

DAVIS v. FEC: THE FIRST AMENDMENT RIGHTS OF A WEALTHY CANDIDATE

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I. INTRODUCTION

In a 5-4 opinion with multiple dissents, the Supreme Court struck down a federal law that increased the campaign contribution limits applicable to a Congressional candidate whose opponent exceeded a threshold amount of personal expenditures.¹ Congress passed the law as part of a congressional effort to limit the influence of campaign contributions on national elections.² According to the majority, the Bipartisan Campaign Reform Act of 2002 (“BCRA”), or the “Millionaire’s Amendment,” violated the First Amendment because it operated as a significant burden on the ability of candidates to self-finance their own campaigns.³ Moreover, the BCRA did not serve any compelling state interest that would justify the imposition of such a burden on a candidate’s ability to finance his own political speech.⁴ The Court’s decision reversed a District Court ruling that had upheld the constitutionality of the law on the grounds that the BCRA did not operate as a burden on the ability of a self-financed candidate to fund his campaign because it merely allowed his opponent to increase his political speech through greater contribution limits.⁵ The ruling in *Davis* was largely based on *Buckley v. Valeo*, a Supreme Court decision handed down thirty-two years earlier that held that limits on personal expenditures were subject to more scrutiny than contribution limits.⁶

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1. *Davis v. FEC* (*Davis*), 128 S. Ct. 2759 (2008).

2. *Davis v. FEC* (*Davis v. FEC*), 501 F. Supp. 2d 22, 25 (D.D.C. 2007).

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

4. *Id.* at 2772–73.

5. *Davis v. FEC*, 501 F. Supp. 2d at 29.

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

One of the Supreme Court's central conclusions in *Davis* was that the only compelling state interests that can justify "a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech" are reducing corruption or the appearance of corruption.⁷ Although Justice Stevens, in a dissent joined by Justice Souter, advocated abandoning the disparate treatment of expenditure and contribution limits established by prior precedent,⁸ the Court was not persuaded by the dissenting Justices' reasoning and instead scrutinized the BCRA very closely because it was "a limit on personal expenditures."⁹

II. FACTUAL AND PROCEDURAL HISTORY

Congress passed the BCRA to limit the influence of wealth on national elections.¹⁰ One element of the BCRA was the so-called "Millionaire's Amendment," which increased the amount of contributions a candidate for the U.S. House of Representatives could receive from individual donors when his opponent's personal expenditures exceeded a certain amount.¹¹ The Millionaire's Amendment was enacted in response to the Supreme Court's decision in *Buckley v. Valeo*, which upheld strict campaign contribution limits but struck down similar limits on a candidate's personal expenditures.¹²

Under the Millionaire's Amendment, when a candidate's expenditure of personal funds caused the "opposition personal funds amount" ("OPFA") to exceed \$350,000, the opposing candidate could receive individual contributions of \$6,900, or three times the normal limit of \$2,300.¹³ The OPFA "is a statistic that compares the

7. See *Davis*, 128 S. Ct. at 2772–73 (holding that the burden the Millionaire's Amendment places on the self-financed candidate "is not justified by any governmental interest in eliminating corruption or the perception of corruption" because the Court had previously held that "reliance on personal funds reduces the threat of corruption").

8. *Id.* at 2778 (Stevens, J., dissenting).

9. *Id.* at 2772.

10. *Davis v. FEC*, 501 F. Supp. 2d at 25.

11. See 2 U.S.C. § 441a-1(a) (2006). There were also disclosure requirements for any candidate who intended to spend personal funds in excess of \$350,000 as well as disclosure requirements once the candidate actually spent over \$350,000 of his own funds. See §441a-1(b)(1).

12. *Buckley v. Valeo*, 424 U.S. 1, 51–54 (1976).

13. 2 U.S.C. § 441a-1(a)(1)(A)–(C).

expenditure of personal funds by competing candidates and also takes into account to some degree certain other fundraising.”¹⁴

Despite the requirements of the Millionaire’s Amendment, Jack Davis relied on his personal wealth to finance two unsuccessful Congressional campaigns in 2004 and 2006.¹⁵ Davis spent close to \$1.2 million of his own funds in 2004 and \$2.275 million of his own funds in 2006.¹⁶ Davis’s opponent spent no personal funds and did not receive any contributions above the normal limits even though he was eligible to receive an extra \$1.5 million as a result of Davis’s personal expenditures.¹⁷

In June of 2006, Davis filed suit against the Federal Election Commission (FEC) in District Court for the District of Columbia arguing that the Millionaire’s Amendment should be held unconstitutional on its face and that the FEC should be enjoined from enforcing it during the 2006 election.¹⁸ Davis and the FEC both moved for summary judgment, and the FEC’s motion was granted by a three-judge panel in the District Court.¹⁹

According to the District Court, to prove a First Amendment violation, Davis needed to demonstrate that the Millionaire’s Amendment burdened the exercise of political speech and that it was not narrowly tailored to serve a compelling state interest.²⁰ The court concluded that the Millionaire’s Amendment did not burden the exercise of political speech because “[i]t place[d] no restrictions on a candidate’s ability to spend unlimited amounts of his personal wealth.”²¹ The increased contribution limits of the Millionaire’s Amendment were “similar to statutes that permit higher contribution limits for candidates who agree to public financing of their campaigns.”²²

Instead of restricting political speech, the court believed that the Millionaire’s Amendment “correct[ed] a potential imbalance in resources available to each candidate.”²³ Also, the court dismissed

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

15. *Id.* at 2767.

16. *Id.*

17. *Id.*

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

19. *Davis v. FEC*, 501 F. Supp. 2d. at 27.

20. *Id.* at 28 (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990)).

21. *Id.* at 29.

22. *Id.*

23. *Id.*

Davis's argument that the Millionaire's Amendment chilled political speech;²⁴ the court noted that he spent well over \$350,000 of his own funds during each campaign, so it was clear his own speech was not chilled.²⁵ Finally, the District Court upheld the Millionaire's Amendment's disclosure requirements²⁶ because they did not "burden [one's] First Amendment right to participate freely in political activities."²⁷

The Supreme Court heard Davis's appeal of the District Court decision because the BCRA designates it as the exclusive avenue for appellate review.²⁸ The Supreme Court reversed the judgment of the District Court and held that the Millionaire's Amendment violated the First Amendment by burdening political speech in furtherance of the impermissible goal of equalizing electoral opportunities.²⁹

III. HOLDING

Justice Alito delivered the majority opinion in the 5-4 decision. The majority held that the increased contribution limits triggered when the OPFA passed \$350,000 were a burden on the self-financing candidate because they discouraged personal expenditures by the candidate.³⁰ The Court reasoned that "[w]hile BCRA does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right."³¹ Thus, the Millionaire's Amendment "impermissibly burdens [Davis's] First Amendment right to spend his own money for campaign speech."³²

24. *Id.* at 31–32 (Davis argued that the Millionaire's Amendment would chill personal expenditures for candidates who "abhor" the corrupting influence of special interest contributions because personal expenditures over \$350,000 would increase the amount of corrupting contributions the opposing candidate could receive.).

25. *Id.* at 32.

26. *See* 2 U.S.C. §441a-1(b)(1)(The disclosure requirements included: 1) Declaring how much personal expenditures in excess of \$350,000 the candidate plans on spending; 2) Notifying the other candidate within 24 hours of spending \$350,000 in personal funds and 3) Notifying the other candidate within 24 hours of making every additional \$10,000 in personal expenditures over \$350,000.).

27. *Id.* at 32.

28. *See* 2 U.S.C. § 403 (2006); 2 U.S.C. § 437h (2006) (establishing the procedures and jurisdiction for judicial review on the constitutionality of the BRCA).

29. *Davis v. FEC* (*Davis*), 128 S. Ct. 2759, 2770 (2008).

30. *See id.* at 2771 (holding that some candidates would continue to make personal expenditures over \$350,000, but some would be discouraged by the Millionaire's Amendment).

31. *Id.*

32. *Id.*

The Court was eager to cast the holding as a consistent application of the principles explicated in *Buckley v. Valeo*.³³ In *Buckley*, the Court struck down a cap on the personal funds a candidate could spend on political speech, while upholding the ability of Congress to limit that candidate's expenditure of personal funds as a condition to accepting public financing of his campaign.³⁴ Like the cap on a candidate's personal expenditures in *Buckley*, the majority held that the Millionaire's Amendment imposed a "significant burden" on any candidate who wished to exercise her First Amendment right to fund campaign speech.³⁵ Also, unlike the limit on personal expenditures tied to a candidate's acceptance of public financing that was upheld in *Buckley*, the Millionaire's Amendment "does not provide any way in which a candidate can exercise that right without abridgment."³⁶

Because the Court concluded that the Millionaire's Amendment is a "substantial burden" on a self-financing candidate's First Amendment right to use personal funds for campaign speech, "that provision cannot stand unless it is 'justified by a compelling state interest.'"³⁷ According to the Court, the only compelling interests that can justify restrictions on campaign expenditures are the prevention of corruption or the prevention of the appearance of corruption.³⁸ Applying the principles of *Buckley*, the Court held that "reliance on personal funds *reduces* the threat of corruption, and therefore [the Millionaire's Amendment], by discouraging use of personal funds, *disserves* the anticorruption interest."³⁹

Although the Government argued that the Millionaire's Amendment's personal expenditure limit leveled electoral opportunities by reducing potential disparity between candidates of unequal personal wealth and thus served a compelling interest, the Court rejected this as contrary to precedent expressly disavowing Congress's ability to restrict one candidate's speech in order to enhance another's.⁴⁰ Also, the Court held that recognizing leveling

33. *See id.* (Buckley established the "fundamental nature of the right to spend personal funds for campaign speech").

34. *Buckley v. Valeo*, 424 U.S. 1 (1976) (also holding that limits on expenditures, both personal and total expenditures, were subject to heightened scrutiny compared to contribution limits).

35. *Davis*, 128 S. Ct. at 2772.

36. *Id.*

37. *Id.* (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986)).

38. *Id.*

39. *Id.* at 2773.

40. *Id.*

electoral opportunities as a compelling interest would have “ominous implications because it would permit Congress to arrogate the voters’ authority to evaluate the strengths of candidates competing for office.”⁴¹ Finally, the Government argued that the Millionaire’s Amendment was justified because it “ameliorate[d] the deleterious effects” of *Buckley*’s disparate treatment between contributions and expenditures.⁴² But, because the Government did not argue that *Buckley*’s treatment of contributions and expenditures should be rejected, the Court said “it is hard to see how undoing the consequences of that decision can be viewed as a compelling interest.”⁴³

Because the Millionaire’s Amendment’s expenditure limits were held unconstitutional, its disclosure requirements were also held unconstitutional because they “were designed to implement the asymmetrical contribution limits provided for in” the Millionaire’s Amendment.⁴⁴

Justice Stevens wrote a dissenting opinion, which Justice Souter joined in full, but which Justices Breyer and Ginsburg joined only to the extent the dissent argued that the Millionaire’s Amendment was a consistent application of *Buckley*’s principles.⁴⁵ In Part I of Justice Stevens’s dissent, he advocated rejecting *Buckley*’s treatment of expenditure limits as direct restrictions on personal speech. Justice Stevens argued that expenditure limits should instead be upheld as long as they serve purposes that are legitimate and substantial.⁴⁶ Furthermore, he offered two purposes that justify expenditure limitations: (1) they free the candidate and staff from the burden of fundraising and (2) they improve the quality of the exposition of ideas by limiting the quantity but not the content of the speech.⁴⁷

In Part II of Justice Stevens’s dissent, which was joined by the other three dissenters, he argued that, even within the framework of *Buckley*, the Millionaire’s Amendment was “within the bounds of the

41. *Id.*

42. *Id.* at 2774.

43. *Id.* The Court did not address Davis’ claim that the Millionaire’s Amendment violated the Equal Protection clause because the Millionaire’s Amendment was found unconstitutional on other grounds. *Id.* at 2775.

44. *Id.*

45. *Id.* at 2777 (Stevens, J. dissenting).

46. *Id.* at 2778 (citing *Buckley v. Valeo*, 424 U.S. 1, 264 (1976) (White, J., concurring in part and dissenting in part)).

47. *Id.* at 2779.

Constitution.”⁴⁸ Unlike the majority, the dissent did not view the Millionaire’s Amendment as a burden on a self-financing candidate, but viewed it instead as a mechanism to increase the speech of a candidate who is unable to spend mass amounts of personal wealth.⁴⁹ The dissent went on to state that even if the Millionaire’s Amendment burdened the self-financing candidate’s First Amendment rights, “the purposes of the [Millionaire’s] Amendment surely justify its effects.”⁵⁰

According to the dissent, the majority was wrong to assert that eliminating corruption or the appearance of corruption were the only reasons sufficient to restrict campaign expenditures.⁵¹ The dissent argued that the Court “ha[s] long recognized the strength of an independent governmental interest in reducing both the influence of wealth on the outcomes of elections, and the appearance that wealth alone dictates those results.”⁵² In support, the dissent pointed to cases upholding restrictions on the amount of corporate funds that can be contributed to political campaigns,⁵³ and argued that there is no reason the principles are “not equally applicable in the context of individual wealth.”⁵⁴ Thus, Justice Stevens argued, the Millionaire’s Amendment is constitutional as a carefully crafted congressional effort “motivated by proper and weighty goals.”⁵⁵

In a separate dissent, Justice Ginsburg, joined by Justice Breyer, endorsed the District Court’s “careful and persuasive opinion,” which upheld the Millionaire’s Amendment.⁵⁶ She broke from Justice Stevens’s dissent and argued that because the FEC did not ask the Court to overrule *Buckley*, she “would leave reconsideration of *Buckley* for a later day.”⁵⁷

IV. CONCLUSION

Among its many conclusions, the Court asserted that the only compelling state interests that can justify a substantial burden on a

48. *Id.*

49. *Id.* at 2780.

50. *Id.*

51. *Id.*

52. *Id.* at 2781.

53. *Id.* (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)).

54. *Id.*

55. *Id.*

56. *Id.* at 2782 (Ginsburg, J., dissenting).

57. *Id.* at 2782–83.

candidate's First Amendment rights are the prevention of corruption or the prevention of the appearance of corruption.⁵⁸ The dissent vigorously disagreed and asserted that even assuming the Millionaire's Amendment burdened Davis's political speech, "[m]inimizing the effect of concentrated wealth on our political process, and the concomitant interest in addressing the dangers that attend the perception that political power can be purchased, are, therefore, sufficiently weighty objectives to justify congressional action."⁵⁹ The dissent supported its position with cases upholding corporate contribution limits on the grounds that they reduced the influence of corporate wealth⁶⁰ and argued that *McConnell v. FEC* supports the proposition that the influence of personal wealth is as much a concern as the influence of corporate wealth.⁶¹

Ultimately, the dissent's argument fails for two reasons. First, the dissent cited cases upholding corporate contribution limits to show that limiting a wealthy candidate's ability to use personal expenditures to fund political speech is a compelling interest. However, *Buckley v. Valeo* long ago established that expenditure and contribution limits merit distinct treatment under the First Amendment,⁶² so cases that limit corporate contributions do not support limits on a self-financing candidate's personal expenditures. Corporate contribution limits can be constitutionally sanctioned under *Buckley* because they limit corruption or the appearance of corruption, whereas similar justification does not exist for limits on a candidate's personal expenditures. Second, *McConnell* was concerned with "the pernicious influence of large campaign contributions," so the dissent is misguided to use *McConnell* to support their argument that limiting the influence of individual wealth is a compelling interest.⁶³ The Millionaire's Amendment was not related to corporate contributions, but was a limit on personal expenditures, which are scrutinized much more closely under *Buckley*.

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

59. *Id.* at 2781 (Ginsburg, J., dissenting).

60. *Id.* at 2782.

61. *See id.* (citing *McConnell*, 540 U.S. 93, 116 (2003) ("Congress' historical concern with the 'political potentialities of wealth' and their 'untoward consequences for the democratic process' . . . has long reached beyond corporate money." (quoting *United States v. Automobile Workers*, 352 U.S. 567, 577–78 (1957))).

62. *Buckley v. Valeo*, 424 U.S. 1, 19–21 (1976).

63. *McConnell v. FEC*, 540 U.S. 93, 117 (2003).

The dissent firmly believed that the Millionaire’s Amendment was not a burden at all, but rather that it simply amplified the voice of the non-self-financing candidate,⁶⁴ and argued that the Millionaire’s Amendment actually promoted the First Amendment right to political speech by “advancing its core principles.”⁶⁵ It did this by “[m]inimizing the effect of concentrated wealth on our political process, and the concomitant interest in addressing the dangers that attend the perception that political power can be purchased.”⁶⁶ This is a compelling point, and one which the majority vigorously attempted to counter by responding that self-financing candidates are reluctant to spend over \$350,000 of their own funds because this triggers increased contribution limits for their opponents.⁶⁷

Furthermore, the dissent and majority agreed that the Millionaire’s Amendment was a limit on personal expenditures,⁶⁸ so the majority felt forced—by *Buckley*’s strict treatment of personal expenditure limits—to conclude that the Millionaire’s Amendment was unconstitutional. This was because the Millionaire’s Amendment did not limit corruption or the appearance of corruption, which are the only two justifications the majority believed can support limits on a candidate’s personal expenditures.

The majority’s reasoning was further bolstered because it was likely that the increased contribution limits, designed by traditionally non-self-financing incumbents, were intended to burden candidates who choose to self-finance their campaigns. As long as a majority of the Court accepts the proposition that schemes like the Millionaire’s Amendment should be treated as expenditure limits, and *Buckley*’s rigid treatment of expenditure limits survives, Congress will have

64. *Davis*, 128 S. Ct. at 2780.

65. *Id.*

66. *Id.* at 2781.

67. *See id.* at 2772 (The Court acknowledges that a candidate is faced with a choice between “[abiding] by a limit on personal expenditures or endur[ing] the burden that is placed on that right” by the Millionaire’s Amendment. Also, by writing that “[m]any candidates who can afford to make large personal expenditures to support their campaigns may choose to do so despite 319(a),” the Court is implying that there are some candidates who will be deterred from self-financing by the Millionaire’s Amendment.).

68. *Id.* at 2771 (“While [the Millionaire’s Amendment] does not impose a cap on a candidate’s expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right.”); *id.* at 2779 (Stevens, J., dissenting) (“If, as I have come to believe, Congress could attempt to reduce the millionaire candidate’s advantage by imposing reasonable limits on *all* candidates’ expenditures, it follows *a fortiori* that the eminently reasonable scheme before us today survives constitutional scrutiny.”).

difficulty restricting the ability of wealthy candidate's to self-finance their campaigns.