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Davis v. Federal Election Commission: Muddying the Clean Money Landscape

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DAVIS V. FEDERAL ELECTION COMMISSION: MUDDYING THE CLEAN MONEY LANDSCAPE

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Efforts towards campaign finance reform have always been limited by the First Amendment concerns inherent to restrictions on political speech. This Article focuses on state Clean Money public financing programs—arguably one of the most successful manifestations of finance reform to date—and how they are threatened by the U.S. Supreme Court's recent decision in Davis v. Federal Election Commission *in two significant ways. First,* Davis *halts a recent judicial trend that had embraced a broad view of anticorruption as a legitimate government interest justifying infringement on the First Amendment. Second, the Court's decision casts serious doubt on the constitutionality of the trigger mechanisms commonly used in Clean Money programs to grant certain candidates more than the original, predetermined allotment of campaign funds. By adopting a candidate-centered interpretation of First Amendment interests in the campaign context, the* Davis *decision exemplifies the Court's changing approach to the interpretation of the First Amendment in the election context generally. Ultimately, this trend will significantly impede the future effectiveness of Clean Money campaign finance reform measures.*

I. INTRODUCTION

Tom Perriello, a Democrat vying for Virginia's Fifth District House seat in the 2008 congressional election, stands in front of a red NASCAR stock car covered with stickers from Chevron, Exxon, Texaco, and JP Morgan. He rips the corporate stickers off the car and says, "Corporate sponsorship may work for NASCAR, but not

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Congress."[1] When the sponsorship stickers are all removed, he adds a "Perriello for Congress" bumper sticker and promises, "I'm taking zero dollars from corporate sponsors so that I can fight for you."[2]

Perriello's campaign advertisement capitalizes on the public's increasing concern that elected representatives "buy" their seat.[3] The public's fear is not unfounded: a political candidate's access to campaign funds often determines the campaign's success.[4] Indeed, the more money a candidate raises, the greater his or her chance of being elected to office.[5] This correlation is the result of politicians' need for exposure[6] in order to reach voters. That is, candidates need to communicate their campaign message to the masses and become

1. CMAG's Ad of the Week for 10/6/08, http://www.tnsmi-cmag.blogspot.com/2008/10/cmags-ad-of-week-for-10608.html (Oct. 6, 2008, 08:59 EST) [hereinafter CMAG].

2. *Id.*

3. Frank J. Sorauf, *If It's Not Broken . . . or Is It?*, *in* INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 18 (1992), *available at* http://www.campaignfinancesite.org/book/pdf/1.pdf ("After the alleged buying of the Congress, it is the alleged buying of the elections to the Congress that most worries Americans."); *see also* Robert Barnes, *Justices to Hear Challenge of Law That Affects Self-Funded Candidates*, WASH. POST, Apr. 21, 2008, at A3, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/04/20/AR2008042001827.html; WKTV News, *Hanna: "Arcuri Selling His Seat in Congress,"* Sept. 30, 2008, http://www.wktv.com/explorepolitics/28083379.html.

4. Daniel Weeks, *Does Money Buy Elections? The Impact of Spending on U.S. Congressional Campaigns*, AMS. FOR CAMPAIGN REFORM, Jan. 2008, at 1, http://www.scribd.com/doc/2383850/Does-Money-Buy-Elections ("[D]ata show[s that s]ince 1992 . . . [n]ine times out of ten, the higher-spending candidate won.").

5. Dan Froomkin, *Money Troubles*, WASHINGTONPOST.COM, Sept. 4, 1998, http://www.washingtonpost.com/wp-srv/politics/special/campfin/campfin.htm ("It takes money to pay a campaign staff and buy materials. It takes money for a campaign to be taken seriously by the press. It even takes money to raise more money."). *But see* Weeks, *supra* note 4, at 2, 5 (noting that spending requirements for a successful campaign vary according to "communication costs . . . [in] the district" and whether the candidate is an incumbent or a challenger). For example, since 1992, congressional incumbents spending less than $1 million when campaigning were more likely to win than those spending $1 million or more. *Id.* at 5.

6. A candidate's exposure, good or bad, influences voters. For example, studies show that political spot advertisements (which are essentially political commercials) ranging from five seconds to five minutes significantly affect voters. *See* Michael Pfau, Tracy Diedrich, Karla M. Larson & Kim M. Van Winkle, *Influence of Communication Modalities on Voters' Perceptions of Candidates During Presidential Primary Campaigns*, 45 J. COMM. 122, 124 (2006) (articulating that televised spot advertising has the highest impact on voter perception in presidential primary elections in comparison with television news, interviews, and televised debates; newspapers; or interpersonal communications). Additionally, negative attack advertisements about an opponent help shape voters' perceptions. *See Young Voters Influenced by Negative Political Ads, Says Study*, EUREKALERT.ORG, Feb. 12, 2008, http://www.eurekalert.org/pub_releases/2008-02/uocp-yvi021208.php (noting that "negative 'attack' ads provoke more voter migration than positive ads"). Even a candidate's physical appearance affects voters. *See* LYNDA LEE KAID, HANDBOOK OF POLITICAL COMMUNICATION RESEARCH 27 (2004) (describing a study that found physically appealing candidates generated more positive voter response than their opponents).

recognizable to the voting public, which typically requires significant amounts of money.[7] Candidates raise funds in different ways; for example, some financially able candidates fund their own campaigns with personal wealth, while others rely on donations from individual sponsors. But, regardless of how each individual campaign is funded, one thing remains constant: money plays an integral role in the American electoral process.

In response to the electoral system's increasing dependence on money and the rising cost of political campaigns,[8] several states have enacted campaign finance legislation as a means of reform.[9] Often, this legislation is directed at curbing excessive spending, regulating sources of funding, and limiting the political influence of special interest groups and wealthy contributors.[10] One particular type of campaign finance reform that has proven to be effective and popular is Clean Money[11] public funding, also referred to in this Article as trigger-based public funding. Under Clean Money public funding programs, a political candidate voluntarily forgoes his or her right to raise private funds in exchange for a predetermined amount of government funding and the possibility of receiving additional funds

7. Weeks, *supra* note 4, at 8 ("[M]oney matters when it comes to building a baseline of voter support. . . . [T]he 'growth potential' in expected votes per unit of additional challenger spending is very great."); *see also* Buckley v. Valeo, 424 U.S. 1, 26 (1976); Homans v. City of Albuquerque, 366 F.3d 900, 917 (10th Cir. 2004).

8. *Perception Is Reality: Public Opinion on Money in Politics and Campaign Finance Reform*, MONEY POLS. RES. ACTION PROJECT, March 4, 2003, http://www.oregonfollowthemoney.org/CampaignReform/poll.htm (citing *Poll Conducted by Princeton Survey Research Association*, NEWSWEEK, Oct. 23, 1999) (finding that out of 755 surveyed adults, (1) 87 percent either are "somewhat concerned" or have a "major concern" that the high cost of campaigns discourages good people from running for office, and (2) 90 percent either are "somewhat concerned" or have a "major concern" that campaign contributions have "too much influence on elections and government policy"); *see also* David A. Strauss, *What Is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 161 (1995) (concluding that the role money plays in the campaign process has consequences including financial inequality among candidates, misuse of candidates' time in raising funds, and questionable levels of interest-group influence in democratic politics).

9. *See, e.g.*, *infra* Part II.B (describing several Clean Money public funding programs currently in practice throughout the United States).

10. *See The Federal Election Campaign Laws: A Short History*, http://www.fec.gov/info/appfour.htm (last visited Jan. 21, 2009).

11. "Clean Money" is a term commonly used to refer to publicly financed elections. *See, e.g.*, Alan Curtis, *The Big Picture*, *in* PATRIOTISM, DEMOCRACY AND COMMON SENSE: RESTORING AMERICA'S PROMISE AT HOME AND ABROAD 59 (Alan Curtis ed., Rowman & Littlefield Publishers, Inc. 2004).

if and when a triggering event occurs.[12] Triggering events are typically predesignated funding markers. For example, under some Clean Money funding programs, a candidate will receive additional funds if his or her opponent has chosen not to participate in the program and has raised private funds in excess of a specified amount.[13]

Though the release of supplementary funds is not guaranteed, and participants can only depend on receiving a flat sum of money for their respective campaigns, politicians value Clean Money programs.[14] The programs free up time that participating candidates would otherwise have to spend fundraising and allow them to focus on their political agenda.[15] Additionally, Clean Money programs provide candidates with "hefty grants, . . . extra money to combat opponents who don't participate[,] and . . . more cash to counter negative ads from third parties."[16] Thus, Clean Money public funding has many attractive attributes.

The trigger mechanism is one component that is not only attractive but necessary to make this type of funding work. Without designated triggers, a candidate who opted in to a Clean Money program would be limited to receiving only the program's predetermined amount of funding, which would severely disadvantage the candidate if he or she faced a privately funded opponent who had significantly fewer financial restrictions.[17]

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12. Private funding is money obtained from private organizations, individuals, and the candidates themselves. It is currently the most common method of fundraising for American candidates. Richard Briffault, *Point/Counterpoint: Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 566 (1999).

13. *See, e.g.*, ME. REV. STAT. ANN. tit. 21A, §1125(9) (2007) (granting participating Clean Money candidates matching funds when an opposing candidate's funds exceed those of the participating candidate).

14. *See, e.g.*, Press Release, Citizen Action of New York, Poll Finds New Yorkers Overwhelmingly Support Public Financing of Elections (Apr. 28, 2008), http://www.citizenactionny.org/press/latestnews/CEPoll%20Release%20albany%20final.pdf (stating that New York Governor David A. Paterson supports Clean Elections). *But see id.* (stating that Senate Majority Leader Joseph Bruno "has long stated his opposition to public financing of state legislative elections").

15. Susan Haigh, *Connecticut Candidates Line Up for Public Financing*, WASHINGTON POST.COM, July 19, 2008, *available at* http://www.ct.gov/seec/lib/seec/archive_program_news/wpost_-_candidates_line_up_for_financing.pdf (stating that public funding gives politicians more time to "get involved with the issues").

16. Haigh, *supra* note 15.

17. Privately funded candidates are less restricted because although they are subject to their state's funding regulations, those restrictions are generally "per contribution" limitations rather

Certainly few, if any, candidates would choose to participate in such an inequitable funding program.

This Article argues that the United States Supreme Court's June 2008 decision in *Davis v. Federal Election Commission*[18] threatens the viability of current and future Clean Money public funding programs because it suggests that triggers are unconstitutional. In *Davis*, the Court struck down the Millionaire's Amendment, an amendment to existing federal campaign finance reform legislation that created asymmetrical fundraising regulations for U.S. House of Representatives candidates if an opposing candidate spent $350,000 or more of his or her personal funds on the campaign.[19] The Court reasoned that the amendment heavily burdened a self-funded candidate's First Amendment right to make unlimited political expenditures, a right that the Supreme Court first articulated in *Buckley v. Valeo*, the seminal campaign finance reform case.[20]

Although *Davis* does not address Clean Money public funding per se, the decision undermines the legal foundation supporting the crucial trigger mechanism in Clean Money funding in two ways. First, the *Davis* court agreed with *Day v. Holahan*,[21] one of only a few lower court decisions that found trigger-based matching funds to be unconstitutional. Second, *Davis* undercuts a previous judicial trend that expanded *Buckley*'s holding that leveling the electoral financial playing field is not a legitimate government interest.

At the macro level, *Davis* indicates a shift in the Court's focus with respect to campaign finance reform, away from the interests of the voting public and toward those of individual candidates. The Court in *Buckley* used what this Article will refer to as electorate-centered reasoning in its evaluation of campaign finance regulation by suggesting that the relationship between First Amendment rights and campaign finance should be structured in a way that best serves the electorate. The *Davis* Court, however, took a different, candidate-centered approach, which views the First Amendment as a

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than a complete funding cap. Arizona's campaign finance law, for example, restricts candidates in an election for statewide office to $1,010 per contribution from an individual. ARIZ. REV. STAT. ANN. § 16-905(B)(1) (2009). While the amount per donor is capped under the statute, a candidate can raise funds from an unlimited number of donors. *Id.*

18. 128 S. Ct. 2759 (2008).

19. *Id.* at 2766–67.

20. *Id.* at 2759 (citing Buckley v. Valeo, 424 U.S. 1 (1976)).

21. 34 F.3d 1356 (8th Cir. 1994).

means to protect the interests of individual candidates in the campaign reform context. The *Davis* approach conflicts with Clean Money programs because Clean Money restricts an individual candidate for the benefit of the public, while the candidate-centered approach in *Davis* prioritizes the interests of a candidate over those of the voting public.

Part II of this Article explores the legal support for, and current implementations of, Clean Money campaign reform. Part III examines the Court's analysis in *Davis*, its projected effect on Clean Money public funding programs, and its current influence on existing reform legislation. Part IV analyzes electorate-centered and candidate-centered approaches and discusses why *Davis*'s candidate-centered approach is antithetical to the progress and improvement of the American electoral system. This Article suggests that the shift from an electorate-centered approach to a candidate-centered approach is a step backwards in an effort to heal the American electoral system, which is suffering because of the financial demands it imposes on its participants. Finally, Part V considers implications of the demise of trigger-based public funding.

II. CLEAN MONEY MECHANICS

Clean Money programs are arguably the most successful type of public funding scheme.[22] *Public funding* is a colloquial term for government- or tax-funded campaigns.[23] In general terms, public funding requires that the government treasury give cash grants to candidates for campaign funding in lieu of private funding.[24] There is no uniform vision of, or framework for, public funding in either theory or practice. Nevertheless, Clean Money is one version of public funding that has gained substantial support and has been translated into actual legislation.[25] Seven states and two

22. *See* Clean Money, Clean Elections: Public Campaign, *Full Public Financing in the Age of the Roberts Supreme Court*, http://www.publicampaign.org/node/40409 (last visited Jan. 11, 2009) (describing Clean Money elections as the "most robust option for campaign reform").

23. Bradley A. Smith, *Point/Counterpoint: Some Problems with Taxpayer-Funded Political Campaigns*, 148 U. PA. L. REV. 591, 592 (1999).

24. Briffault, *supra* note 12.

25. Common Cause, *Public Financing in the States*, http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=507399 (last visited Jan. 11, 2009) (noting that sixteen states currently implement some form of direct public financing to candidates, including Arizona, Connecticut, Florida, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, North Carolina, Rhode Island, Vermont, and Wisconsin). *See* Green

municipalities employ some version of the Clean Money scheme, including Arizona, Connecticut, Maine, New Jersey, New Mexico, North Carolina, Vermont, and Portland, Oregon, and Albuquerque, New Mexico.[26] Each instance of Clean Money legislation is unique, but there is a standard Clean Money model consisting of threshold qualifying requirements, a fixed amount of funding, and trigger-based matching funds.[27] Maine's Clean Money program illustrates this standard Clean Money model in practice.

A. Maine's Implementation of the Basic Clean Money Public Funding Model

The Maine Clean Elections Act ("MCEA")[28] is a voluntary program available to candidates running for governor, state senator, or state representative.[29] It provides participants with a fixed amount of government funding and equalizes funding levels between participating and privately funded candidates by releasing supplementary public funds to the participating candidate if the privately funded candidate's expenditures exceed a certain amount.[30]

1. Qualification

Candidates must qualify to participate in the MCEA program by collecting a specified number of signatures and $5 qualifying contributions from registered voters within a designated time period.[31] Candidates are permitted to privately raise $100 per contributor in seed money[32] to fund this qualification period.[33]

Party of Conn. v. Garfield, 537 F. Supp. 2d 359, 381–90 (D. Conn. 2008) (detailing full and partial state public funding laws); *see also* Jason B. Frasco, *Full Public Funding: An Effective and Legally Viable Model for Campaign Finance Reform in the States*, 92 CORNELL L. REV. 733, 743–87 (2007).

26. Clean Money, Clean Elections: Public Campaign, *States/Localities with Clean Elections*, http://www.publicampaign.org/where (last visited Jan. 4, 2009).

27. Clean Money, Clean Elections: Public Campaign, *How Clean Elections Works*, http://www.publicampaign.org/node/34047 (last visited Jan. 4, 2009) [hereinafter *How Clean Elections Works*] (explaining that typical Clean Elections require a candidate to collect a set number of small qualifying contributions and a limited amount of matching funds if a participating candidate is outspent by the opponent, independent groups, or individuals).

28. ME. REV. STAT. ANN. tit. 21A, §§ 1121–1128 (2008).

29. *Id.* § 1125.

30. *Maine Commission on Governmental Ethics & Election Practices, The Maine Clean Election Act*, http://maine.gov/ethics/mcea/index.htm (last visited Jan. 4, 2009).

31. ME. REV. STAT. ANN. tit. 21A, § 1125(3) (2008).

32. *Id.* § 1122(9).

2. Fixed Funding

MCEA participants forgo all private funding and instead receive a fixed sum from the Clean Money fund. The fund consists of the candidates' qualifying contributions, residual unspent funds collected from past participants, tax revenues, fines imposed for selected offenses, and voluntary donations, among other things.[34] The Maine Commission on Governmental Ethics and Election Practices regulates the fund.[35] Candidates receive varying amounts of funding depending on the office sought, whether the position is contested, and whether the election is a primary or general election.[36] For example, participating candidates in a contested legislative primary election receive the average amount of money that similarly situated state senate and house candidates spent in the previous two primary elections.[37]

3. Matching Funds

MCEA provides participating candidates with additional funds beyond the initial allotment if their opponent's expenditure exceeds the original grant. If a privately funded candidate's campaign expenditures, including contributions and independent expenditures, exceed the original public grant amount, a publicly funded candidate can obtain additional public matching funds totaling the difference between the candidates' funds.[38] Additional matching funds are capped at twice the original grant.[39]

B. Clean Money Variations in Practice

MCEA exemplifies the standard Clean Money model, but many variations are used in practice. These programs differ in several ways, including to whom the funding is available and how the public fund is financed.[40]

33. *Id.* § 1125(2-A).
34. *Id.* § 1124(2).
35. *Id.* §§ 1122(2), 1124(1).
36. *Id.* § 1125(8).
37. *Id.*
38. ME. REV. STAT. ANN. tit. 21A, § 1125(9).
39. *Id.*
40. Common Cause, *supra* note 25.

1. Eligible Participants

The most extensive versions of Clean Money programs are available to candidates in several states. Currently, Maine,[41] Arizona,[42] and Connecticut[43] are the only states that offer full public funding[44] for all state elections.[45] Other states offer funding programs only to candidates running for select offices. North Carolina, for example, employs a more limited Clean Money program, which is available only to candidates running for state judicial offices.[46] Similarly, Vermont's Clean Money system is available solely to candidates seeking governor and lieutenant governor positions,[47] and New Mexico provides the option of public funding exclusively to candidates for the Public Regulation Commission.[48] Additionally, New Jersey's pilot program, though recently repealed, was limited to three legislative jurisdictions and only funded state legislative candidates.[49]

2. Financing the Public Fund

Clean Money programs generally obtain funding from several sources to finance the public fund. For example, Maine's program derives revenue from eight sources.[50] Tax revenue is a common funding source among state Clean Money programs. One variation of tax funding, known as tax add-on, gives taxpayers the option of

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41. ME. REV. STAT. ANN. tit. 21A, § 1122(1).

42. ARIZ. REV. STAT. ANN. §§ 16-940 to -961 (2003).

43. CONN. GEN. STAT. §§ 9-600 to -674, 9-700 to -751 (2008).

44. "Full public funding" means that a participating candidate receives 100 percent funding from the government and cannot receive any money from private sources, with the exception of initial seed money, which is a threshold requirement for participation in Clean Money programs. Other types of public funding programs offer partial funding, in which only a portion of election costs is subsidized by the government. In Hawaii, for example, the public funding program provides participating candidates with only 10 to 15 percent of their spending limit, depending on the office. Common Cause, *supra* note 25.

45. Common Cause, *supra* note 25 (mentioning that before its repeal in 2003, Massachusetts had a Clean Money system that was structured similarly to the programs in Maine and Arizona).

46. N.C. GEN. STAT. § 163-278.61 (2009).

47. VT. STAT. ANN. tit. 17, §§ 2851–2883 (2002).

48. N.M. STAT. § 1-19A-2(D) (2003).

49. Common Cause, *supra* note 25. *See* George Amick, *'Clean' Candidates Flourish Elsewhere*, NJ.COM, Dec. 8, 2008, http://www.nj.com/timesoftrenton/stories/index.ssf?/base/columns-0/1228712731193320.xml&coll=5 (noting that the pilot program in New Jersey has been terminated).

50. ME. REV. STAT. ANN. tit. 21, § 1124 (1996).

essentially donating money by either receiving less of a tax refund or just paying more taxes initially.[51] North Carolina, Arizona, and Vermont provide this option.[52]

Another tax-related option, offered in Maine and Arizona, is a tax check-off, which allows taxpayers to allocate a certain amount of money on their tax return to be taken out of the amount owed and does not require an additional payment.[53]

Other funding sources include voluntary donations,[54] residual money left unspent by past participants,[55] and fines imposed for various state offenses. For example, the Arizona program adds a 10 percent surcharge to civil and criminal fines from various traffic- and vehicle-related penalties that goes directly into the fund.[56] Vermont, on the other hand, directs fines collected from violations of the Clean Money program itself back into the public fund.[57]

No matter how these programs fund Clean Money elections, however, many faced legal challenges shortly after their enactment. The constitutional principles on which Clean Money programs rely were first articulated by the United States Supreme Court in the seminal public funding case, *Buckley v. Valeo*.[58]

C. *The Law Supports Clean Money Financing Schemes: The Supreme Court Upholds Public Financing in* Buckley v. Valeo

The principles articulated in *Buckley* provide the foundation for public funding schemes. Clean Money legislation, specifically the trigger provision, consistently faces constitutional challenges under

51. Common Cause, *supra* note 25.

52. ARIZ. REV. STAT. ANN. § 16-954(B) (2003); N.C. GEN. STAT. § 163-278.63(b) (2009); VT. STAT. ANN. tit. 17, § 2856(5) (2002).

53. *See* ARIZ. REV. STAT. ANN. § 16-954(A) (2003); ME. REV. STAT. ANN. tit. 21, § 1124(2)(C) (1996).

54. *See, e.g.*, CONN. GEN. STAT. § 9-751 (2008); ME. REV. STAT. ANN. tit. 21, § 1124(2)(G) (1996); N.C. GEN. STAT. ANN. § 163-278.63(b)(6) (West 2002); VT. STAT. ANN. tit. 17, § 2856(b)(6) (2002).

55. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-954(D) (2003); ME. REV. STAT. ANN. tit. 21, § 1124(2)(E) (1996); N.C. GEN. STAT. § 163-278.63(b)(4) (2002); VT. STAT. ANN. tit. 17, § 2856(b)(6) (2002).

56. ARIZ. REV. STAT. ANN. §§ 12-116.01, 16-954(C) (2003).

57. VT. STAT. ANN. tit. 17, § 2856(c) (2002).

58. 424 U.S. 1 (1976).

the free speech provision of the First Amendment.[59] Most challenges, however, have been unsuccessful, and public funding programs have been upheld.[60]

In *Buckley*, the Supreme Court addressed "by far the most comprehensive reform legislation (ever) passed by Congress concerning the election of the President, Vice-President, and members of Congress."[61] The Court found the majority of the challenged Federal Election Campaign Act ("FECA") 1974 amendments to be constitutional, including provisions limiting individual contributions and expenditures for federal office campaigns and establishing a public funding system for presidential races.[62]

1. *Buckley* Determines That Expenditure Regulations Deserve More Scrutiny Than Contribution Regulations

The *Buckley* Court drew a sharp distinction between limitations on contributions and on expenditures, ultimately upholding the constitutionality of limiting the former but not the latter.[63] The Court opined that expenditure limitations directly inhibit speech protected by the First Amendment because capping the amount of money a person can spend on a political 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."[64]

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59. *See infra* note 60.

60. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-952 (2003); CONN. GEN. STAT. §§ 9-600 to -674, 9-700 to -751 (2008); KY. REV. STAT. ANN. § 121A.030(5)(a) (West 2002) (repealed 2005) (defeating a constitutional challenge before being repealed); ME. REV. STAT. ANN. tit. 21, § 1125(9) (1996); *see also* Daggett v. Comm'n on Gov't Ethics & Election Practices, 205 F.3d 445, 472 (1st Cir. 2000) (upholding as constitutional Maine's matching funds provision corresponding to independent expenditures); Gable v. Patton, 142 F.3d 940, 949 (6th Cir. 1998) ("Absent a clearer form of coercion, we decline to find that the incentives inherent in the Trigger provision are different in kind from clearly constitutional incentives."); Ass'n of Am. Physicians & Surgeons v. Brewer, 363 F. Supp. 2d 1197, 1202–03 (D. Ariz. 2005) (adopting the reasoning in *Daggett* and affirming Arizona's matching funds provision as constitutional); Green Party of Conn. v. Garfield, 537 F. Supp. 2d 359, 392 (D. Conn. 2008) (holding that "triggers do not . . . burden the exercise of political speech").

61. Buckley, 424 U.S. at 7 (quoting Buckley v. Valeo, 519 F.2d 821, 831 (D.C. Cir. 1975)).

62. *Id.*

63. *Id.* at 143.

64. *Id.* at 19.

Conversely, the Court determined that contribution limitations do not directly restrain protected speech because a contribution's expressive value rests solely on the "symbolic act of contributing" rather than on its size.[65] The contribution itself is once removed from being the contributor's political speech because the contributor does not directly dictate how the contribution is used. Rather, the contribution's recipient spends the contribution to promote his or her political message.[66] Consequently, the amount that a contributor donates to a candidate is not germane to the contributor's ability to "speak."

2. *Buckley* Finds Only One Valid Government Interest

One of the most important aspects of the *Buckley* decision is the Supreme Court's finding that only one legitimate government interest justifies infringing on candidates' First Amendment rights in a campaign context: limiting the actuality and appearance of corruption.[67]

The Court acknowledged that the challenged legislation's contribution and expenditure limitations "both implicate[d] fundamental First Amendment interests,"[68] but went on to explain that constitutional rights in the political context are not absolute.[69] Instead, the Court found that while "[t]he First Amendment affords the *broadest protection* to such political expression,"[70] the broadest

65. *Id.* at 21.

66. *Id.* ("[T]ransformation of contributions into political debate involves speech by someone other than the contributor.").

67. *Id.* at 27; *see also* Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985) ("Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.").

68. Buckley v. Valeo, 424 U.S. 1, 23 (1976). The Court said that political speech is protected by the First Amendment because "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates . . . ." *Id.* at 14 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)). The Court also acknowledged that restricting the amount of money a person or group can spend on political communication during a campaign necessarily reduces expression by limiting the number and depth of issues discussed, as well as the size of the audience reached. *Id.* at 19. This is because virtually every means of mass communication costs money. *Id.*

69. *Id.* at 25.

70. *Id.* at 14 (emphasis added).

protection allows government to "abridge" such expression if it presents a "constitutionally sufficient justification"[71] for doing so.[72]

Justice Kennedy's dissent in *McConnell v. Federal Election Commission*,[73] the first campaign finance-related case that the Supreme Court heard after *Buckley*, clarified the standard by which the Court intended "constitutionally sufficient justifications" to be evaluated. Justifications for expenditure limits, Justice Kennedy said, were subject to strict scrutiny, while those for contribution limits were subject to "closely drawn" scrutiny, a less stringent review.[74]

The *Buckley* Court held that preventing corruption or the appearance thereof was a sufficient government justification for legislating contribution limits that infringe on First Amendment rights.[75] On the other hand, the Court found that "[n]o governmental interest that ha[d] been suggested [was] sufficient to justify the restriction on the quantity of political expression imposed by . . . campaign expenditure limitations."[76] The Court drew this distinction because it found the danger of large contributions "buying" political influence[77] and the public perception that large contributions lead to political *quid pro quos*[78] to be legitimate concerns.[79] The Court concluded, however, that personal,[80] independent,[81] and campaign[82]

71. *Id.* at 26.

72. *Id.* at 25.

73. 540 U.S. 93 (2003).

74. *Id.* at 308 (Kennedy, J., dissenting) ("In *Buckley*, we applied 'closely drawn' scrutiny [a less exacting review] to contribution limitations and strict scrutiny to expenditure limitations.").

75. *Buckley*, 424 U.S. at 29.

76. *Id.* at 55.

77. *Id.* at 26 ("[L]arge contributions [may be] given to secure a political *quid pro quo* from . . . office holders.").

78. *Id.* at 27 (defining the appearance of corruption as "public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions").

79. *Id.* at 27 (describing corruption and the appearance thereof as "pernicious practices [that] can never be reliably ascertained [but that are] . . . not . . . illusory").

80. Personal expenditures are those made by a candidate or the candidate's family. *Id.* at 53 (stating that personal expenditures "reduce[] the candidate's dependence on outside contributions and thereby counteract[] . . . coercive pressures and attendant risks of abuse").

81. Independent expenditures are those made by individuals and groups, including political parties that fail to place a candidate on the ballot. *Id.* at 46–47 (stating that independent expenditures do not involve the same possibility of corruption because they are made "independently of the candidate and his campaign," which takes the threat of a *quid pro quo* out of the equation).

expenditures did not pose the same risk of corrupt *quid pro quos* and, therefore, the anticorruption justification did not constitutionally validate expenditure regulations.[83]

Moreover, the Court rejected the government's interest in leveling the playing field[84] to reduce the wealthy "voice" in elections[85] because "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."[86] Further, the Court concluded that a person's First Amendment rights should not be compromised simply because of his or her financial ability to participate more extensively in the political process.[87]

Accordingly, the Court validated only anticorruption as a legitimate government justification for infringing on First Amendment rights, and only with respect to contribution limitations.[88] This determination is momentous because it provides a very narrow basis for constitutional campaign regulation. If a court determines, as it did in *Davis*,[89] that a campaign finance regulatory provision does not further anticorruption efforts, *Buckley* suggests that there is no other constitutionally sufficient purpose to justify it.

3. *Buckley* Deems Public Financing Constitutional

In *Buckley*, the Court ultimately upheld publicly financed presidential elections as constitutionally valid.[90] Its decision hinged on the fact that candidates voluntarily subjected themselves to expenditure limitations, which reduced the otherwise

82. Campaign expenditures are those made for the candidate's campaign by the candidate or "any other person that is 'authorized or requested' by the candidate." *Id.* at 55 n.60; *see also id.* at 55 ("[A]lleviating the corrupting influence of large contributions is served by . . . contribution limitations and disclosure provisions rather than by . . . campaign expenditure ceilings.").

83. *Id.* at 45, 53, 55.

84. *Id.* at 48 (stating that equalizing the playing field is "equalizing the relative ability of individuals and groups to influence the outcome of elections").

85. *Id.* at 25.

86. *Id.* at 48–49.

87. *Id.* at 49.

88. *Id.*

89. Davis v. Federal Election Comm'n, 128 S. Ct. 2759, 2773 (2008). *See* discussion *infra* Part III.A.

90. *Buckley*, 424 U.S. at 142–43.

unconstitutional burden[91] and made the public funding scheme legitimate.[92]

The plaintiffs argued that the funding scheme was inconsistent with the First Amendment right to freedom of speech.[93] The Court flatly rejected the claim and asserted an electorate-centered understanding of the First Amendment with which public funding comports. It stated that public financing "facilitate[s] and enlarge[s] public discussion and participation in the electoral process, goals vital to a self-governing people . . . [and does] not abridge[] pertinent First Amendment values."[94]

III. *DAVIS V. FEDERAL ELECTION COMMISSION*: DEBASING TRIGGER-BASED PUBLIC FINANCING

In June 2008, the Court decided *Davis*, which struck down the Millionaire's Amendment, a federal statutory provision that created asymmetrical[95] funding regulations for self-funded and non-self-funded U.S. House of Representatives candidates.[96] The regulations were asymmetrical because they held self-funded candidates to standard campaign finance regulations, while imposing less stringent fundraising limitations on non-self-funded candidates upon the occurrence of a triggering event.[97]

Although *Davis* does not directly implicate Clean Money public financing, it calls into question the constitutionality of trigger mechanisms. What is troublesome to the future of Clean Money programs is not so much the *Davis* holding as the Court's discussion in reaching its conclusion: namely, the Court's endorsement of *Day*

91. *Id.* at 50 (noting that expenditure limitations unconstitutionally burden First Amendment rights).

92. *Id.* at 100–02.

93. *Id.* at 90, 92.

94. *Id.* at 92–93.

95. Davis v. Federal Election Comm'n, 128 S. Ct. 2759, 2771 (2008) (explaining that the funding was asymmetrical because it "impose[d] different contribution limits for candidates who are competing against each other").

96. *Davis*, 128 S. Ct. 2759 (finding the Millionaire's Amendment to be unconstitutional).

97. *Compare* 2 U.S.C. § 441a (2006) (laying out the standard federal campaign finance limitations), *with* 2 U.S.C. § 441a-1 (setting out campaign finance limitations for non-self-funded candidates campaigning against a self-funded opponent). For more details about the Millionare's Amendment's provisions, see discussion *infra* Part III.A.

v. Holahan and its revitalization of *Buckley*'s holding that equalizing the financial playing field is not a legitimate government interest.[98]

A. Davis v. Federal Election Commission*: How Many People Does It Take to Fund a Campaign?*

In *Davis*, the Supreme Court considered the constitutionality of section 319(a) and (b) of the Bipartisan Campaign Reform Act of 2002 ("BCRA"),[99] also known as the Millionaire's Amendment.[100] Section 319(a) provided that if a self-funded candidate's personal expenditures exceeded those of a non-self-funded candidate by at least $350,000, the latter received relaxed fundraising limitations.[101] Specifically, the non-self-funded candidate would have unlimited access to coordinated party expenditures—expenditures by political party committees on behalf of their candidates[102]—while the self-funded candidate would be restricted to the current $40,900 limitation.[103] The non-self-funded candidate would also be entitled to a more relaxed individual contribution limit that was three times greater than that of the self-funded candidate.[104] For example, the Millionaire's Amendment raised the contribution limit from $2,300 to $6,900 per individual contributing to plaintiff Jack Davis's non-self-funded opponent's campaign, while the $2,300 contribution limit remained for donations made to Davis.[105]

The Millionaire's Amendment created a formula to determine when to enact asymmetrical funding. The formula added a

98. *Davis*, 128 S. Ct. at 2772, 2759.

99. 2 U.S.C. § 441a-1. This Article references the statute challenged in *Davis* as "BCRA § 319(a) and (b)" or the "Millionaire's Amendment" to maintain consistency with the language in the *Davis* opinion. In actuality, however, BCRA § 319 was merely the conduit that added the true statutory provisions at issue: Federal Election Campaign Act of 1971 ("FECA") § 315A(a) and (b). *Davis*, 128 S. Ct. at 2766 n.3.

100. *Davis*, 128 S. Ct. at 2766–67.

101. *Id.* at 2770. If a non-self-funded candidate received relaxed funding limitations and as a result exceeded the $350,000 difference as compared to his or her opponent, then he or she would once again be subject to the original limitations. *Id.*

102. R. SAM GARRETT & L. PAIGE WHITAKER, CONGRESSIONAL RESEARCH SERVICE: LIBRARY OF CONGRESS, COORDINATED PARTY EXPENDITURES IN FEDERAL ELECTIONS: AN OVERVIEW (2007), http://fpc.state.gov/documents/organization/84325.pdf.

103. Price Index Increases for Expenditure and Contribution Limitations, 72 Fed. Reg. 5294 (Feb. 5, 2007) (limiting national and state political party committee expenditures to $40,900 for House of Representative elections in states with more than one House seat).

104. *Davis*, 128 S. Ct. at 2766.

105. *Id.* at 2766–67. Though legally entitled to additional funding, Davis's opponent never exceeded the normal contribution limits. *Id.*

candidate's personal expenditures to 50 percent of his or her funds from other sources for the election at issue, the sum of which was a statistic called the opposition personal funds amount ("OPFA").[106] A difference greater than $350,000 between two candidates' OPFAs triggered the application of asymmetrical limitations.[107] To monitor the candidates' OFPAs, section 319(b) provided several disclosure requirements and timelines.[108]

Davis—a self-funded[109] U.S. House of Representatives candidate—claimed that section 319(a) unconstitutionally burdened his First Amendment right to make unlimited expenditures.[110] He argued that section 319(a) inhibited him from making expenditures because it used his expenditures to determine when his opponent could acquire additional funding that would theoretically be used to finance speech injurious to his campaign.[111] The Court sided with Davis, holding that the Millionaire's Amendment violated his First Amendment right to spend freely on his own campaign.[112]

B. *Davis* Threatens the Legal Foundation of Clean Money Financing

Two components of the Court's opinion are particularly disconcerting for the future of Clean Money programs. First, the Court subjected section 319(a) to strict scrutiny, and contrary to prior campaign finance jurisprudence suggesting a broadening trend in defining the government's anticorruption interests,[113] reverted to

106. *Id.* at 2766 n.5. The OPFA is measured at specified dates throughout the year prior to the election. *Id.* at 2766.

107. *Id.* at 2766 n.5.

108. 2 U.S.C. § 441a-1(b)(1)(B)–(D) (2006) (requiring self-financing candidates to file three types of disclosures: (1) a "declaration of intent" specifying the amount of personal funds over $350,000 that the candidate anticipates spending within fifteen days of entering the race; (2) an "initial notification" within twenty-four hours of reaching $350,000; and (3) an "additional notification" for every additional $10,000 expenditure over $350,000 within twenty-four hours of making it).

109. *Davis*, 128 S. Ct. at 2767 (noting that during his 2004 campaign, Davis spent over $1.2 million of his own money, which made up the majority of his funding, and in 2006, Davis personally financed all but $126,000 of his $2.3 million campaign expenditures).

110. *Id.*

111. *Id.* at 2770.

112. *Id.* at 2771–74; *cf.* Buckley v. Valeo, 424 U.S. 1, 51–54 (1976) (holding that federal candidates can spend limitlessly toward their campaigns because it is a violation of First Amendment rights for FECA to regulate a federal candidate's personal campaign expenditures).

113. *See generally* Richard L. Hasen, Buckley *Is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L.

Buckley's narrower application of the anticorruption justification.[114] Second, the Court endorsed *Day*, evidencing the Court's current unfavorable disposition towards the constitutionality of Clean Money trigger-based programs.

1. *Davis* Stunts a Judicial Trend of a Liberal *Buckley* Application

Davis applied *Buckley*'s public funding-related holding that "equalizing the relative financial resources of candidates"[115] is not a legitimate or compelling government interest.[116] Though *Buckley*'s holding was never overturned, in the years following the decision, the Supreme Court and lower courts seemed to broaden the scope of the anticorruption government interest laid out in *Buckley* by recognizing financial equality in the electoral process as an important and valid governmental consideration.[117]

Austin v. Michigan Chamber of Commerce,[118] for example, demonstrates this broadening trend.[119] In *Austin*, the Court upheld corporate expenditure limitations for the first time by applying an expanded definition of government anticorruption interests. Specifically, the Court veered away from *Buckley*'s understanding of anticorruption, which amounted to avoiding political *quid pro quos*,[120] and recognized 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."[121] The Court seemed to embrace the

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REV. 31, 43 (2004) (discussing a shift in the 2000s that "sufficiently expanded the definitions of 'corruption' and 'the appearance of corruption' to justify campaign finance regulation").

114. *Davis*, 128 S. Ct. at 2773 ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." (alterations in original) (quoting Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985))).

115. *Id.* at 2771 (quoting *Buckley*, 424 U.S. at 54).

116. *Id.* at 2771–75.

117. *See* Hasen, *supra* note 113, at 31 ("[I]t appears that the Court's jurisprudence is moving in the direction [of] . . . upholding campaign finance laws that promote a kind of political equality . . . 'to democratize the influence that money can bring to bear upon the electoral process . . . .'" (quoting Stephen Breyer, Our Democratic Constitution, 77 N.Y.U. L. REV. 245, 253 (2002)).

118. 494 U.S. 652 (1990).

119. *Id.* at 659–60 (describing a broadened concept of corruption).

120. *Buckley*, 424 U.S. at 26–27.

121. Austin v. Mich. Chamber of Commerce, 494 U.S. at 660.

government's financial equalization interest, but avoided a direct conflict with *Buckley* by labeling it a "different type of corruption," [122] thus folding it into an anticorruption rationale.

Also significant in this *Buckley* expansion was Justice Breyer's concurrence in *Nixon v. Shrink Missouri Government PAC.* [123] He offered that the Court cannot literally interpret *Buckley*'s proposition that the First Amendment does not support a "government [that] may restrict the speech of some elements of our society in order to enhance the relative voice of others . . . ." [124] To the contrary, Justice Breyer said that "[t]he Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many . . . ." [125] Further, Justice Breyer advocated that the Court should defer to the legislature's judgment as to whether "unlimited spending threatens the integrity of the electoral process" [126] rather than place an absolute ban on certain electoral monetary regulations. [127]

Lower courts also took a less-than-literal approach to interpreting *Buckley*. For example, the court in *Daggett v. Commission on Governmental Ethics & Election Practices* [128] found that the state's matching-funds provision, which was triggered by independent contributions made to nonparticipating candidates (i.e., funding contributed by individuals other than the candidate), was constitutional. It reasoned that the matching-funds provision was crucial in reaching "the state's goal of distributing roughly proportionate funding, albeit with a limit, to publicly funded candidates." [129] Thus, the court acknowledged, and seemingly accepted, the state's interest in leveling the financial field.

Davis's explicit statement that the Constitution does not permit the government to "level electoral opportunities," [130] however, provides support for future trigger-related Clean Money challenges.

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122. *Id.*
123. 528 U.S. 377 (2000).
124. *Buckley*, 424 U.S. at 48–49.
125. *Shrink*, 528 U.S. at 402.
126. *Id.* at 403–04.
127. *Id.*
128. 205 F.3d 445 (1st Cir. 2000).
129. *Id.* at 470.
130. Davis v. Federal Election Comm'n, 128 S. Ct. 2759, 2773 (2008).

Clean Money opponents now have a Supreme Court opinion to combat several years' worth of campaign-reform-friendly jurisprudence.

2. *Davis* Alludes to Clean Money by Citing *Day v. Holahan*

The *Davis* Court also adopted precedent that was antithetical to the majority of cases upholding Clean Money legislation. Specifically, the *Davis* majority cited *Day v. Holahan*,[131] an Eighth Circuit case finding that Clean Money triggers violate the First Amendment.[132] The *Day* court concluded that increasing a candidate's spending limits and granting him or her an additional public subsidy as a direct result of an opponent's supporter's independent expenditure "chills the free exercise of that protected speech."[133] This "chilling," the court explained, leads to self-censorship, which is "no less a burden on speech that is susceptible to constitutional challenge than is direct government censorship."[134]

Prior to *Davis*, many lower courts discredited *Day*. They adopted *Buckley*'s electorate-centered view of the First Amendment that trigger provisions further First Amendment purposes rather than obstruct them as *Day* suggested.[135] Additionally, courts had the ability to reject *Day* because the Supreme Court had not spoken specifically on the issue.[136] The Court seemed to quietly accept, if

131. 34 F.3d 1356 (8th Cir. 1994).

132. *Id.* at 1361.

133. *Id.* at 1360.

134. *Id.*

135. *See, e.g.*, North Carolina Right to Life Comm. Fund v. Leake, 524 F.3d 427, 437–38 (4th Cir. 2008) (rejecting plaintiffs' reliance on *Day*'s "unpersuasive" decision that matching funds chill speech, because *Day* relied on a flimsy comparison to a factually distinguishable case in order to support its conclusion); Daggett v. Comm'n on Gov't Ethics & Election Practices, 205 F.3d 445, 464–465 (1st Cir. 2000) (rejecting the "logic of *Day*" because it "equate[d] responsive speech with an impairment to the initial speaker" and mischaracterized the First Amendment's protection of speech because it provided "no right to speak free from response," but rather should "secure the 'widest possible dissemination of information from diverse and antagonistic sources'" (citations omitted)); Green Party of Conn. v. Garfield, 537 F. Supp. 2d 359, 391 (D. Conn. 2008) ("reject[ing] *Day*'s logic" on the grounds that while "[a]n individual or candidate may decide, as a strategic matter, not to speak as a result of the campaign financing system . . . he is in no way prohibited from exercising his right to free speech"); Ass'n of Am. Physicians & Surgeons v. Brewer, 363 F. Supp. 2d 1197, 1202 (D. Ariz. 2005) (adopting the reasoning in *Daggett* because cases following *Day* "cast doubt" on the decision).

136. Many of the appellate cases that challenged trigger-based matching-funds provisions were denied a writ of certiorari. *See, e.g.*, North Carolina Right to Life Comm. Fund v. Leake, 524 F.3d 427 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 490 (2008); Rosenstiel v. Rodriguez, 101

not approve, the national campaign finance reform movement by refusing invitations to review Clean Money constitutional challenges.

Davis instantly burst any notion of implied authorization. Though *Davis* does not explicitly discuss matching funds or the trigger provisions addressed in *Day*, it resurrected *Day*'s precedent, suggesting the direction in which the Court, and lower courts following its lead, will head. *Davis* uses *Day* indirectly to make the point that an asymmetrical funding scheme [137] triggered by personal campaign expenditures penalizes self-funded candidates for exercising protected First Amendment rights, [138] just as the *Day* court held that trigger-based funding penalizes an individual for making an independent expenditure in favor of his or her candidate of choice. [139] The Court's parallel here is hard to ignore. It will be difficult for lower courts not to make the same connection. *Davis*'s endorsement of *Day* will make courts think twice before rejecting *Day*'s precedent as they so often did before *Davis*. [140]

C. The Likely Demise of Clean Money Financing After *Davis*

The Supreme Court decided *Davis* less than a year ago, but the decision has already stifled Clean Money programs. For example, in *McComish v. Brewer*, [141] a U.S. district court in Arizona interpreted *Davis* broadly to suggest that trigger-based funding is unconstitutional. The Court denied the plaintiffs' motion for a preliminary injunction to prevent candidates from participating in Arizona's Clean Money program. The *McComish* court cited *Davis* as controlling precedent and expressed a broad, rather than fact-specific, interpretation of the *Davis* decision.

F.3d 1544 (8th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997); Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995).

137. Davis v. Federal Election Comm'n, 128 S. Ct. 2759, 2771 (2008) (describing the section 319(a) asymmetrical funding scheme as "discriminatory fundraising limitations").

138. *Id.* at 2771–72.

139. *Day*, 34 F.3d at 1360.

140. *But see The Supreme Court, 2007 Term-Leading Cases*, 122 HARV. L. REV. 375, 385 (2008) (opining that *Davis* was intended to, and will, be read narrowly to apply only to asymmetrical expenditure limits and will not "stretch" to implicate the constitutionality of asymmetrical funding schemes).

141. No. CV-08-1550-PHX-ROS, 2008 U.S. Dist. LEXIS 83307 (D. Ariz. Oct. 17, 2008).

> [T]he *Davis* [C]ourt focused not merely on the fact that the contributions limit differs for participating and non-participating candidates, but on the fact that "the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics." . . . [It] expounded on the constitutional dangers of such a scheme, writing that while one does not "have the right to be free from vigorous debate," one "*does* have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of opponents." [142]

Thus, *McComish* suggests that all existing Clean Money legislation is endangered.

Some may argue that the *McComish* court's refusal to grant a preliminary injunction indicates that *Davis* will not be successful in derailing Clean Money programs. The court only denied the motion, however, because participating candidates would have been drastically handicapped in the rapidly approaching election if the motion were granted and funds were immediately revoked. [143] This reasoning indicates that its denial of the motion does not foreshadow the court's ultimate conclusion regarding the program's constitutionality. To the contrary, in its evaluation of the motion, the court got a glimpse of the merits [144] and made no secret of its opinion that plaintiffs had a "very strong likelihood of success on the merits." [145] Therefore, despite the small victory for Clean Money with respect to the motion for a preliminary injunction, it is likely that Arizona's Clean Money program will eventually face more significant setbacks following *McComish* as a result of *Davis*.

Legislators, as well as jurists, are interpreting *Davis* broadly and halting their campaign finance initiatives. In New Jersey, for example, efforts to develop a Clean Money program known as the

142. *Id.* at *19 (quoting *Davis*, 128 S. Ct at 2772) (emphasis in original).

143. *Id.* at *35–36.

144. *Id.* at *11 (indicating that the two Ninth Circuit standards of review for preliminary injunctions require the court to evaluate each case's likelihood of success on the merits).

145. *Id.* at *36.

2009 New Jersey Fair and Clean Elections Pilot Project Act[146] officially ceased as a result of *Davis* and *McComish*.[147] The New Jersey Legislature met during summer 2008 to determine how *Davis* would affect its own "rescue funds" provision.[148] It concluded that the provision was unconstitutional in light of the recent Supreme Court decision, and that the Clean Money legislation would be ineffective without that provision.[149]

In sum, *Davis*'s holding quickly resonated throughout the public funding world. It has already left its mark on the Clean Money public funding landscape by impeding Clean Money programs, such as the Arizona program in *McComish*, and prompting the elimination of others, such as the pilot program in New Jersey.

IV. *DAVIS* SHIFTS THE COURT'S FOCUS FROM ELECTORATE-CENTERED TO CANDIDATE-CENTERED FIRST AMENDMENT INTERPRETATION

Until *Davis*, courts typically took an electorate-centered position when evaluating the interplay between public funding and the First Amendment. Specifically, pre-*Davis* courts viewed trigger-based matching funds as furthering the First Amendment's purpose by enabling and encouraging political speech.[150] This interpretation is

146. Center for Competitive Politics, *Wishful Thinking*, http://www.campaignfreedom.org/blog/id.681/blog_detail.asp (Aug. 18, 2008).

147. New Jersey Election and Finance Law Blog, *New Jersey Clean Elections Program Dead—For Now*, http://eleclaw.blogspot.com/2008/09/new-jersey-clean-elections-program-dead.html (Sept. 2, 2008, 08:18 EST) (referencing *Federal Court Effectively Kills NJ Clean Elections*, POLITICKERNJ.COM, Sept. 2, 2008, http://www.politickernj.com/editor/23014/federal-court-effectively-kills-nj-clean-elections).

148. Rescue funds allot candidates competing against high spenders up to $75,000 and an additional $75,000 if faced with attacking issue-advocacy groups. Gregory J. Volpe, *Court Ruling May Affect Election Finance: Clean Elections Program in N.J. Aids Those Running Against Rich Opponents*, DAILYRECORD.COM, July 6, 2008, http://www.webberforassembly.com/news/DR-CourtRulingMayAffectElectionFinance.pdf.

149. New Jersey Election and Campaign Finance Law Blog, *Legislators to Meet to Address Rescue Funds Provision for Clean Elections Program Reauthorization*, http://eleclaw.blogspot.com/2008/08/legislators-to-meet-to-address-rescue.html (Aug. 4, 2008, 12:36 EST). *See also* Matt Friedman, *Panel Meets to Determine Clean Elections Future*, POLITICKERNJ.COM, Aug. 4, 2008, http://www.politickernj.com/matt-friedman/22011/panel-meets-determine-clean-elections-future (reporting legislators' recognition that "[i]t would be very difficult to convince candidates to [participate] without rescue money" (quoting New Jersey Senator Bill Baroni)). *But see* Election Law Blog, "Clean Elections on its Death Bed," http://electionlawblog.org/archives/011488.html (Sept. 8, 2008, 08:34 PST) (suggesting that "the Arizona decision is a fig leaf for shelving the New Jersey public financing program").

150. *See, e.g.*, Daggett v. Comm'n on Gov't Ethics & Election Practices, 205 F.3d 445, 464 (1st Cir. 2000) ("[T]he provision of matching funds does not indirectly burden donors' speech

electorate-centered because it allows campaign finance regulations and the First Amendment to coincide, which this author believes is in the best interests of the electorate, or voting public. The electorate should hear from all candidates to relatively equal degrees because it enables the most informed and most genuinely democratic electoral process.[151] Clean Money trigger-based programs are electorate-centered because they increase speech-enabling funding for participating candidates and balance the information available to voters, both of which advance the electorate's interests.

By contrast, a candidate-centered approach to the First Amendment as it applies to matching public funds merely promotes the best interests of an individual candidate's campaign. That type of system produces a disproportionate amount of information from candidates who are best financially equipped to spread their message. This is undesirable because it can potentially skew electoral results by altering the amount and balance of information the electorate has to form political opinions and ultimately to cast an intelligent vote.

A. Perspectives of the First Amendment and Democracy Shape the Electorate's Best Interests

What exactly are the electorate's "best interests"?

The answer to this question goes directly to the long-standing debate about the First Amendment's role. Traditionally, the First Amendment's objective was understood as "a shield, as a means of protecting the individual speaker from being silenced by the state."[152] This perspective views government regulation as inherently adverse to free speech, so that protecting autonomy of the individual speaker is in the collective's best interest.[153] *Davis*'s candidate-centered approach mimics this understanding of the First Amendment.

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and associational rights. Appellants misconstrue the meaning of the First Amendment's protection of their speech. They have no right to speak free from response—the purpose of the First Amendment is to secure the widest possible dissemination of information from diverse and antagonistic sources." (internal citations omitted)). *But see* Day v. Holahan, 34 F.3d 1356, 1366 (8th Cir. 1994) (holding that providing a candidate with additional funds when expenditures made on behalf of an opponent reach a certain level "impairs" the opponent's supporters' political speech).

151. There is much debate over democracy and its interplay with the electoral process. *See* discussion *infra* Part IV.A.

152. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408 (1986).

153. *Id.*

Alternatively, the electorate-centered approach is based on a different understanding of the First Amendment's purpose. It sees free speech as a conduit to democracy, understood to be a "promise[] [of] collective self-determination—a freedom to the people to decide their own fate—and presupposes a debate on public issues that [is uninhibited]."[154] The electorate-centered approach shifts the First Amendment's protectee from the "soapbox"[155] speaker to the listener[156] because it recognizes that government regulation of the electoral process can facilitate democracy.

Davis's candidate-centered approach, which protects autonomy in the electoral context, conflicts with a true democracy's goal of selecting representation "because we believe it the best, not because it is the only thing we know."[157] Clean Money programs exemplify government action that establishes and regulates a framework that furthers a genuine democracy. They provide the electorate with diverse information from a variety of political schools of thought, thereby affording the public the best opportunity to elect truly representative candidates. An unregulated candidate-centered system, on the other hand, "produce[s] a public debate that is dominated by those who are economically powerful,"[158] and therefore breeds default representatives. The preservation of a true American democracy should be at the forefront of the First Amendment's agenda.

B. Judicial Evolution of First Amendment Interpretation from *Buckley's* Electorate-Centered Approach to *Davis's* Candidate-Centered Approach

The *Buckley* Court articulated its electorate-centered mentality when it stated that "the central purpose of the Speech and Press Clauses [is] to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative

154. *Id.* at 1407.
155. *Id.* at 1408.
156. *Id.* at 1417.
157. *Id.* at 1416.
158. *Id.* at 1412.

democracy flourish."[159] The Court viewed public funding as a means to "facilitate and enlarge public discussion and participation in the electoral process" and not to "abridge, restrict or censor speech . . . ."[160] It conducted its public funding evaluation through an electorate-centered lens by supporting the electorate's access to more political information with which to create an intelligent, democratic electoral process.[161]

Other courts also recognized the value in establishing an electorate-centered system, and this arguably influenced their legal discussions about trigger provisions. For example, in *Wilkinson v. Jones*,[162] the court stated that "the trigger provision promotes more speech, not less."[163] Additionally, the court in *Rosenstiel v. Rodriguez*[164] agreed that "the State's scheme[165] promotes, rather than detracts from, cherished First Amendment values."[166] Hence, courts valued and prioritized a heightened level of political discourse that not only benefits an individual candidate in his or her campaign,[167] but also provides the voting public with the tools to make a truly informed decision.[168]

Davis represents a noticeable departure from this priority. Rather than follow the electorate-centered analysis—giving

159. Buckley v. Valeo, 424 U.S. 1, 93 n.127 (1976) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

160. *Id.* at 92–93.

161. Kenneth N. Weine, *Triggering the First Amendment: Why Campaign Finance Systems That Include "Triggers" Are Constitutional*, 24 J. LEGIS. 223, 235 (1998) ("Because democracy requires a diverse discourse, First Amendment jurisprudence embraces the government's financing of a competing speaker.").

162. Wilkinson v. Jones, 876 F. Supp. 916 (W.D. Ky. 1995).

163. *Id.* at 928.

164. 101 F.3d 1544 (8th Cir. 1996).

165. The scheme's trigger provision provided an "expenditure limitation waiver, which permit[ted] a publicly financed candidate to exceed the expenditure limits while retaining the public subsidy when opposed by a nonparticipating candidate who ha[d] spent or received contributions beyond the triggering amounts spelled out in the statute . . . ." *Rosenstiel*, 101 F.3d at 1551.

166. *Id.* at 1552.

167. Republican Nat'l Comm. v. Fed. Election Comm'n, 487 F. Supp. 280, 285 (S.D.N.Y. 1980) ("[T]he total amount raised and spent by each candidate, and hence the candidate's speech power, would be increased by the sums contributed from the public coffers . . . .").

168. Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976) (stating that "[d]emocracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues").

significant weight to the value of "enlarged public discussion"[169]—the Court voiced an alternative perspective. Indeed, *Davis* focused on the impact that the Millionaire's Amendment had on individual candidates rather than on the electorate at large. The opinion gave more weight to the "penalty"[170] that the amendment imposed on candidates' First Amendment right to make political expenditures,[171] than to the First Amendment goal of "secur[ing] the 'widest possible dissemination of information from diverse and antagonistic sources . . . .'"[172]

The Court's view that giving one candidate additional funding reduces another candidate's speech implies that campaigning is a zero-sum game, a tug-of-war among candidates that necessarily takes from one what it gives to another.[173] This view reduces the campaigning process to a finite pool of benefits and burdens that are distributed among the candidates, and eliminates the electorate's interests as a key consideration.

V. CONCLUSION

Davis undoubtedly attacks the core of Clean Money public funding schemes. Though the debate rages on, it is hard to ignore the tacit implications of its holding. The Tom Perriellos of the world[174] might continue to symbolically rip Exxon stickers from their cars and "fight for you" despite the lack of assistance available to them to run a competitive campaign. But to what end and for what purpose? Without structured programs to help candidates unlock the golden handcuffs offered by "big money" donors, they will willingly stay locked in, because there is no alternative.

Unless Clean Money programs remain viable, American democracy will continue to be tainted by the by-product of an unregulated, money-demanding campaigning system resulting in a

169. *Id.* at 92–93.

170. Davis v. Federal Election Comm'n, 128 S. Ct. 2759, 2771 (2008).

171. *Buckley*, 424 U.S. at 48 (finding that capping independent expenditures is unconstitutional because it does not satisfy any substantial government interest and because it heavily burdens the protected First Amendment right to "vigorous advocacy").

172. *Id.* at 49 (internal citation omitted).

173. *Davis*, 128 S. Ct. at 2780 (Stevens, J., dissenting) ("Extrapolating from the zero-sum nature of a political race, Davis insists that any benefit conferred upon a self-funder's opponent thereby works a detriment to the self-funding candidate.").

174. *See supra* Part I.

less than adequately informed electorate. Given the critical importance that money plays in elections, legislatures must be free to implement appropriate and effective remedies. Clean Money has proven to be one of the most successful means to combat this unfortunate reality, yet the *Davis* opinion strikes at the heart of the Clean Money framework. With the trigger mechanism in question, it is safe to say that Clean Money faces a muddy future.