or is not all-things-considered justified.”<sup>215</sup> In other words, the *Davis* Court emphasizes methodological formality in lieu of undertaking the complicated campaign finance analysis that prudence and prior precedent require, offering a generalized answer to a specific problem. Professor Briffault takes this reasoning a step farther, arguing that *Davis* is “an important milestone in the Roberts Court’s ongoing challenge to campaign finance regulation” because 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.”<sup>216</sup> This outcome is ironic in a sense because all of the “previously invalidated campaign finance laws sought to limit the role of money in campaigns while the Millionaire’s Amendment actually sought to make it easier for some candidates to raise money.”<sup>217</sup> Such hostility to the equalization rationale and those campaign laws that seek to level the playing field to some degree “surely does not bode well” for the future of the reform movement.<sup>218</sup>

Justice Alito never describes how the Millionaire’s Amendment prohibits or chills speech; he cites no evidentiary support that the provision has worked a penalty on millionaires in the sense that they are curtailing their spending or

---

213. *Id.*

214. *Id.* at 527. The authors suggest that this may be an indication that the law “was designed to serve the electoral or partisan interests of those who wrote it,” *id.*, but, as discussed previously, there is no indication that the law was passed in bad faith or for incumbent-protection purposes. *See supra* notes 157–58 and accompanying text.

215. Elmendorf & Foley, *supra* note 212, at 527. Justice Alito’s opinion, according to the authors, “exemplifies rule-content gatekeeping—but without an overt acknowledgement that this is what he was doing.” *Id.* at 525.

216. Richard Briffault, *Davis v. FEC: The Roberts Court’s Continuing Attack on Campaign Finance Reform*, 44 TULSA L. REV. 475, 476 (2009).

217. *Id.* at 476–77.

218. *Id.* at 477.

that it has dissuaded such individuals from running in the first place; and he does not adequately describe how or why the choice to accept public financing is distinguished from the choice to spend \$350,000 of one's own money.<sup>219</sup> Instead, the Amendment provides a benefit to non-self-financing Candidate A, while merely denying that same benefit (the opportunity for increased fundraising) to self-financing Candidate B.<sup>220</sup> Candidate B maintains the ability to receive contributions as normal, outspend his or her opponent two-, three-, even tenfold (assuming he or she is truly a millionaire), and run his or her campaign as desired. The fact that this provision enables some candidates to run who would otherwise be financially unable to do so, or allows a candidate to remain competitive in the face of economic disparity, does not serve as a constitutional justification for rejecting the Millionaire's Amendment. While it is true that increasing the contribution limits for the non-self-financing candidate appears to contradict the Court's concern with corruption, essentially allowing more "corrupting" money to come into and potentially influence the campaign,<sup>221</sup> that concern must be balanced against the perception that seats are for sale and the reality that such contributions are still limited, available only in this one specific circumstance.<sup>222</sup> Moreover, while that issue may remain a conceptual problem, the precise issue in the case concerns the free speech of the self-financing candidate. That speech, whether or not "corrupting" money is present in the opponent's coffers, is not chilled.<sup>223</sup>

---

219. See *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2765–75 (2008).

220. See *id.* at 2780 (Stevens, J., dissenting). Yet Candidate A must still strive to reap the advantages of this benefit—it is not simply a "blank check" to run an electoral campaign. Rather, it is targeted to those who have a legitimate goal of serving within government but, because of financial constraints, never have the opportunity to reach that goal. Candidate B may feel slighted that he or she cannot reap the reward of such increased contributions but such a candidate will always have greater resources available due to the OPFA's cessation once the imbalance is restored. The harm, if any does exist, is systemic in that Candidate B now has increased viable competition. This, however, is the basis of our electoral system—i.e., the harm is duplicative (in that competition would otherwise exist were it not for the initial resource differential) and in a sense harmless (in that it does not eradicate, but merely alleviates, the resource differential).

221. See *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976).

222. For example, in 2004, 56% of survey respondents felt the government was run for the benefit of a few big interests, 35% felt that quite a few government officials were crooked, and 50% felt public officials do not care what people think. *The American National Election Studies, THE ANES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR* (University of Michigan, Center for Political Studies ed., 2004), <http://www.electionstudies.org/nesguide/nesguide.htm>.

223. See *Davis*, 128 S. Ct. at 2780 (Stevens, J., dissenting).

Justice Alito also makes no attempt to reconcile the decision with the Court's own precedent in *Nixon*, *McConnell*, and *Austin*, other than to reject the deference shown in those cases. Justice Alito does succeed, however, in muddling the contribution-expenditure analysis and complicating the picture for future reformers.<sup>224</sup> Nowhere in the Millionaire's Amendment does an expenditure limitation appear,<sup>225</sup> but Justice Alito construes the issue as a penalty on the self-financing candidate akin to such a limitation. If the Court is willing to blur the distinction that it created in *Buckley*, it may signal a fundamental shift in the Court's jurisprudence, perhaps also hinting at the Court's willingness to move towards deregulation. Thus, all evidence suggests that the *Davis* decision may have been result-oriented,<sup>226</sup> used as a vehicle to further a deregulatory agenda. The repercussions in that direction have already begun.

### B. *Future Ramifications—A Blow to Reformers*

The *Davis* decision, through its broad language, directly affected campaign finance schemes in Arizona and New Jersey, and potentially affected a number of other schemes that currently allow for differing contribution amounts to electoral candidates such as those in Maine and New York City. For example, in Arizona, the state's "clean elections" system, prior to being provisionally struck down as discussed below, provided extra funds to publicly financed candidates when wealthy opponents who had opted out of the public system outspent them.<sup>227</sup> New Jersey, prior to voluntarily freezing its system, experimented with a similar clean elections law (it was slated to be expanded to twenty percent of the districts in 2009), which involved candidates agreeing to confine their campaign contributions to small amounts—"effectively negating big dollar infusions from special interests"—in return for designated amounts of public funds.<sup>228</sup> Also under consideration at the time of the *Davis* ruling was an amendment to the system that

---

224. See Elmendorf & Foley, *supra* note 212; Carney, *supra* note 12, at Rules of the Game, available at [http://www.nationaljournal.com/njonline/rg\\_20080728\\_5842.php](http://www.nationaljournal.com/njonline/rg_20080728_5842.php).

225. See BCRA, *supra* note 4, § 319(a).

226. See *supra* text accompanying note 193.

227. *Election Funding; Ruling Thwarts NJ 'Clean' Initiative*, NEW JERSEY LAW., Sept. 8, 2008, at 5, 5.

228. *Id.*

would allow additional public funds to be channeled to a candidate who was either outspent or who became the target of opposition groups.<sup>229</sup> A similar scheme providing for extra matching funds for participants in voluntary public financing systems still exists in Maine.<sup>230</sup> And in New York City, the rules imposed by the city's Campaign Finance Board currently result in variable contribution limits as well: the Board places severe contribution limits on personal or organizational donors having business dealings with the city so that they can only donate \$400 to a mayoral candidate, while a regular contributor can donate up to \$4,500.<sup>231</sup>

Shortly after the *Davis* decision, six Arizona GOP candidates, through the Goldwater Institute, sued to enjoin the Citizens Clean Elections Commission from distributing matching funds to their publicly funded opponents.<sup>232</sup> U.S. District Judge Roslyn O. Silver provisionally ruled that the Arizona scheme was unconstitutional because it was "substantially the same as the issue sparked by the *Davis* ruling."<sup>233</sup> That system, according to Judge Silver, "could be manipulated to undercut efforts at fair elections. For instance, she said a group could intentionally run inconsequential [or minimally damaging] ads about one candidate in order to enable the candidate that the group really favored to get more matching funds."<sup>234</sup> Thus, interest group A, who supports Candidate A, could run "attack" ads against Candidate A in order to allow him or her to capitalize on the matching funds provision. In response, New Jersey shut down its own clean elections program for the

---

229. *Id.* For example, in 2007, one candidate was awarded an additional \$100,000 "when she was attacked in ads brought by an out-of-state group." *Id.*

230. LOWENSTEIN ET AL. *supra* note 64, at 905 n.6.

231. Editorial, . . . *And Davis, Too*, THE N.Y. SUN, June 30, 2008, at 10. Furthermore, labor contributions can be matched with public funds while business-interest contributions cannot. *Id.*

232. Christian Palmer, *6 Arizona GOP Candidates Sue to Block Clean Elections Matching Funds*, ARIZONA CAPITOL TIMES, Aug. 22, 2008, at NEWS. A similar lawsuit was brought in 2006, but the scheme was held constitutional because the candidates had chosen to run private campaigns and would be unable to raise money in excess of the maximum spending limits for publicly financed candidates (thus not financially disadvantaging their campaigns). *Id.*

233. *Election Funding*, *supra* note 227, at 5.

234. *Id.* Judge Silver did deny the plaintiffs' preliminary injunction motion, however, because although the plaintiffs demonstrated a high likelihood of success on the merits, the "extraordinary context of an election in progress" prevented the public interest from tilting in their favor. *McComish v. Brewer*, No. cv-08-1550-PHX-ROS, 2008 WL 4629337, at \*12 (D. Ariz. Oct. 17, 2008).

2009 election cycle until a constitutionally sound replacement could be worked out.<sup>235</sup>

Moreover, the *Davis* decision has emboldened deregulators to bring or appeal at least three test cases that challenge the constitutionality of other areas of campaign finance regulation. For example, in one lawsuit, SpeechNow.Org<sup>236</sup> challenged a provision in FECA that requires independent groups to use only regulated money subject to contribution limits when expressly advocating for the election or defeat of a candidate.<sup>237</sup> In another test case, *N.C. Right to Life Committee Fund for Independent Political Expenditures v. Leake*,<sup>238</sup> a pro-life group challenged, among other things, “state public financing rules that indirectly penalize candidates who opt instead to raise private money.”<sup>239</sup> There the campaign finance system imposed a \$4,000 independent expenditure limit on political committees and allowed matching funds to be made to publicly financed candidates when communications opposing them or supporting another candidate were made.<sup>240</sup> The court held the independent expenditure limitation, as well as definitional issues associated with such a limitation, unconstitutional as applied.<sup>241</sup>

Finally, in *Citizens United v. FEC*,<sup>242</sup> Citizens United challenged the BCRA’s disclosure requirement for groups that engage in electioneering communications.<sup>243</sup> The group “wanted to distribute and advertise a movie critical of Sen[ator] Clinton without disclosing its donors.”<sup>244</sup> The court, however, denied the group’s request as it was a request for preliminary injunc-

---

235. *Id.* “Instead of rushing to find stop-gap solutions,” the New Jersey Assembly Speaker said, “Clean Elections simply needs a time-out.” *Id.*

236. *Speechnow.Org v. Fed. Election Comm’n*, 567 F. Supp. 2d 70 (D.D.C. 2008).

237. *Carney*, *supra* note 12, at Rules of the Game. The precise issue in the case was again a request for a preliminary injunction which the court denied on the basis of *McConnell* and without explicitly discussing *Davis*. 567 F. Supp. 2d at 82. As of yet, it does not appear the group has appealed the ruling.

238. 525 F.3d 274 (4th Cir. 2008).

239. *Carney*, *supra* note 12, at Rules of the Game.

240. *See N.C. Right to Life*, 525 F.3d at 280–95.

241. *Id.* at 308. The latter question, the matching funds provision, was the subject of a petition for certiorari, but the Court denied the petition in November 2008. *Duke v. Leake*, 129 S. Ct. 490, 490 (2008).

242. 530 F. Supp. 2d 274 (D.D.C. Jan. 15, 2008) (denying Citizens United’s request for a preliminary injunction).

243. *Carney*, *supra* note 12.

244. *Id.* The group subsequently promoted and advertised an anti-Barack Obama film. *Id.*

tion and sufficiently analogous to *McConnell* to be governed by that case.<sup>245</sup> Eventually, the court entered summary judgment for the government without considering the effect of the since-decided *Davis* decision.<sup>246</sup> Citizens United then appealed the decision to the Supreme Court.<sup>247</sup> The Court, in a unique course of events, heard oral arguments in March 2009 and then again in September 2009, after it ordered sua sponte re-argument specifically concerning whether it should overrule the *Austin* decision and parts of *McConnell*.<sup>248</sup> The Court thus intentionally crafted the specific doctrinal issue it wished to address, rejecting several potentially narrow rulings that could have resolved the case.<sup>249</sup> The result was that a sharply divided Court overruled *Austin*, holding that the government may not suppress speech based on the speaker's corporate identity, and part of *McConnell*, holding that restrictions on corporate independent expenditures are invalid.<sup>250</sup> In so doing, the Court crafted the issue as one of basic political speech; it rejected an anticorruption rationale as inapplicable to corporate independent expenditures because of the rationale's limitation to *quid pro quo* corruption,<sup>251</sup> discounted a shareholder protection interest,<sup>252</sup> and broadly dismissed *Austin's* antidistortion rationale.<sup>253</sup> The decision has immediate implications

245. See *Citizens United*, 530 F. Supp. 2d at 282.

246. *Citizens United v. Fed. Election Comm'n*, Civil Action No. 07-2240 (ARR, RCL, RWR), 2008 WL 2788753 (D.D.C. July 18, 2008) (not reported).

247. *Citizens United v. Fed. Election Comm'n*, 129 S. Ct. 594 (2008).

248. Adam Liptak, *Day at Supreme Court Augurs a Victory on Political Speech, but How Broad?*, N.Y. TIMES, Sept. 9, 2009, at A28.

249. Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 21, 2010, at A1. Liptak notes several of these alternatives: "The court could have ruled that Citizens United was not the sort of group to which the McCain-Feingold law was meant to apply, or that the law did not mean to address 90-minute documentaries, or that video-on-demand technologies were not regulated by the law." *Id.*

250. *Citizens United v. Fed. Election Comm'n*, 558 U.S. \_\_\_, 130 S. Ct. 876, 913 (2010). The Court also upheld various disclaimer and disclosure provisions required under the BCRA for electioneering communications. *Id.* at 915.

251. *Id.* at 910 ("The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.").

252. *Id.* at 911 (noting that the proper protection lies in the procedures of corporate democracy or regulatory mechanisms not based on limitation of speech, and questioning Congress's true intent by restricting this protection to dissenting shareholders to only certain timeframes and certain media before elections).

253. *Id.* at 903-08 (noting that political speech, regardless of the speaker, is indispensable, and that the antidistortion rationale impermissibly tried to equalize advantages in contravention of *Davis*). The Court further noted that, like corporations, "[a]ll speakers . . . use money amassed from the economic market-

not only for corporations and other associational groups, such as labor unions, but for the way elections are conducted in general.<sup>254</sup> While others will certainly write in far greater detail about the case and its implications, several observations are appropriate in the context of this Note. First, the Court is clearly in the midst of a doctrinal shift away from campaign finance regulation—each opinion going a bit farther than the one before to impact the regulatory scheme. Second, the Roberts Court is intent on protecting speech regardless of its connection to wealth. Finally, the *Citizens United* opinion demonstrates a further narrowing of the corruption rationale to only those situations of *quid pro quo* corruption, building on the analysis first employed in *Davis* to restrict yet again the degree of deference accorded the legislature. These three test cases, taken in conjunction, illustrate the power of an opinion such as *Davis* that negates an entire basis of regulation such as the equalization rationale and the ease with which such analysis can be applied to disparate factual scenarios.

Ultimately, the *Davis* decision opened the door for challenges to systems based explicitly on equalization and to other areas of campaign finance that may be vulnerable to deregulation under the Roberts Court. The consequences, such as harm to the public dialogue and a forced restructuring of public financing provisions, are just now beginning to trickle into the public consciousness and are likely to have effects well into the future.

## CONCLUSION

The *Davis* decision represents the third in a string of Roberts Court opinions that inch the Court closer to deregulation. The Court would likely have come to a different conclusion were the issue posed to it in the late 1990s. Instead of the deference to the legislative branch (and a willingness to uphold creative solutions to the fundamental problem of achieving fair elections) that had become indicative of campaign finance cases in the 1990s, the Roberts Court asserted its anti-reform sentiment and aligned itself wholly against justifying interests that

---

place to fund their speech[.]” and that “*Austin* interferes with the ‘open marketplace’ of ideas protected by the First Amendment . . . permit[ting] the Government to ban the political speech of millions of associations of citizens.” *Id.* at 905–06.

254. See Liptak, *supra* note 8; see also David Kirkpatrick, *Democrats Try to Rebuild Campaign-Spending Barriers*, N.Y. TIMES, Feb. 11, 2010, at A19.

fall outside the corruption or appearance of corruption rationale. The decision reversed a trend of deference to legislative judgment in a complex area, with potentially far-reaching implications. By taking a legislative amendment seeking to equalize the opportunity to compete in the electoral system and treating it as an expenditures cap, the Court further complicated the contributions-expenditures analysis it created in *Buckley*. Yet the underpinnings of democracy require more in the electoral context than this muddled analysis; they necessitate a vast array of viewpoints and frank and open discussion. By limiting the opportunity of citizens of less than grandiose means to meet the challenge of spiraling electoral costs, the decision harms not only the public dialogue but also the integrity of the electoral system.

Most significantly, the decision represents a resounding rejection of the equality rationale as a compelling governmental interest. Simply accepting the corruption rationale addresses only part of the problem, as demonstrated by the aftermath of *Buckley*. Corruption is necessarily a derivative part of the equality interest. It is, after all, addressing a specific type of inequality—that of the influence of wealth via the conduit of a campaign contribution. But the problem is larger and more systemic. Wealth can influence the outcome of an election in a myriad of ways: independent expenditures can appeal directly to the voter, a wealthy friend can persuade his or her associates to donate more money to a certain candidate, and a large personal fortune can enable a candidate to undertake a massive media blitz. This cronyism, in turn, has contributed to the escalating costs of elections, so much so that candidates of less-than-able means are effectively prevented from even entering the race in the typical situation.

Even assuming that expenditures from one's personal fortunes are protected under the First Amendment (although this is a tenuous assertion at best, as many believe money most assuredly is not speech), this conduct is not and should not be immune to regulation. Rather, the competing concern of equality, with the goals it fosters—diversity of opinion and a marketplace of ideas—should provide a mediating influence to the expenditure of unbridled wealth pursuant to a candidate campaign. Most notably, the Millionaire's Amendment does not even restrict the speech of the self-financing candidate to achieve this goal. It merely allows the non-self-financing candidate an opportunity to close the resource differential and con-



tribute his or her opinions and ideas to the electoral discussion. To the extent that this does, in fact, limit the self-financing candidate's speech, either through personal choice (like the public-financing choice) or through a conception of "speech" as a limited resource that is encroached by competition, the underlying rationale of the First Amendment gravitates in favor of equality. Indeed, prior to *Davis*, a number of courts accepted the premise, both explicitly and implicitly, that the equality rationale was a compelling governmental interest sufficient to address the problem of massive aggregations of wealth derived from non-political successes impermissibly influencing elections.

While the Millionaire's Amendment may only affect a minute percentage of cases, the *Davis* decision represents a broader attack on campaign finance reform. Total deregulation may be a far-fetched reality, but a reexamination of the rationales for campaign finance regulation, as well as more modest legislation, certainly is not. Reformers, it appears, will need to produce more creative ways to achieve their ends—and they will need to do so within the simplified framework of the Roberts Court.