

---

---

DAVIS V. FEDERAL ELECTION COMMISSION:  
CONSTITUTIONAL RIGHT TO ENSURE CAMPAIGN  
FINANCE ADVANTAGE

*W. Clayton Landa\**

I. INTRODUCTION

Since the passage of the landmark amendments to the Federal Election Campaign Act (“FECA”) in 1974, Congress and the courts have grappled with the role money can and should play in politics and the electoral process.<sup>1</sup> On one side stands Congress, attempting to regulate campaign contributions from donors and spending by candidates in an effort to lower the cost of campaigning, reduce the influence of wealthy special interests to limit alleged corruption, open up the political process to change, and promote a brand of political equality.<sup>2</sup> On the other side stands the Supreme Court of the United States, engaging in a balancing act to protect core First Amendment political speech through campaign expenditures and contributions, while allowing Congress to protect against corruption or the appearance of corruption.<sup>3</sup>

While the major debate usually centers on campaign contributions and expenditures by individuals, corporations, or other organizations, a new

---

\* J.D. Candidate, 2010, University of Richmond School of Law; M.P.A., 2005, Virginia Commonwealth University; B.A., 1999, College of Charleston. Mr. Landa received the L. Douglas Wilder School of Government and Public Affairs 2006 Master of Public Administration Student of the Year Award and worked as a Policy Analyst for the Virginia State Board of Elections from 2004–2007.

1. See Richard L. Hasen, *Beyond Incoherence: The Roberts Court’s Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1067 (2008) (noting Supreme Court jurisprudence concerning campaign finance law has swung like a pendulum, with periods of court deference to Congressional regulation alternating with a more skeptical view that the First Amendment bars much campaign finance regulation).

2. Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1049–50 (1996).

3. See Yoav Dotan, *Campaign Finance Reform and the Social Inequality Paradox*, 37 U. MICH. J.L. REFORM 955, 967–68 (2004) (describing the Supreme Court’s evolution of the definition of corruption and its practice of allowing Congress to combat corruption from the earliest case of *Buckley v. Valeo* through *McConnell v. FEC*, while still adhering to strict scrutiny when considering any regulations of money as political speech protected by the First Amendment).

attempt to solve an old dilemma of the wealthy, self-financed candidate recently reached the Supreme Court in *Davis v. Federal Election Commission*.<sup>4</sup> The Supreme Court is set to determine if the “Millionaires’ Amendment” to the Bipartisan Campaign Reform Act of 2002 (“BCRA”) violates the First Amendment by chilling the free speech of a self-financed candidate.<sup>5</sup> Opponents of the amendment argue allowing an adversary of a self-financed candidate to raise campaign funds in excess of normal statutory limits and allowing increased coordinated expenditures from a political party burdens free speech rights because such an advantage discourages a candidate from self-financing his campaign.<sup>6</sup> Congress first addressed the problem of wealthy self-financed candidates in the 1974 FECA amendments by limiting expenditure amounts for self-financed candidates.<sup>7</sup> In the landmark campaign finance decision *Buckley v. Valeo*,<sup>8</sup> the Supreme Court struck down such direct expenditure limits as violating the First Amendment’s right to freedom of speech.<sup>9</sup> Almost three decades after this decision, Congress passed the Millionaires’ Amendment as a way to address the problem of wealthy self-financed candidates without running afoul of the First Amendment and *Buckley*.<sup>10</sup>

*Davis* has raised numerous campaign finance issues: the precise definition of corruption in the electoral process; whether the government has an important interest in leveling the playing field of campaign finance to battle the perception that money can buy a seat in Congress; whether variations in contribution limits actually chill political speech by discouraging a candidate from self-financing; and, even if it does, whether the government interest is sufficient to allow raised limits.<sup>11</sup> Part II of this note explores the history of campaign finance regulation through Congress and the courts, specifically focusing on self-financed candidates and the consideration of expenditure and contribution limits through the lens of the First Amendment. Part III will detail the background to *Davis* and analyze the District Court of the

---

4. *Davis v. FEC*, 128 S. Ct. 976 (2008); see Richard Wolf Hess, *No Fair Play for Millionaires? McCain-Feingold’s Wealthy Candidate Restrictions and the First Amendment*, 70 U. CHI. L. REV. 1067, 1067 (2003).

5. See Bipartisan Campaign Reform Act of 2002 § 319, 2 U.S.C. § 441a-1 (Supp. V 2005); *Davis*, 128 S.Ct. at 976.

6. 2 U.S.C. § 441a-1; *Davis*, 128 S. Ct. at 976.

7. See Hess, *supra* note 4, at 1067.

8. 424 U.S. 1 (1976).

9. *Id.* at 39–59.

10. Jennifer A. Steen, *The Millionaires’ Amendment*, in LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS 159, 161 (Michael J. Malbin ed., 2003).

11. See Hess, *supra* note 4, at 1067–69.

District of Columbia's decision to uphold the Millionaires' Amendment. Part IV will then analyze the issues the amendment presents in detail and provide insight into possible Court rulings and ramifications.

## II. HISTORY AND BACKGROUND

### A. The FECA and *Buckley v. Valeo*

In the wake of the Watergate scandal, Congress enacted amendments to the FECA in 1974, including the first true stringent regulations on the campaign finance system in elections.<sup>12</sup> The amendments limited individual, political party, and political action committee ("PAC") contributions to candidates; personal spending by candidates; campaign spending for federal offices; and independent spending by groups unaffiliated with a candidate.<sup>13</sup> In *Buckley*, the Supreme Court considered all of these amendments, but of particular importance, the Court considered individual limits placed on spending and contributions, as well as implications for protected First Amendment free speech.<sup>14</sup>

The Court uniformly struck down any direct limits on a self-financed candidate's spending of personal funds on his own behalf.<sup>15</sup> The Court first noted that money essentially equates to political speech in today's society and therefore, "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."<sup>16</sup> The Court did not rule equality of resources was an illegitimate government interest, but that equality alone was not sufficient to impose direct limits on a candidate's personal funding for his campaign.<sup>17</sup> As the Court equated personal spending with political speech, the "ancillary interest" of relative equality of resources could not justify a direct restriction on the freedom of a candidate's speech.<sup>18</sup>

---

12. See Smith, *supra* note 2, at 1055.

13. *Id.* (citing Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263).

14. *Buckley v. Valeo*, 424 U.S. 1, 19-59 (1976).

15. See *id.* at 52-54.

16. *Id.* at 19.

17. *Id.* at 54.

18. See *id.*

The Court also noted that candidate contribution limits, while implicating First Amendment restrictions on free speech, entail “only a marginal restriction upon the contributor’s ability to engage in free communication.”<sup>19</sup> As the limits on contributions involve only little direct restraint on political speech, the Court determined the government interest in preventing corruption or even the appearance of corruption was sufficient to uphold the one thousand dollar contribution limit set by Congress.<sup>20</sup> The existence of actual large donations to secure quid pro quo arrangements from current and potential elected officials, as well as the appearance of such possible corruption, justified Congress in setting the limit it deemed appropriate.<sup>21</sup> Further, the Court ruled it was for Congress, and not the courts, to determine what limit is necessary to combat real or perceived corruption and any failure of Congress to adjust the limits does not invalidate the legislation.<sup>22</sup>

In addition to these main findings implicated in *Buckley*, the Court also upheld the public financing system set up by the 1974 amendments and the candidate disclosure requirements.<sup>23</sup> The Court allowed candidates to receive public financing, which carried raised contribution limits and expenditure ceilings,<sup>24</sup> but the Court did not find a burden on the publicly financed candidate’s opponent when the choice to receive funds was voluntary.<sup>25</sup> In addition, the Court held the public financing system did not violate the Fifth Amendment’s equal protection clause and “the Constitution does not require Congress to treat all declared candidates the same for public financing purposes.”<sup>26</sup> In other words, the public funding scheme used to determine if a presidential candidate could receive public funding and the effect or disadvantage such funding may have on the opponent was not an equal protection violation.<sup>27</sup>

---

19. *Id.* at 19.

20. *Id.* at 20–21.

21. *Id.*

22. *Id.* at 30.

23. *Id.* at 109.

24. *Id.* at 57 n.65 (noting that Congress may provide for public financing and condition acceptance of funds on an agreement to abide by expenditure limits).

25. *Id.* (“Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.”).

26. *Id.* at 97.

27. *See id.*

### B. The BCRA, McConnell, and Other Cases

In 2002, the BCRA went into effect to address numerous loopholes and inconsistencies that emerged since the FECA in 1974 and the varying decisions of the Supreme Court.<sup>28</sup> While the BCRA mainly focused on the use of so-called soft money in elections, Congress again attempted to address what in the sponsors' minds was "the public perception that there is something inherently corrupt about a wealthy candidate who can use a substantial amount of his or her personal resources to win an election."<sup>29</sup> The law set out a scheme allowing an opponent of a self-financed candidate who has spent more than three hundred and fifty thousand dollars to calculate the opposition personal funds amount ("OPFA") in order to determine if he is eligible for relaxed contribution limits and other measures.<sup>30</sup> If eligible, the opponent may receive individual contributions at three times the normal limit, receive contributions from individuals who have met their aggregate limit for contributions, and coordinate with his political party on otherwise limited party expenditures.<sup>31</sup> The amendment also requires a candidate planning to self-finance his campaign to declare the amount of personal funds over three hundred and fifty thousand dollars he plans to spend within fifteen days of declaring his candidacy.<sup>32</sup> In addition, when the candidate exceeds the three hundred and fifty thousand dollar threshold, he must notify the Federal Election Commission ("FEC") within twenty-four hours and must report each additional personal fund expenditure of ten thousand dollars or more.<sup>33</sup> Finally, the self-financed candidate's opponent using the raised contribution limits and coordinated party expenditures must report to the FEC and his party within twenty-four hours of receiving contributions equal to one hundred percent of the OPFA.<sup>34</sup>

---

28. See Kurt Hohenstein, "Clio, Meet Buckley – Buckley, Clio": *Re-Introducing History to Unravel the Tangle of Campaign Finance Reform*, 1 ALB. GOV'T L. REV. 63, 89–92 (2008).

29. Hess, *supra* note 4, at 1074 (quoting 147 CONG. REC. S2535 (daily ed. Mar. 20, 2001) (statement of Senator Dewine)).

30. 2 U.S.C. § 441a-1(a)(1) (Supp. V 2005). The candidate must determine the amount of funds spent by each candidate, add fifty percent of the total funds raised by each candidate during the year prior to the election, and compare the totals. *Id.* § 441a-1(a)(2). If the opponent's OPFA is below the self-financed candidate, he may take advantage of the higher limits until the amounts are equal under the OPFA formula. *Id.*

31. *Id.* § 441a-1(a)(1)(A)–(C).

32. *Id.* § 441a-1(b)(1)(B).

33. *Id.* § 441a-1(b)(1)(C)–(D).

34. *Id.*

The BCRA, including the Millionaires' Amendment, was challenged almost immediately and substantially upheld by the Supreme Court in *McConnell v. Federal Election Commission*.<sup>35</sup> The Court again focused on corruption as the main justification for statutory provisions placing a burden on the First Amendment's freedom of speech.<sup>36</sup> The Court notably deferred to Congress to determine the appropriate level of limits.<sup>37</sup> Concerning the Millionaires' Amendment, the Court dismissed the complaint, stating the plaintiffs "fail[ed] to allege a cognizable injury that [was] 'fairly traceable' to the BCRA."<sup>38</sup> The Court considered the plaintiffs' arguments that the raised limits affected a "curtailment of the scope of their participation in the electoral process" without merit.<sup>39</sup> Further, the Court noted "political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources"<sup>40</sup> and the "alleged inability to compete stem[med from the plaintiffs'] own personal 'wish' not to solicit or accept large contributions, i.e., their personal choice."<sup>41</sup> Finally, of particular importance to *Davis*, the Court also upheld strict twenty-four hour disclosure and reporting requirements for specific large expenditures, holding they did not prevent anyone from speaking.<sup>42</sup>

Other rulings, while not bearing directly on self-financed candidates, show a progression from a more deferential Supreme Court to one reasserting a greater role for the First Amendment.<sup>43</sup> In *Nixon v. Shrink Missouri Government PAC*,<sup>44</sup> the Rehnquist Court almost completely deferred to Congress on the matter of appropriate contribution limits.<sup>45</sup> Even further, the Court held that contribution limits do not merit strict scrutiny under the First Amendment in the same vein as expenditure limits.<sup>46</sup> Yet, just six years later, the new Roberts Court, with two new

---

35. 540 U.S. 93 (2003); see Hohenstein, *supra* note 28 at 92.

36. See *McConnell*, 540 U.S. at 136.

37. See *id.* at 137.

38. *Id.* at 230.

39. *Id.* at 227.

40. *Id.* at 227 (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)).

41. *Id.* at 228.

42. See *id.* at 201–02 (ruling that a twenty-four reporting requirement for each direct expenditure totaling more than \$10,000, for the purposes of producing and airing electioneering communications, did not prevent speech).

43. See Hasen, *supra* note 1 at 1065.

44. 528 U.S. 377 (2000).

45. See *id.* at 389; see also Hasen, *supra* note 1, at 1069 (noting that with such a deferential tone, "it was hard to see any contribution limit failing constitutional scrutiny as too low").

46. *Shrink Missouri*, 528 U.S. at 387–88 (noting that contribution limits "require less compelling justification than restrictions on independent spending").

justices, struck down Vermont's state contribution limits as too low to allow for meaningful political speech in *Randall v. Sorrell*.<sup>47</sup>

In addition, the Court, while adhering to *Buckley*'s anti-corruption justification, began to espouse slightly broader definitions for corruption when it upheld spending limits for corporations in candidate elections.<sup>48</sup> The Court noted such corporate independent expenditures may not be a part of the normal quid pro quo corruption of *Buckley*.<sup>49</sup> Still, the statute "aims at a different type of corruption in the political arena: 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>50</sup> This corruption rationale appeared wholly consistent with *Buckley*, which noted "the limitation on the size of outside contributions, the financial resources available to a candidate... , [and] the number of volunteers recruited will... vary with the size and intensity of the candidate's support."<sup>51</sup> Therefore, only public support should serve to limit a candidate in sending his or her message to the public, not the government.<sup>52</sup> In *Austin*, the Court essentially ruled that a corporation did not solicit funds to support its political ideology or for specific candidate support and the government can restrict such independent expenditures for express advocacy.<sup>53</sup> Again, in *Federal Election Commission v. Wisconsin Right to Life*,<sup>54</sup> without expressly overturning *Austin*, the new Roberts Court granted a corporation an exemption to use treasury funds to pay and run an independent expenditure advertisement, claiming it was not express advocacy.<sup>55</sup>

*Davis* will be decided in this spectrum of a changing Supreme Court. As Richard Hasen notes, "the Supreme Court's approach to campaign finance law has swung like a pendulum" since 1976 with periods of deference to views that the First Amendment prohibits much campaign

---

47. 548 U.S. 230, 260–62 (2006).

48. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659–60 (1990) (holding that corporations may not use their treasury funds for direct independent expenditures but must funnel the money through a separate political action committee).

49. *Id.*

50. *Id.*

51. *Buckley v. Valeo*, 424 U.S. 1, 56 (1976).

52. *See id.*

53. *Austin*, 494 U.S. at 659–60.

54. 551 U.S. \_\_\_, 127 S. Ct. 2652 (2007).

55. *Id.* at 2672–73 (2007) (holding the purported interest in combating a different type of corruption did not need to be considered because the ad in question was not express advocacy).

finance regulation.<sup>56</sup> *Davis* will be decided by a Court where “the pendulum has swung sharply away from deference toward perhaps the greatest period of deregulation we will have witnessed since before Congress passed the important [FECA] Amendments of 1974.”<sup>57</sup>

### III. DISTRICT OF COLUMBIA DECISION

#### A. Procedural Background

Jack Davis, the plaintiff, ran and lost a self-financed campaign for a congressional seat as the Democratic nominee in 2004.<sup>58</sup> While running for the same seat in 2006, Davis filed the required Statement of Candidacy on March 23, 2006 and, under the BCRA, declared his intent to refrain from spending any personal funds for the primary campaign and spend only \$1,000,000 in personal funds for the November general election.<sup>59</sup> Davis then filed a facial challenge to the Millionaires’ Amendment in the District Court for the District of Columbia, and both Davis and the FEC moved for summary judgment.<sup>60</sup> The District Court determined Davis had standing because the added disclosure requirements imposed an injury-in-fact that could be traced directly to the Millionaires’ Amendment and removed by a favorable ruling by the court.<sup>61</sup> The court then proceeded on the substantive issues.<sup>62</sup>

#### B. District of Columbia Decision

The D.C. District Court uniformly dismissed Davis’s First Amendment claims as the BCRA placed no direct burden or limitation on the exercise of his political speech by restricting his expenditures.<sup>63</sup> The court also dismissed Davis’s claim that a benefit conferred on his opponent to raise additional funds and increase coordinated party expenditures resulted in a penalty that sufficiently chilled political

---

56. Hasen, *supra* note 1, at 1064.

57. *Id.* at 1065.

58. *Davis v. FEC*, 501 F. Supp. 2d 22, 27 (D.D.C. 2007).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 29. The court found the amendment placed no restrictions on a candidate’s ability to spend unlimited amounts of his personal wealth to speak to the voters, nor reduced the amount of money he is able to raise from contributors under normal limits. *Id.*



speech and thereby violated the First Amendment.<sup>64</sup> The court did agree with Davis's suggestion that a regulatory scheme conferring a competitive advantage may be so extreme as to work an "unconstitutional burden on a candidate's First Amendment right to pursue elective office."<sup>65</sup> However, the court went on to say, "no court has found such a... burden where the... candidate's choice to fund his campaign from one of several permissible sources" results in the disadvantage.<sup>66</sup>

The court analogized the advantage of raised contribution limits and choice to the public financing schemes upheld in *Buckley*, where the candidate chose public financing and therefore benefited from public funding but agreed to expenditure limits or restrictions on free speech.<sup>67</sup> In addition, the court found the Millionaires' Amendment was similar to other public financing schemes permitting higher contribution limits for candidates agreeing to public financing and expenditure limits.<sup>68</sup> The main issue, the court noted, was the level of coercion the advantage placed on the candidate where a disadvantage may be so onerous that the candidate essentially feels compelled to forgo one permissible funding option.<sup>69</sup>

In this case, the court determined no such disparities existed and, in fact, the amendment only allowed the opponent of a self-financed candidate to level the playing field through increased contribution limits, without gaining an overall money advantage.<sup>70</sup> Further, Davis did not show his speech was limited in any way, as he chose to spend \$1,000,000 of his own money even after losing the election during his

---

64. *Id.* at 30 (ruling that a benefit to one candidate, and therefore a penalty to the other, does not by itself violate the First Amendment unless the advantage chills a substantial amount of free speech).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 29 (citing *Daggett v. Comm'n on Gov't Ethics & Election Practices*, 205 F.3d 445, 464–65 (1st Cir. 2000) (upholding statute providing public matching funds to candidates participating in a public financing scheme); *Gable v. Patton*, 142 F.3d 940, 948 (6th Cir. 1998) (upholding statutory provision waiving expenditure limits when a non-participating opponent raises funds exceeding that amount); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1551 (8th Cir. 1996) (upholding statutory provision waiving the expenditure limitation when a privately financed opponent's spending exceeds the limit); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (upholding statute permitting a limitation of \$1000 on contributions received by non-participating candidates while allowing candidates accepting public funding to accept \$2000 contributions)).

69. *Id.* at 31 (noting *Buckley's* reliance on a candidate's choice to forgo private fundraising and accept public funding did not create a constitutional dilemma, and a constitutional burden exists only when an advantage creates "a large disparity between benefits and restrictions that candidates are coerced to publicly finance their campaigns" (quoting *Rosenstiel*, 101 F.3d at 1550)).

70. *Id.*

first attempt.<sup>71</sup>

The court then determined the additional disclosure requirements posed no constitutional burden on a self-financed candidate.<sup>72</sup> First, the court reasoned that *Buckley* found “no constitutional [burdens] in the recordkeeping[,] reporting, and disclosure requirements of the FECA.”<sup>73</sup> Second, the Supreme Court had upheld more onerous disclosure requirements in *McConnell* by requiring a filing within twenty-four hours after any person makes a disbursement totaling more than \$10,000 for an electioneering communication.<sup>74</sup> While the requirements may be burdensome, the Supreme Court ruled that they did not inhibit speech.<sup>75</sup> Therefore, the court determined the strict twenty-four hour timing of the requirement was no more burdensome than the provisions upheld in *McConnell*, and Davis conceded the information would have to be disclosed even without the amendment.<sup>76</sup> Finally, the reporting requirements do not apply unilaterally to the self-financed candidate as the candidate’s opponent must also notify the FEC and his political party within twenty-four hours after determining the self-financed candidate spent above the threshold.<sup>77</sup> Additionally, the court held the opponent must notify the FEC and his party within twenty-four hours if he received increased contributions.<sup>78</sup> The notification requirements also apply when the candidate receives Millionaires’ Amendment contributions and when he reaches the proportionality cap.<sup>79</sup> Political parties must also report increased coordinated expenditures within twenty-four hours.<sup>80</sup>

Finally, the court rejected Davis’s Fifth Amendment equal protection claim because Davis did not show the Millionaires’ Amendment treated similarly situated candidates differently.<sup>81</sup> In addition, the Supreme

---

71. *See id.* at 31–32.

72. *See id.* at 32.

73. *Id.* at 32 (citing *Buckley v. Valeo*, 424 U.S. 1, 63, 84 (1976) (noting FECA required records including the name and address of any contributor making a contribution in excess of \$10, in addition to the date and amount of the contribution, and if the person’s contributions aggregate more than \$100, his occupation and place of business, as well as quarterly reports of detailed financial information on contributors and contributions).

74. *Id.* at 32.

75. *Id.* at 32 (citing *McConnell v. FEC*, 540 U.S. 93, 201 (2003)).

76. *Id.* at 32–33.

77. *Id.* at 33.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 33 (noting self-financed candidates are in a different situation from those who lack the resources to fund their own campaigns, and it was precisely this difference that spurred Congress to

Court has long held that the Constitution does not require all declared candidates to be treated identically for public financing purposes, and such differences do not amount to an equal protection violation.<sup>82</sup>

#### IV. ANALYSIS OF AMENDMENT, SUPREME COURT CONSIDERATION, AND POSSIBLE OUTCOMES

##### A. Protected Political Speech and First Amendment Harm.

###### 1. Coercion is Necessary to Substantially Chill Political Speech

In a case claiming a violation of First Amendment freedom of speech, the Court must first determine if the Millionaires' Amendment actually "burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest."<sup>83</sup> Political speech, in the form of expenditures of money, may not be directly restricted by government as such a restriction violates the First Amendment's freedom of speech.<sup>84</sup> The Millionaires' Amendment provides no such direct restriction on any candidate's ability to spend unlimited amounts of personal funds.<sup>85</sup> Therefore, Davis argues that the benefit of increased contribution limits works to chill his political speech by providing a disincentive to using his own personal funds for his campaign and such a disincentive alone violates the First Amendment.<sup>86</sup> The only alleged harm imposed is a self-financed candidate's knowledge his spending will provide his opponent with an advantage of raised limits or that the self-financed candidate will enhance his opponent's speech.<sup>87</sup>

The Supreme Court's rulings to date concerning protected political speech have only addressed direct limits on core political speech through

---

craft an amendment combating the perception of electoral unfairness in the wealthy being able to buy seats in Congress).

82. *Id.* at 33–34.

83. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 657 (1990) (citing *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976) (per curiam)).

84. *See Buckley*, 424 U.S. at 19.

85. *Davis v. FEC*, 501 F. Supp. 2d 22, 29 (2007); *see* Transcript of Oral Argument at 3–4, *Davis v. FEC*, No. 07-320 (U.S. Apr. 22, 2008). Chief Justice Roberts categorically stated that wealthy candidates are not restricted in their personal spending habits, and Davis's counsel agreed. *Id.*

86. *See* Brief of Appellant at 42–44, *Davis v. FEC*, No. 07-320 (U.S. Feb. 20, 2008) (noting potential self-financers either forgo their constitutional right to fund their own campaign or provide their opponent with financial benefits correlated to their personal expenditures).

87. Transcript of Oral Argument, *supra* note 85, at 4.

either expenditures or contributions.<sup>88</sup> In fact, as the district court noted, there is no precedent that an advantage for one candidate acts directly as a sufficient burden on the opposing candidate in violation of the First Amendment.<sup>89</sup> Davis argues that whether the regulation imposes an absolute restriction on money spent or creates an impairment for the candidate's own voluntary choice to spend money is irrelevant.<sup>90</sup> For support, Davis cites *Day v. Holahan*,<sup>91</sup> where the Eighth Circuit struck down a provision allowing a publicly funded candidate to go above voluntary spending limits and receive additional public subsidies in response to an independent expenditure campaign.<sup>92</sup>

What Davis does not mention is that just two years after *Day*, in *Rosenstiel v. Rodriguez*,<sup>93</sup> the Eighth Circuit upheld a statute allowing a publicly funded candidate who had previously agreed to expenditure limits to waive that limit if a non-participating opponent raised or spent over a threshold amount.<sup>94</sup> In addition, the court found a lack of coercion or advantage that would chill political speech by allowing a partial tax break to donors of participating candidates.<sup>95</sup> Specifically, providing an incentive for public financing, even allowing greater spending once an opponent spends a specific amount, does not sufficiently burden the opponent's free speech because the disparities between the benefit and alleged burden are not so great as to coerce a candidate into accepting the public financing.<sup>96</sup> Without such coercion, no First Amendment violation exists.<sup>97</sup> Instead, such a provision actually enhances the First Amendment by allowing for more political

88. See *FEC v. Wisc. Right to Life*, 557 U.S. \_\_\_, 127 S. Ct. 2652, 2672–73 (2007); *Randall v. Sorell*, 548 U.S. 230, 260–62 (2006); *McConnell v. FEC*, 540 U.S. 93, 136–37, 227–30 (2003); *Nixon v. Shrink Mo.*, 528 U.S. 377, 385–89 (2000); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 659–60 (1990); *Buckley v. Valeo*, 424 U.S. 1 (1976).

89. See *Davis*, 501 F. Supp. 2d at 30 (noting a regulatory scheme could exist, creating an extreme competitive advantage that works as an unconstitutional burden on a candidate's right to pursue elective office, but no court has found such a burden where the disadvantage is the result of candidate's choice to fund his campaign from a permissible source).

90. Reply Brief of Appellant at 6, *Davis v. FEC*, No. 07-0320 (U.S. Apr. 11, 2008).

91. 34 F.3d 1356 (8th Cir. 1994).

92. *Id.* at 1360–66 (stating that a targeted candidate would benefit from the knowledge that an independent group's spending could actually discourage the group from speaking in the first place and that such self-censorship burdens political speech); Reply Brief of Appellant, *supra* note 90, at 6; Brief of Appellant, *supra* note 86, at 43–44.

93. 101 F.3d 1544 (8th Cir. 1996).

94. *Id.* at 1549–52.

95. See *id.* at 1555.

96. See *id.* at 1552–53 (noting the voluntary nature of a candidate's funding scheme determination and the non-participating candidate's control over whether and when the participating opponent will be freed from limits).

97. See *id.*

speech through enhanced expenditures,<sup>98</sup> a statement agreed upon by the district court in *Davis*<sup>99</sup> and put forth by Chief Justice Roberts concerning the Millionaires' Amendment.<sup>100</sup>

In addition to these findings in *Davis*, the Supreme Court in *Buckley* expressly upheld public financing schemes providing a clear advantage for public funding.<sup>101</sup> The Supreme Court held no First Amendment violation exists when the government withholds the advantage of public funds to a candidate who chooses to make unlimited expenditures.<sup>102</sup> Under *Davis*'s reasoning, courts could strike down public campaign financing as a violation of the non-participating candidate's First Amendment rights, but the Supreme Court has declined to do so.<sup>103</sup>

## 2. Millionaires' Amendment Does Not Appear to Coerce Candidates but May Self-Chill Speech

A candidate's First Amendment rights are not violated simply because another candidate benefits, unless the disparity essentially coerces a candidate into a funding scheme.<sup>104</sup> In the present case, *Davis* argues such coercion is similar to some statutes invalidated by the Supreme Court.<sup>105</sup> These statutes include those requiring a utility company to include materials from an opposing consumer group with its bills,<sup>106</sup> those placing revenues earned from writings of convicted criminals into escrow,<sup>107</sup> those singling out magazines and newspapers from generally

---

98. *See id.* at 1552 (explaining how a scheme that allows for greater spending, in response to non-participating candidates' spending, promotes, rather than detracts from, cherished First Amendment values).

99. *See Davis v. FEC*, 501 F. Supp. 2d 22, 29 (D.D.C. 2007) (claiming "the Millionaires' Amendment accomplishes its sponsors' aim to preserve core First Amendment values by protecting the candidate's ability to enhance his participation in the political marketplace").

100. Transcript of Oral Argument, *supra* note 85, at 21 (noting "a self-financed candidate isn't subject to any restriction at all on what he can spend and his opponent is subject to less restrictions. It seems to me the First Amendment comes out better").

101. *Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976).

102. *See Motion to Dismiss or Affirm* at 15, *Davis v. FEC*, No. 07-320 (U.S. Dec. 4, 2007) (asserting that the disadvantage of being denied federal funds upheld by Supreme Court is more direct than injury claimed from Millionaires' Amendment); *see also supra* note 62.

103. *See Hess, supra* note 4, at 1087.

104. *See Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552-53 (8th Cir. 1996); *Davis v. FEC*, 501 F. Supp. 2d 22, 30 (D.D.C. 2002).

105. *Davis*, 501 F. Supp. 2d at 32.

106. Reply Brief of Appellant, *supra* note 90, at 6 (citing *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 14 (1986)).

107. Jurisdictional Statement at 12, *Davis v. FEC*, No. 07-320 (Sep. 7, 2008) (citing *Simon & Shuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991)).

applicable gross receipts tax,<sup>108</sup> and those taxing paper and ink that only fell on newspapers.<sup>109</sup>

Unfortunately, these statutes are inapposite from the statute in *Davis* because they impose direct restrictions, requirements, or taxes on individuals rather than a chilling effect on the choice to do a voluntary action such as self-finance.<sup>110</sup> Similarly, the Millionaires' Amendment does not directly tax or interfere with a First Amendment right to make or spend money, like the other cases cited.<sup>111</sup> The Supreme Court only invalidated statutes like the one found in found in *Simon & Shuster* because they directly restricted speech's content by burdening the direct income from such speech.<sup>112</sup> The Millionaires' Amendment provides no such direct restriction.<sup>113</sup>

Conversely, candidates who spend just near the threshold or just above may choose to regulate their own spending to ensure they do not trigger the increased amounts.<sup>114</sup> Even these self-financed candidates, but more specifically the majority of self-financed candidates who spend much more than the trigger, still get a return for the use of their personal funds through their political speech.<sup>115</sup> Even if spending meets the threshold, the amendment itself does not allow any unequal advantage as the opponent of a self-financing candidate cannot raise funds over the OPFA formula or, in the words of the courts, to such a level creating a large disparity.<sup>116</sup> Therefore, the Supreme Court likely will not conclude that the Millionaires' Amendment violates the First Amendment by coercing the candidate into seeking and receiving contributions, rather

---

108. *Id.* at 12–13 (citing *Ark. Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987)).

109. *Id.* at 13 (citing *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 593 (1983)).

110. See Transcript of Oral Argument, *supra* note 85, at 26. General Clement noted the Millionaires' Amendment does not require a self-financed candidate to carry his opponent's speech as in *Pacific Gas. Id.*

111. Compare 2 U.S.C. § 441a-1, with *supra* notes 96–98.

112. See Crandall Close, *Speech and Subsidies: How Government Uses Financial Threats and Incentives to Dampen First Amendment Protections*, 6 FIRST AMENDMENT L. REV. 285, 289–90 (2008).

113. *Davis v. FEC*, 501 F. Supp. 2d 22, 29; see Transcript of Oral Argument, *supra* note 85, at 3–4. Chief Justice Roberts categorically stated, “there is no restriction whatsoever on [a] wealth[y] candidate. He can spend as much of his money as he wants,” to which *Davis*'s counsel agreed. *Id.*

114. See Transcript of Oral Argument, *supra* note 85, at 6.

115. See Steen, *supra* note 10, at 171. Steen's research found there were relatively few self-financing congressional candidates in 2000 that spent just above the trigger amounts. *Id.* The majority of candidates who spend over the threshold did so by wide margins and, based on their amounts spent, would be unlikely to restrict their spending to avoid the trigger amounts. *Id.* at 171–72.

116. See Hess, *supra* note 4, at 1090 (noting the provision only benefits the opponent to the level of the self-financed candidate and not beyond).

than spending his personal funds.

The current Roberts Court has moved away from the Rehnquist Court that deferred to Congress and past precedent on First Amendment issues.<sup>117</sup> Prior to *Randall*, the Court showed great deference in *Austin* and *Shrink Missouri* where the deferential standard allowed the legislature great leeway to determine appropriate expenditure restrictions on corporations and contribution limits.<sup>118</sup> The Court under Chief Justice Roberts—and joined by Justice Alito—showed less deference when striking down Vermont’s contribution limits as too low.<sup>119</sup> Subsequently, the Roberts Court moved even closer toward “the First Amendment deregulatory position” rather than allowing the legislature to define corruption, a move appearing to lower the bar for finding First Amendment harm.<sup>120</sup> If these trends continue, Justices Scalia, Thomas, and Kennedy appear poised to find a First Amendment harm from the Millionaires’ Amendment.<sup>121</sup> Justices Souter, Stevens, Ginsburg, and Breyer likely will continue choosing deference to the legislature for setting contribution limits as it sees fit so long as it allows greater, rather than lower, limits.<sup>122</sup> Chief Justice Roberts and Justice Alito likely will form the controlling bloc and find even contribution limits produce First Amendment harms.<sup>123</sup>

If the Supreme Court finds a First Amendment violation, the limited chill on the choice not to enhance an opponent’s speech likely will be justified through a determination that the government has no legitimate interest in raising contribution limits or coordinated party expenditures in the face of a self-financed candidate.

#### B. Government Interest

In *Buckley*, the Supreme Court ruled that equalizing resources between candidates was not a sufficient government interest to justify

---

117. See Hasen, *supra* note 1, at 1065 (stating the Supreme Court has moved away from the deference shown under Rehnquist towards perhaps the greatest period of deregulation witnessed since before Congress passed FECA amendments in 1974).

118. *Id.* at 1070–71.

119. *Id.* at 1071–72.

120. See *id.* at 1072.

121. Cf. *id.* at 1079 (finding Scalia, Kennedy, and Thomas would have overturned *Austin* and *McConnell* and both unions and corporations should be able to pay for electioneering communications from whatever source they choose).

122. Cf. *id.* at 1071–72 (noting the Court was split in *Randall* with Justices Stevens, Souter, and Ginsburg upholding the limits while Justice Breyer found them too low).

123. See *id.* at 1104.

infringement upon core political speech through set limits on personal fund expenditures.<sup>124</sup> The Supreme Court has never ruled, however, that equality of core protected political speech is not a valid government interest, but simply that equality was not sufficient to directly limit the amount of personal funds a candidate may spend.<sup>125</sup> If the Supreme Court finds the Millionaires' Amendment does infringe upon core political speech, the Court must then consider if the harm is sufficient and narrowly tailored to achieve a valid government interest.<sup>126</sup> As contribution limits only marginally affect political speech, they receive less exacting review than strict scrutiny.<sup>127</sup> Therefore, the Court has held combating corruption or even the appearance of corruption is a valid government interest to set contribution limits.<sup>128</sup> Further, courts have upheld public funding schemes providing a benefit to a candidate, as they pose little to no constitutional harm, but even if they did, the harm is justified by the government interest in combating corruption.<sup>129</sup>

In the present case, the government asserts numerous interests in enhancing the political speech of a self-financed candidate's opponent who spends vast amounts of his personal wealth.<sup>130</sup> The government is most concerned that the disparity of campaign resources will make it more difficult for non-wealthy candidates to compete and put their message out to the public, the competitive advantage creates the public perception that someone with enough money can buy a seat in Congress, and political parties increasingly only recruit independently wealthy candidates for office.<sup>131</sup>

These interests of leveling the playing field and fighting the perception that Congress is for sale do not fit into the traditional anti-corruption rationale upheld by the Court.<sup>132</sup> Nonetheless, the Court has prevented a "different type of corruption in the political arena: the

---

124. *Buckley v. Valeo*, 424 U.S. 1, 54 (1976).

125. Motion to Dismiss or Affirm, *supra* note 102, at 17.

126. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 657 (1990).

127. *See Buckley*, 424 U.S. at 19–29.

128. *See McConnell v. FEC*, 540 U.S. 93, 136–37 (2003); *Buckley*, 424 U.S. at 19–29.

129. *See* Motion to Dismiss or Affirm, *supra* note 102, at 15 (asserting the disadvantage of being denied federal funds, which has been upheld by the Supreme Court, is much more direct than the injury claimed from the Millionaires' Amendment); *see also supra* note 62.

130. Brief of Appellee at 6, *Davis v. FEC*, No. 07-320 (U.S. Mar. 19, 2008).

131. *Id.*; *see also* Steen, *supra* note 10, at 170–71 (finding that self-financing has had a chilling effect on candidate emergence as potential candidates find costs too high when facing a wealthy self-financer).

132. *See* Transcript of Oral Argument, *supra* note 85, at 28 (Justice Scalia pointed out the only campaign finance regimes approved to date by the Supreme Court have used an anti-corruption rationale).



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>133</sup> While speaking the language of corruption, the Court embraced the equality rationale that was originally rejected in *Buckley*, at least as applied to a corporation.<sup>134</sup> Although the Court allowed an applied expenditure in *Wisconsin Right to Life*, originally prohibited in *Austin*, the Court did not reject this rationale.<sup>135</sup>

Further, the Millionaires' Amendment combats a form of corruption similar to the one cited in *Austin*, or rather the corrosive effects of immense wealth accumulated by an individual and having no correlation to the candidate's actual public support.<sup>136</sup> In *Buckley*, the Supreme Court noted that the normal relationship between the resources of a candidate due to the public's support "may not apply where the candidate devotes a large amount of his personal resources to his campaign."<sup>137</sup> There is no discernible difference between a candidate who achieves his campaign funds from personal wealth, as opposed to the public's support, and the corruption detailed in *Austin*.<sup>138</sup> As the Court typically defers to Congress concerning the appropriate level of contribution limits to battle corruption, unless they are too low, the courts should also defer to Congress to define corruption as including the effects of massive amounts of wealth not tied to public support.<sup>139</sup> Otherwise, the Court risks dictating that Congress has no position to ensure those without money have a loud enough voice to be heard in the electoral process by protecting them from wealthy candidates who can effectively drown out others' speech.<sup>140</sup>

It is unclear exactly how the controlling bloc of Chief Justice Roberts and Justice Alito will decide the government interest in view of the slight, indirect, possible First Amendment harm.<sup>141</sup> Justice Alito's

---

133. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990).

134. Hasen, *supra* note 1, at 1070.

135. *See* *FEC v. Wisc. Right to Life*, 551 U.S. \_\_\_, 127 S. Ct. 2652, 2672–73 (2007).

136. *See Austin*, 494 U.S. at 660; Hess, *supra* note 4, at 1089 (noting the amendment reduces precisely the type of corruption that voters fear most: that money matters more than ideas in elections).

137. *See* Motion to Dismiss or Affirm, *supra* note 102, at 16 (quoting *Buckley v. Valeo*, 424 U.S. 1, 56 n.63 (1975)).

138. *See id.*

139. *See* Dotan, *supra* note 3, at 997 (noting courts should only intervene to ensure the political arena stays open for competition and allowing only the wealthy to use their money to forestall or inhibit democratic process will block democracy).

140. *See id.* at 988.

141. *See generally* Transcript of Oral Argument, *supra* note 85.

questions during oral arguments appear to indicate that the government's interests may be stronger when currently allowable contribution limits are the main factor hindering the opponent of a self-financed candidate, but these questions do not indicate that the interest by itself is compelling or permissible.<sup>142</sup> Further, Chief Justice Roberts indicated the relaxing of contribution restrictions on a candidate eases any constitutional issues for that candidate so the law may actually be less violative of the First Amendment.<sup>143</sup> If the Supreme Court does find the slight harm to the First Amendment is enough to warrant scrutiny, it may be severely split on the government interest put forth to justify that harm.<sup>144</sup> The Supreme Court may allow the increased contribution limits because they enhance political speech overall.<sup>145</sup>

### C. Disclosure Requirements

The Supreme Court has consistently upheld disclosure requirements to further a valid government interest.<sup>146</sup> Therefore, Davis must show the disclosure requirements for a self-financed candidate further no legitimate government interest or were burdensome by divulging protected speech in the form of campaign spending strategy.<sup>147</sup> If the government interests put forth in the preceding subsection are not considered sufficient, then the Court may strike down the disclosure requirements as not furthering a valid government interest.

While the requirements may be burdensome by requiring reporting within twenty-four hours of exceeding the threshold and with every subsequent \$10,000, such a burden alone has never resulted in a First Amendment violation of other the FECA requirements.<sup>148</sup> In addition, the Supreme Court only previously discussed the possible burden in terms of its effect on privacy of association and belief guaranteed by the First Amendment.<sup>149</sup> Further, in *McConnell*, the Court has allowed similar twenty-four hour reporting requirements concerning electioneering communications to ensure prompt and timely information to voters.<sup>150</sup> While a self-financed candidate does not divulge contributors, the

---

142. *Id.* at 14–15.

143. *See id.* at 20.

144. *See id.* at 20–21.

145. *See id.* at 20.

146. *See* *McConnell v. FEC*, 540 U.S. 93, 201 (2003); *Buckley v. Valeo*, 424 U.S. 1, 63, 84 (1976).

147. *See* Brief of Appellant, *supra* note 86, at 37–38.

148. *See* Brief of Appellee, *supra* note 130, at 46–47.

149. *See id.* at 47.

150. *Id.* at 52 (citing *McConnell*, 540 U.S. at 200).

information is necessary to inform the public of the campaign money's source is coming from and to ensure the statute operates appropriately.<sup>151</sup>

During oral arguments, Chief Justice Roberts remarked that the differential reporting requirements and strict timelines were problematic, without discussing any of the associated burdens previously put forth by the Court.<sup>152</sup> Again, it is unclear based on prior case law exactly how the justices will decide the added disclosure requirements. The decision for this element may very well rely upon whether the Court determines that raised contribution limits do not violate the self-financed candidate's free speech. Even if the statute slightly chills the opponent's speech, but the government interest in leveling the playing field to combat the corrosive effects of money is sufficient, the disclosure requirements will likely be upheld as necessary to the operation of the statute.<sup>153</sup>

#### D. Equal Protection Violation

A successful equal protection argument must show that the Millionaires' Amendment treats similarly situated candidates differently.<sup>154</sup> Davis argues the self-financed candidate and his opponent are similarly situated, regardless of the differences in funding sources, simply because they are both candidates for the same congressional seat.<sup>155</sup> Therefore, the statute treats the self-financed candidate spending a specific amount of money differently than his opponent because different sets of contribution limits apply if both candidates solicited funds.<sup>156</sup> In addition, the self-financed candidate's opponent may benefit from increased coordinated party expenditures.<sup>157</sup> These differences occur only because the self-financed candidate exercises his fundamental right to expend his own personal funds on his behalf as core, protected, political speech.<sup>158</sup>

---

151. *Id.* at 48 (quoting *Buckley*, 424 U.S. at 66–67) (The information “provides the electorate with information ‘as to where political campaign money comes from’ in order to aid the voters in evaluating those who seek federal office”) (internal citations omitted).

152. Transcript of Oral Argument, *supra* note 85, at 34–35.

153. See *McConnell*, 540 U.S. at 196 (agreeing with the *Buckley* Court that gathering necessary data to uphold more substantive electioneering provisions is an important government interest).

154. *Davis v. FEC*, 501 F. Supp. 2d 22, 33 (D.D.C. 2007) (citing *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 200 (1981)).

155. Brief of Appellant, *supra* note 86, at 57.

156. *Id.* at 58–59.

157. *Id.* at 59.

158. *Id.*

The fact that both parties are candidates by itself is insufficient to show the parties are similarly situated and subject to an equal protection violation.<sup>159</sup> In *Buckley*, the Supreme Court expressly found the Constitution does not require all candidates receive identical treatment for public financing purposes, which was a legitimate government interest.<sup>160</sup> Additionally, the Supreme Court noted Congress was justified in providing major political parties with full public funding and other parties with only a percentage of the major party funding because the parties themselves were differentiated by their ability to raise and spend money.<sup>161</sup> Further, the Court found no evidence the differential treatment disadvantaged the appellants by reducing their strength below what they would have attained under full public financing.<sup>162</sup> For this finding, the Court specifically relied on the fact the parties are free to raise money from whatever sources they choose and are free to spend as much as they desire.<sup>163</sup>

Under this equal protection analysis, Congress appears justified to treat a self-financed candidate differently than his opponent.<sup>164</sup> Congress may directly provide different funding to political parties based on their public support, ability to raise money, and ability to win elections.<sup>165</sup> There is little difference and, in fact much less direct interference, when Congress provides different contribution limits for a candidate who chooses to raise funds and one who chooses to spend his own personal wealth.<sup>166</sup>

Again, it is difficult to predict how the Supreme Court will rule on the equal protection claim, as the analysis of differential treatment relied on the accepted fact that public funding was a legitimate public purpose.<sup>167</sup> In the present case, if the Court finds no First Amendment harm because

---

159. See *Davis*, 501 F. Supp. at 33–34; Brief of Appellee, *supra* note 130, at 44–45.

160. *Buckley v. Valeo*, 424 U.S. 1, 97–98 (1976). The Court noted:

[T]here are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other . . . . Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . . .

*Id.* (quoting *Jenness v. Fortson*, 403 U.S. 431, 441–42 (1971)).

161. *Buckley*, 424 U.S. at 98.

162. *Id.* at 98–99.

163. *Id.* at 99.

164. Brief for Appellee, *supra* note 130, at 44–45.

165. *Buckley*, 424 U.S. at 98.

166. See Brief of Appellee, *supra* note 130, at 45 (“There is no reason to regard Section 319’s differentials in the amounts of money that candidates may receive from private contributions as more suspect than analogous differentials in the distribution of federal funds.”).

167. *Buckley*, 424 U.S. at 95–96.

raised contribution limits and coordinated party expenditures are not inherently coercive, then the arguments of an equal protection violation have little merit.<sup>168</sup> Further, if the government interests of leveling the playing field or combating the effects of personal wealth on elections are valid, then Congress is completely justified in treating the differences in candidates' resources differently.<sup>169</sup>

The Court may rule separately on the increased coordinated party expenditures allowed for the self-financed candidate's opponent.<sup>170</sup> Specifically, Justice Kennedy raised serious concerns with allowing only one candidate increased coordinated party expenditures while withholding this advantage to a self-financed candidate.<sup>171</sup> While Congress may be justified in treating different candidates differently, Justice Kennedy strenuously questioned a provision allowing one candidate, simply by virtue of his opponent's spending, to have additional support from his political party.<sup>172</sup> Specifically, Justice Kennedy asked whether increased coordinated party expenditures for one candidate allowed the candidate access to a different kind and quality of speech than his self-financed opponent.<sup>173</sup> Regulating access to this particularly potent kind of speech and party support for one candidate substantially differs from regulating access to campaign funding.<sup>174</sup> Allowing raised contribution limits simply provides more money, which is political speech, to one candidate relative to the personal funds utilized by the opposing candidate and does not restrict or enhance access to a different kind and quality of speech.<sup>175</sup> The Court may very well sever this provision from the statute—at the very least—and declare it unconstitutional because it regulates access to a kind of speech based solely on campaign expenditures.<sup>176</sup>

---

168. Brief of Appellee, *supra* note 130, at 45 (noting Davis argues an equal protection violation for the same reasons as a First Amendment harm, thus if no First Amendment harm exists, there cannot be an equal protection violation).

169. *See Buckley*, 424 U.S. at 95–98.

170. *See* Davis v. FEC: Splitting the Baby?, <http://electionlawblog.org/archives/010673.html> (Apr. 22, 2008, 12:38 EST).

171. Transcript of Oral Argument, *supra* note 85, at 17–20.

172. *Id.* at 17–20, 22, 28–30.

173. *Id.* at 28–29.

174. *Cf. id.* at 28–29. Justice Kennedy said party support is a very different kind of speech providing support to a candidate to win an election. *Id.*

175. *See id.* at 20–21, 28–29.

176. *See id.* at 48–49; Davis v. FEC: Splitting the Baby?, <http://electionlawblog.org/archives/010673.html> (Apr. 22, 2008, 12:38 EST).

## V. CONCLUSION

Congress enacted the Millionaires' Amendment to the BCRA to combat an old problem of excessive amounts of wealth in the hands of a small minority of individuals buying seats in Congress and hindering less affluent candidates from running.<sup>177</sup> When determining the necessity of combating corruption in the electoral process, the Supreme Court traditionally defers to Congress to set what Congress determines are appropriate contribution limits.<sup>178</sup> In *Davis*, the Supreme Court must decide if Congress's determination to combat the corrosive effects of immense wealth not tied to actual public support<sup>179</sup> sufficiently discourages a candidate's choice to self-finance his campaign and therefore violates the First Amendment.<sup>180</sup> Traditionally, the courts only found a First Amendment violation when a statute creates such a large disparity between permissible funding sources that the statute effectively coerces a candidate into one funding source.<sup>181</sup> By its construction, the Millionaires' Amendment allows a self-financed candidate's opponent to receive contributions in excess of normal limits but only up to a level of parity with the funds expended by the self-financed candidate.<sup>182</sup> Therefore, as there is no large disparity and the candidate has the choice to self-fund, the Supreme Court cannot likely rule the statute effectively coerces the candidate into receiving contributions or takes away his choice to self-fund.<sup>183</sup> Instead, the amendment actually works to enhance overall speech by loosening restrictions on political speech and thereby raising contribution limits.<sup>184</sup> If the Supreme Court finds a First Amendment violation, it would have to determine that the effect of an advantage for one candidate, which is

---

177. Brief of Appellee, *supra* note 130, at 6; *see* Steen, *supra* note 9, at 159–62; Hess, *supra* note 4, at 1067.

178. *See* *McConnell v. FEC*, 540 U.S. 93, 136–37 (2003); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 385–90 (2000); *Buckley v. Valeo*, 424 U.S. 1, 30 (1975).

179. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

180. 2 U.S.C. § 441a-1; *see* *Davis v. FEC*, 128 S. Ct. 976 (2008).

181. *Davis v. FEC*, 501 F. Supp. 2d 22, 31 (2007) (noting *Buckley's* reliance on the choice of a candidate to forgo private fundraising and accept public funding created no constitutional dilemma, and only when an advantage creates "a large disparity between benefits and restrictions that candidates are coerced to publicly finance their campaigns" is there a constitutional burden) (quoting *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1550 (8th Cir. 1996)).

182. *See* *Davis*, 501 F. Supp. 2d at 31.

183. *See* *Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976); *Davis*, 501 F. Supp. 2d at 31.

184. *See* *Davis*, 501 F. Supp. 2d at 29 (claiming the "Millionaires' Amendment accomplishes its sponsors' aim to preserve core First Amendment values by protecting the candidate's ability to enhance his participation in the political marketplace"); Transcript of Oral Argument, *supra* note 85, at 21 (noting a self-financed "candidate isn't subject to any restriction at all on what he can spend and his opponent is subject to less restrictions. It seems to me the First Amendment comes out better.").

purely dependent upon the self-financed candidate's choice, is enough to chill political speech.

The Supreme Court may rule such harm exists mainly due to the lack of a sufficient government interest to impose any chill on political speech, even if the harm is only due to pure choice.<sup>185</sup> If the Court rules that government has no interest in leveling the playing field between candidates to combat the effects of immense wealth, the Court would essentially take away Congress's role to define corruption and limit such a definition only to quid pro quo.<sup>186</sup> In addition, the enhanced twenty-four hour disclosure requirements will likely rise or fall depending on the constitutionality of the government's interest as necessary components of the statute to implement this interest.<sup>187</sup>

Finally, as the Supreme Court allows candidates and parties to be treated differently based upon their resources and public support, Davis's equal protection claim cannot stand on the argument that both parties are candidates for a congressional seat.<sup>188</sup> Therefore, the Court would have to find the differences in contribution limits are not justified by the government interest, even though the candidates are situated differently in their resources. The Court may find an equal protection violation concerning one candidate's access to increased coordinated party expenditures in response to a self-financed candidate's spending.<sup>189</sup> The Court appears to consider access to a kind and quality of speech characterized by party coordination as inherently different from speech allowed through increased money in response to money spent.<sup>190</sup>

With so many issues to consider, the overall ruling may be fragmented. The Court may allow Congress to ease restrictions on contributions because little harm results due to the opponent's choice of free speech, but may strike down some provisions concerning access to party support. While little coercion exists, the Court may also continue its swing towards the First Amendment and not allow any chill on free

---

185. See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 657 (1990) (stating any harm done to First Amendment must be justified by compelling government interest narrowly tailored to achieve that end).

186. See *Dotan*, *supra* note 3, at 997–98.

187. Brief of Appellee, *supra* note 130, at 48 ((quoting *Buckley*, 424 U.S. at 66–67) (The information “provides the electorate with information ‘as to where political campaign money comes from’ . . . in order to aid the voters in evaluating those who seek federal office”) (internal citations omitted)).

188. See *Buckley*, 424 U.S. at 97–98.

189. *Davis v. FEC: Splitting the Baby?*, <http://electionlawblog.org/archives/010673.html> (Apr. 22, 2008, 12:38 EST).

190. See Transcript of Oral Argument, *supra* note 85, at 48–50; *Davis v. FEC: Splitting the Baby?*, <http://electionlawblog.org/archives/010673.html> (Apr. 22, 2008, 12:38 EST).

speech, specifically without more of an interest than leveling the playing field.<sup>191</sup>

---

191. *See* Hasen, *supra* note 1, at 1065.