



---

Summer 6-1-2009

## Failed Rescue: Why Davis v. FEC Signals the End to Effective Clean Elections

E. Stewart Crosland

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Law and Politics Commons](#)

---

### Recommended Citation

E. Stewart Crosland, *Failed Rescue: Why Davis v. FEC Signals the End to Effective Clean Elections*, 66 Wash. & Lee L. Rev. 1265 (2009).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol66/iss3/13>

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

# Failed Rescue: Why *Davis v. FEC* Signals the End to Effective Clean Elections

E. Stewart Crosland\*

## *Table of Contents*

I. Introduction .....	1266
II. The Development of Public Funding in U.S. Elections and the Federal Election Campaign Act.....	1269
A. Public Campaign Funding's U.S. Origins and the Federal Election Campaign Act of 1971.....	1269
B. Watergate and the 1974 Federal Election Campaign Act Amendments .....	1271
III. <i>Buckley v. Valeo</i> and <i>RNC v. FEC</i> : Campaign Finance's Constitutional Framework .....	1272
A. <i>Buckley's</i> Standards for Contribution and Expenditure Limits.....	1273
1. Expenditure Limits Substantially Burden Fundamental First Amendment Rights.....	1273
2. The Compelling State Interest in Preventing Political Corruption and the Appearance of Such Corruption.....	1274
B. <i>Buckley</i> and <i>RNC</i> Establish Public Funding Standards .....	1277
IV. The Rise of State and Local Public Funding Programs, Clean Elections, and Rescue Funds .....	1278
A. State and Municipal Public Campaign Funding Systems.....	1278
B. Clean Elections Programs.....	1279

---

\* Candidate for J.D., Washington and Lee University School of Law, May 2010. I extend my deepest thanks to my parents, Edward and Martha Crosland, and my sister, Mallory Crosland, for their never ceasing love, support, and encouragement. Many thanks must also go to my faculty Note advisor, Professor Mark Grunewald, Bridget Tainer-Parkins, Mike McCarthy, and Ryan Decker for their countless helpful comments and suggestions during this Note's composition.

C.	Rescue Funds in Clean Elections.....	1281
V.	The Circuit Court Dispute over Rescue Funds’ Constitutionality .....	1282
VI.	<i>Davis v. FEC</i> : A New Standard?.....	1289
A.	BCRA and the Millionaire’s Amendment .....	1289
B.	The United States District Court for the District of Columbia Upholds the Millionaire’s Amendment Against a First Amendment Challenge.....	1292
C.	The Supreme Court Reverses and Declares the Millionaire’s Amendment a First Amendment Violation ....	1293
1.	<i>Davis</i> ’s First Amendment Burden Analysis .....	1293
2.	<i>Davis</i> ’s Strict Scrutiny Review .....	1295
VII.	How Does <i>Davis</i> Bear on the Assessment of Rescue Funds’ Constitutionality? .....	1296
A.	Burden Analysis .....	1297
1.	<i>Davis</i> Undermines the Prevailing Arguments that Rescue Funds Do Not Burden a Nonparticipating Candidate’s Speech .....	1298
2.	Summary of Why Rescue Funds Burden Speech.....	1309
B.	Strict Scrutiny Review .....	1310
VIII.	Conclusion.....	1313

### I. Introduction

"[P]ublic financing . . . as it exists today is broken."<sup>1</sup> Then-Senator Barack Obama offered this revealing assertion on June 19, 2008 as he declared his intent to become the first major party general election candidate to opt out of the voluntary system for public funding of presidential elections in the nearly thirty-five years since the program’s establishment in the wake of Watergate.<sup>2</sup> At first, Obama received heavy criticism for rescinding his (unofficial) earlier pledges to accept public money.<sup>3</sup> These opening chides, however, later

---

1. Shailagh Murray & Perry Bacon Jr., *Obama to Reject Public Funds for Election*, WASH. POST, June 20, 2008, at A1.

2. See Adam Nagourney & Jeff Zeleny, *Obama Forgoes Public Funds in First for Major Candidate*, N.Y. TIMES, June 20, 2008, at A1 (discussing the historical significance of Obama’s decision to forgo general election public campaign funds in the 2008 Presidential Election).

3. See, e.g., *id.* (presenting a statement by Obama’s Republican opponent, Senator John

morphed into debate about the efficacy and sustainability of the current presidential election public financing system after Obama's campaign fundraising efforts vastly exceeded the subsidy granted to his publicly funded opponent, Senator John McCain.<sup>4</sup>

As the latest discussions about public campaign financing have centered on Obama's decision, little attention has been paid to the fact that on June 26, 2008, only one week after Obama's announcement, U.S. public funding programs took a prospective second blow. On that date, the same day it ruled on the landmark Second Amendment case, *District of Columbia v. Heller*,<sup>5</sup> the Supreme Court decided *Davis v. FEC*.<sup>6</sup> In *Davis*, the Court declared that a provision of the Bipartisan Campaign Reform Act of 2002 (BCRA),<sup>7</sup> called the "Millionaire's Amendment,"<sup>8</sup> violated the First Amendment rights of wealthy congressional candidates.<sup>9</sup> The ruling concerning the fairly obscure legal area of campaign finance regulation drew little hype in comparison to the handgun opinion.<sup>10</sup> Despite its lack of publicity, however, *Davis* raises important questions about the efficacy of an increasingly popular campaign finance

McCain, questioning Obama's change-of-heart with regards to receiving public funding after Obama had indicated several times that he would accept the subsidy).

4. See, e.g., Jim Wooten, *Public Campaign Financing is Dead*, ATLANTA J. CONST., (Oct. 22, 2008), [http://www.ajc.com/opinion/content/sharedblogs/ajc/thinkingright/entries/2008/10/22/public\\_campaign\\_financing\\_is\\_d.html](http://www.ajc.com/opinion/content/sharedblogs/ajc/thinkingright/entries/2008/10/22/public_campaign_financing_is_d.html) (last visited Sept. 29, 2009) ("Without doubt, we are seeing the end of public financing in presidential campaigns. When this election rolls around, the money raised and spent by the Obama campaign will have rolled it into the morgue with Prohibition.") (on file with the Washington and Lee Law Review).

5. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821–22 (2008) (holding that the Second Amendment bestows a right to keep and bear arms and that a District of Columbia statute barring handgun possession, and the rendering of any handgun operable, in the home violated that Second Amendment right).

6. See *Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008) (holding that BCRA's Millionaire's Amendment violated the First Amendment because it imposed a substantial burden on the right of a candidate to use unlimited personal funds in campaign speech absent a compelling state interest justifying the law).

7. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C., 28 U.S.C., and 47 U.S.C.). BCRA is also called "McCain-Feingold" to recognize the legislation's bipartisan sponsors, Senators John McCain and Russ Feingold. Michael J. Malbin, *Assessing the Bipartisan Campaign Reform Act*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT*, 1, 1 (Michael J. Malbin ed., 2006).

8. See *infra* notes 176–88 and accompanying text (explaining the Millionaire's Amendment's purpose and operation, and providing textual excerpts of the law).

9. *Davis*, 128 S. Ct. at 2775.

10. See, e.g., Robert Barnes, *Justices Reject D.C. Ban on Handgun Ownership*, WASH. POST, June 27, 2008, at A1 (referring to *Heller* as the "most anticipated" ruling of the Court's 2007–2008 term).

reform measure known as "Clean Elections" by placing "rescue funds"—a critical element of these schemes—on shaky constitutional ground.<sup>11</sup> In light of this issue, this Note analyzes whether after *Davis* rescue funds remain a constitutionally viable component of Clean Elections systems and, in turn, illustrates that while *Heller*'s roar overwhelmed *Davis*'s whimper, the little known decision may prove more momentous.<sup>12</sup>

To pursue this end, Part II of this Note provides a brief history of the rise of the presidential election public funding system and of other Watergate-induced federal campaign finance reforms. Part III presents the fundamental constitutional standards that govern campaign expenditures and contributions, as well as public financing programs, that the Court established in *Buckley v. Valeo*<sup>13</sup> and *RNC v. FEC*.<sup>14</sup> Part IV gives a glimpse of state and municipal public financing systems by: (1) looking at how they arose in response to Watergate; (2) introducing the radical, but increasingly popular, public funding reform measure of Clean Elections; (3) surveying the states and cities that have adopted Clean Elections; and (4) discussing the Clean Elections programs' use of rescue funds. Part V explains the jurisprudential dispute that has arisen amongst the circuit courts regarding whether rescue funds infringe First Amendment rights. Part VI supplies a succinct overview of BCRA and the Millionaire's Amendment, and presents the Court's ruling in *Davis* that found the Millionaire's Amendment unconstitutional. Part VII analyzes *Davis*'s effect on rescue funds' constitutionality by evaluating competing arguments and, ultimately, concludes that pursuant to *Davis* rescue funds impermissibly burden First

---

11. See Josh Gerstein, *Court Shakes Up Campaign Finance Law*, N.Y. SUN, June 27, 2008, at A1 (stating that while *Davis* did not directly affect state and local public funding systems' legality, it could undermine them by making rescue funds unconstitutional); see also *infra* Part IV.B (introducing the concept of Clean Elections); *infra* Part IV.C (explaining the purpose and operation of rescue funds provisions in Clean Elections).

12. Posting of Rick Esenberg to Shark and Shepherd, <http://sharkandshepherd.blogspot.com/2008/06/davis-v-fec-days-most-important.html> (June 26, 2008, 13:22 EDT) (last visited Sept. 29, 2009) (suggesting that *Davis* may be more important than *Heller*) (on file with the Washington and Lee Law Review).

13. See *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (per curiam) (finding the Federal Election Campaign Act's individual contribution limits, disclosure and reporting provisions, and presidential election public financing scheme constitutional, but declaring its campaign, independent expenditures (IE), and candidate personal expenditure limits and its system for appointment of FEC Commissioners unconstitutional).

14. See *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 283–86 (S.D.N.Y. 1980) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980) (affirming the district court's conclusion that the Presidential Election Campaign Fund Act, which provided public funding to participating presidential candidates, did not burden the constitutional rights of major party presidential candidates and their supporters).

Amendment rights and, in turn, fail strict scrutiny. With this result in mind, this Note declares that courts should find all challenged rescue funds provisions unconstitutional and, consequently, warns legislators of the ensuing end to effective Clean Elections.

## II. *The Development of Public Funding in U.S. Elections and the Federal Election Campaign Act*

### A. *Public Campaign Funding's U.S. Origins and the Federal Election Campaign Act of 1971*

In the United States, the concept of the government subsidizing elections arose during the twentieth century's initial years.<sup>15</sup> These early notions, which included President Theodore Roosevelt during his 1907 State of the Union Address calling for congressional legislation to provide for public funding of all federal elections,<sup>16</sup> however, caught little momentum,<sup>17</sup> and six decades passed before Congress enacted its first public campaign financing law in 1966.<sup>18</sup>

Congress's 1966 legislation aimed to provide optional public subsidies to the major political parties in order to allay the potential influence of wealthy campaign donors and the burdens imposed by rising campaign costs.<sup>19</sup> To supply this money, the bill intended to utilize a U.S. Treasury account, called the "Presidential Election Campaign Fund," which would receive financing via a voluntary one dollar check-off on taxpayer tax returns.<sup>20</sup> The legislation, however, faced heavy criticism in the Senate, and

15. See Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 1, 13 (2005) (stating that the concept of public campaign financing dates back as far as 1904, when New York Representative William Bourke Cockran first suggested the radical idea of the government paying for political candidates' election costs).

16. See President Theodore Roosevelt, State of the Union Address (Dec. 3, 1907) (declaring that "[t]he need for collecting large campaign funds would vanish if Congress provided an appropriation for the proper and legitimate expenses of each of the great national parties, an appropriation ample enough to meet the necessity for thorough organization and machinery, which requires a large expenditure of money").

17. See Corrado, *supra* note 15, at 13 (stating that not "even Roosevelt's embrace could . . . persuade many legislators to pursue the notion" of public campaign funding).

18. FEC, *Public Funding of Presidential Elections* (2008), <http://www.fec.gov/pages/brochures/pubfund.shtml> (last visited Sept. 29, 2009) [hereinafter FEC Brochure] (on file with the Washington and Lee Law Review).

19. Corrado, *supra* note 15, at 19.

20. FEC Brochure, *supra* note 18.

although it passed as a rider on an unrelated bill,<sup>21</sup> the success proved fleeting.<sup>22</sup> In the spring of 1967, Congress rendered the law inoperative by postponing the dollar check-off program until the formation of guidelines governing the disbursement of the collected funds.<sup>23</sup>

In 1971, however, Congress "signaled the beginning of the modern era of campaign finance reform" when it enacted the Federal Election Campaign Act of 1971 (FECA)<sup>24</sup> to revamp most of the major provisions of the federal election laws, including those pertaining to presidential contests.<sup>25</sup> FECA aimed to cut rising campaign costs in two ways. First, it imposed strict requirements on candidates to make public disclosures of their campaign contributions and expenditures.<sup>26</sup> Second, it placed limits on the amount a candidate could spend in support of her own campaign and on media advertising.<sup>27</sup>

This reform push also included fresh calls for public campaign funding. Congress, seeking to mitigate candidate reliance on private donations, enacted, as part of the Revenue Act of 1971, a presidential election public funding scheme similar to the one endorsed in 1966.<sup>28</sup> For instance, the 1971 public financing law revived the 1966 legislation's dollar tax check-off system.<sup>29</sup>

21. See Corrado, *supra* note 15, at 19 (stating that the Presidential Election Campaign Fund Act of 1966 only passed the Senate because of its attachment to the Foreign Investors Tax Act of 1966).

22. See *id.* (calling the "victory" attained through the 1966 law's passage "short-lived").

23. See, e.g., *id.* at 19–20 (discussing the various motivations that led Congress to make the 1966 Presidential Election Campaign Act ultimately inoperative, including concerns that the provision of subsidies to the national political parties would place too much power in the parties' leaders' hands).

24. See Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–42, 451–56 (2006)) (providing for increased disclosure of contributions in federal election campaigns, and limiting candidate personal funds and advertising expenditures).

25. Corrado, *supra* note 15, at 20.

26. *Id.*

27. *Id.* FECA limited the amount that a candidate could expend on her own campaign to \$50,000 for presidential candidates, \$35,000 for Senate candidates, and \$25,000 for House candidates. *Id.*

28. See Presidential Election Campaign Fund Act, I.R.C. § 9001 (1971) (establishing guidelines for public funding of presidential elections through a taxpayer dollar check-off system applicable for taxable years beginning with calendar year 1972); see also Joseph E. Cantor, *Campaign Financing in Federal Elections: A Guide to the Law and its Operation*, in CAMPAIGN FINANCING IN THE UNITED STATES: ISSUES AND LAWS 55, 62–63 (Auguste V. Anschutz ed., 2002) (stating that the Revenue Act of 1971 "intended to lessen candidate dependence on private money by providing public funds instead").

29. Corrado, *supra* note 15, at 25.

Unlike the 1966 law, however, the 1971 bill offered the optional federal subsidies directly to participating presidential nominees, not their parties.<sup>30</sup> It also established expenditure limits on nominees who received public money and banned all private contributions to them.<sup>31</sup> Together, these policies created a system of "full public funding" in presidential general elections, which meant that a nominee could receive a public subsidy in the amount of the statutory expenditure limit if she agreed to refrain from spending all private money.<sup>32</sup> Due to these advancements, the 1971 Revenue Act "formed the basis of the public funding system in effect today," but the scheme as it exists presently did not come to fruition until Watergate incited immense federal campaign finance reform in 1974.<sup>33</sup>

*B. Watergate and the 1974 Federal Election Campaign Act Amendments*

The Watergate investigations' revelation of several improprieties by President Nixon's 1972 presidential campaign raised questions regarding money's deleterious effect on the political process and highlighted the existing federal election laws' failings.<sup>34</sup> "[A] searching debate on campaign financing and how it could be reformed to prevent future Watergate-type abuses" ensued,<sup>35</sup> and, in 1974, Congress responded to national cries for change in campaign finance regulation by overhauling FECA.<sup>36</sup> These amendments, Congress's most comprehensive campaign finance reform legislation to date,<sup>37</sup>

30. FEC Brochure, *supra* note 18.

31. *Id.*

32. See Corrado, *supra* note 15, at 24 (explaining the concept and operation of "full public funding").

33. FEC Brochure, *supra* note 18.

34. See Corrado, *supra* note 15, at 22 (describing the questions about money's influence in politics raised by the findings that Nixon's 1972 campaign included a vast number of large contributions and other improprieties such as acceptance of proscribed corporate gifts and the existence of slush funds containing millions of dollars that helped fund the Watergate break-in).

35. *Dollar Politics: The Issue of Campaign Spending*, 2 CONG. Q., Oct. 1974, at 22.

36. See Corrado, *supra* note 15, at 22, for a discussion of how Congress responded to the national uproar caused by Watergate through enactment of the Federal Election Campaign Act of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (amended 1976, 1980, & 1986) (amending the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, §§ 101-06, 201-06, 309-11, 401, 86 Stat. 3 (1972)) (codified as amended in scattered sections of 2 U.S.C., 18 U.S.C., and 26 U.S.C.).

37. See *Buckley v. Valeo*, 424 U.S. 1, 7 (1976) (per curiam) (calling the 1974 FECA amendments "by far the most comprehensive reform legislation (ever) passed by Congress concerning the election of the President, Vice-President, and members of Congress") (citations omitted).



established the Federal Election Commission (FEC) to serve as a bipartisan agency responsible for administering election laws and implementing the public funding system.<sup>38</sup> The revisions retained 1971's ceilings on candidate personal expenditures;<sup>39</sup> yet, they provided for new campaign contribution limits that sought to reduce the risk of corruption posed by large donations.<sup>40</sup> For example, the amended legislation restricted individual contributions to \$1,000 per person, per election cycle, and aggregate individual contributions to all federal candidates and political committees to \$25,000.<sup>41</sup> Other provisions of the amendments set a \$1,000 per election maximum on independent expenditures (IEs)—money spent by an individual or interest group on behalf of a "clearly identified" candidate but absent the candidate's request or consent—and established a threshold on a candidate's collective campaign spending.<sup>42</sup> Additionally, the altered law finalized creation of the system for public funding of presidential elections currently in force.<sup>43</sup> It did so by extending the 1971 Revenue Act's public financing provisions to presidential primary elections and to the presidential nominating conventions of the national parties.<sup>44</sup>

### III. *Buckley v. Valeo and* *RNC v. FEC: Campaign Finance's Constitutional Framework*

The amended version of FECA, including the Presidential Election Campaign Fund Act, faced almost immediate court challenge. In 1976's *Buckley v. Valeo*, "the first and most important of the campaign finance cases,"<sup>45</sup> the Supreme Court assessed the constitutionality of various aspects of the law.<sup>46</sup> The resulting *per curiam* opinion created constitutional guidelines that continue to oversee campaign finance regulations.<sup>47</sup> *Buckley*, for instance,

---

38. Corrado, *supra* note 15, at 24.

39. *See supra* note 27 and accompanying text (discussing the 1971 FECA personal funds expenditure limitations).

40. *Buckley*, 424 U.S. at 7.

41. Cantor, *supra* note 28, at 63.

42. *Id.* at 63–64.

43. FEC Brochure, *supra* note 18.

44. *Id.*

45. David R. Ortiz, *The First Amendment and the Limits of Campaign Finance Reform*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 91, 92 (2005).

46. *Id.*

47. *See id.* ("[T]he Supreme Court created [in *Buckley*] a framework that still guides [campaign finance] analysis."); *see also infra* note 115 and accompanying text (discussing how

established a tenet central to the constitutional analysis of any campaign finance law: The giving and spending of money in political campaigns equates to speech, not conduct.<sup>48</sup> Political campaign contributions and expenditures infringe upon the most fundamental of First Amendment activities as "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."<sup>49</sup> State restrictions on political contributions and expenditures, therefore, implicate this fundamental First Amendment right.<sup>50</sup>

*A. Buckley's Standards for Contribution and Expenditure Limits*

*1. Expenditure Limits Substantially Burden Fundamental First Amendment Rights*

Although *Buckley* found that both expenditure and contribution limits directly restrain speech, the Court declared that an inherent distinction exists between the levels of restriction that each type of regulation imposes.<sup>51</sup> Controlling the amount one may contribute to a candidate or political committee, the Court determined, "entails only a marginal restriction upon the contributor's ability to engage in free communication."<sup>52</sup> Consequently, *Buckley* ruled that contribution limits need only meet "closely drawn" scrutiny and, therefore, must be closely drawn to serve an important governmental interest.<sup>53</sup>

Expenditure limits, on the other hand, the Court found, entail "significantly more severe restrictions on protected" First Amendment rights.<sup>54</sup> The *Buckley* Court reached this conclusion because, while spending strictures remain neutral as to the ideas expressed, they nevertheless, "limit political expression at the core of our electoral process and of the First Amendment

---

courts have adhered to the campaign finance constitutional framework established in *Buckley*).

48. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (per curiam).

49. *Id.* at 14.

50. *Id.* at 23.

51. See *Ortiz*, *supra* note 45, at 93 (discussing how *Buckley* concluded that distinctions exist between restrictions on campaign spending and contributions because the Court "saw contributions and expenditures as two quite different kinds of speech").

52. *Buckley*, 424 U.S. at 20.

53. *Id.* at 25.

54. *Id.* at 23.

freedoms."<sup>55</sup> Effective political dialogue, *Buckley* ruled, requires spending money as

virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.<sup>56</sup>

Restrictions on expenditures by candidates and IE-making groups, therefore, the Court avowed, hamper freedom of expression by limiting "the number of issues discussed, the depth of their exploration, and the size of the audience reached" and represent substantial, not theoretical, constraints on the quantity and diversity of political speech.<sup>57</sup> Additionally, the *Buckley* Court determined that limits on the amount of personal funds a candidate could spend on her own campaign burden that candidate's "First Amendment right to engage in the discussion of public issues and to vigorously and tirelessly advocate [her] own election."<sup>58</sup> Because of these "substantial burdens," the Court averred that expenditure limits must meet "exacting scrutiny" and be narrowly tailored to achieve a compelling government interest.<sup>59</sup>

## *2. The Compelling State Interest in Preventing Political Corruption and the Appearance of Such Corruption*

With these standards established, the Court contemplated the adequacies of the governmental interests justifying FECA's contribution and expenditure limits. The *Buckley* Court upheld the \$1,000 individual contribution ceiling.<sup>60</sup> An overriding state interest in preventing large donations from causing political process corruption, or creating the appearance of such corruption, the Court

55. *Id.* at 39 (citations omitted).

56. *Id.* at 19.

57. *Id.* The Court analogized freedom to engage in unlimited political expression while subject to expenditure limits to being able to drive a car as far and often as you desire on one tank of gas. *Id.* at 19 n.18.

58. *Id.* at 52.

59. *See id.* at 44–45 (declaring that expenditure limits' constitutionality "turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression").

60. *See supra* note 41 and accompanying text (discussing FECA's individual contribution limit).

concluded, justified the restriction.<sup>61</sup> In the *Buckley* Court's opinion, large, unlimited contributions can harm the integrity of the political process in two ways. First, because of campaigns' rising costs, substantial contributions present a significant threat of "political quid pro quos"—campaign money given in return for promised political favors.<sup>62</sup> Second, the public's belief in the presence of these deals to secure political favor, whether or not they truly exist, could prove just as detrimental as their actual being.<sup>63</sup> The Court concluded that Congress had the right to constrain abuse (or potential abuse), and that FECA's contribution ceilings "focuse[d] precisely on the [large donation] problem."<sup>64</sup> At the same time, the Court found that the limits did not materially undermine the ability of individual citizens to "engage in political debate and discussion."<sup>65</sup> In light of these determinations, the *Buckley* Court also upheld FECA's aggregate contribution limitation.<sup>66</sup> The Court decided that this stricture operated to prevent one's ability to circumvent the \$1,000 individual contribution ceiling through massive donations to political committees likely to contribute to that person's favored candidate.<sup>67</sup>

The *Buckley* Court, though, found that FECA's limits on IEs,<sup>68</sup> candidate spending of personal funds,<sup>69</sup> and aggregate campaign expenditures<sup>70</sup> less visibly served anticorruption interests. For instance, the

61. See *Buckley v. Valeo*, 424 U.S. 1, 58 (1976) (per curiam) (stating that FECA's contribution mandates "constitute[d] [one of] the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions").

62. *Id.* at 26–27. The Court's view of political process corruption extends beyond quid pro quo arrangements, to "the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder." *McConnell v. FEC*, 540 U.S. 93, 153 (2003).

63. See *Buckley*, 424 U.S. at 27 ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").

64. *Id.* at 28.

65. *Id.* at 58–59.

66. See *supra* note 41 and accompanying text (discussing FECA's aggregate contribution limit).

67. *Buckley v. Valeo*, 424 U.S. 1, 38 (1976) (per curiam).

68. See *supra* note 42 and accompanying text (discussing FECA's IE ceiling).

69. See *supra* notes 27, 39 and accompanying text (discussing FECA's restriction on a candidate's expenditure of personal funds).

70. See *supra* note 42 and accompanying text (discussing FECA's constraints on total campaign spending).

Court determined that IEs fail to pose a similar threat of political process corruption because the absence of coordination between the candidate and the independent group obviates the danger that the expenditures will result in quid pro quo arrangements.<sup>71</sup> FECA's ceiling on a candidate's use of personal funds, too, did not further this interest because, the *Buckley* Court concluded, expenditures of personal wealth actually reduce a candidate's dependence on outside contributions and, accordingly, mitigate the coercive pressures that encourage abuse and corruption.<sup>72</sup> In essence, therefore, the Court decided that "[i]f expenditures could not indebt a candidate to a voter, they could never give rise to even the appearance of corruption[, and] regulating them therefore could not be claimed to protect the integrity of the political process."<sup>73</sup>

*Buckley* also discarded an ancillary state goal posited in support of FECA's expenditure limits. The Government suggested it had an interest in balancing the abilities of candidates, individuals, and groups to exercise electoral influence by equalizing relative financial resources.<sup>74</sup> The Court rejected this view, however, declaring that fundamental liberties cannot be sacrificed in order to achieve greater equality in the political process.<sup>75</sup> According to the *Buckley* Court, the First Amendment aims "to secure the widest possible dissemination of information . . . and to assure unfettered interchange of ideas."<sup>76</sup> Consequently, the Court avowed, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment," which, the Court ruled, likewise, "cannot tolerate . . . restriction upon the freedom of a candidate to speak without legislative limit on behalf of [her] own candidacy."<sup>77</sup>

---

71. *Buckley*, 424 U.S. at 47.

72. *See id.* at 53 (discussing the lack of an overriding governmental interest justifying the burden FECA imposed on a candidate's ability to spend personal funds on campaign speech).

73. *Ortiz*, *supra* note 45, at 92–93.

74. *See Buckley v. Valeo*, 424 U.S. 1, 48, 54 (1976) (per curiam) (presenting and rejecting the government's claimed ancillary justification for requiring FECA's IE limit that suggested the state could seek to equalize the relative political clout of candidates, individuals, and groups).

75. *See id.* at 49 ("The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.").

76. *Id.* at 48–49 (citations omitted).

77. *Id.*

*B. Buckley and RNC Establish Public Funding Standards*

Unlike its ruling on expenditure limits, the *Buckley* Court upheld the system for public funding of presidential elections against various constitutional challenges, including the assertion that the scheme violated the First Amendment.<sup>78</sup> The Court determined that the program serves an anticorruption purpose by eliminating a candidate's reliance on large contributions.<sup>79</sup> Further, the *Buckley* Court declared that the government has the right to, and frequently does, promote speech through legislation.<sup>80</sup> Thus, Congress, according to *Buckley*, in creating the presidential election public financing scheme, simply "further[ed] . . . pertinent First Amendment values" by "enlarg[ing] public discussion and participation in the electoral process, goals vital to self-governing people" and, therefore, had not "abridged" unlawfully freedom of speech.<sup>81</sup> Additionally, the Court ruled that while mandatory limits on campaign expenditures violate a candidate's First Amendment rights, Congress can establish a system where the government conditions receipt of public funds on the candidate's agreement to limit campaign expenditures.<sup>82</sup> As long as a candidate remains free to not participate in public financing and to raise and spend unlimited private money, the public funding system survives constitutional challenge.<sup>83</sup> According to the Court:

Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.<sup>84</sup>

In light of this declaration, the Court in *Republican National Committee v. FEC (RNC)* expressly affirmed that the system for public funding of

78. The plaintiffs unsuccessfully challenged the constitutionality of the public funding scheme on three grounds: (1) as contrary to the General Welfare Clause—Article I, Section 8, Clause 2; (2) as inconsistent with the First Amendment; and (3) as violative of the Fifth Amendment's Equal Protection Clause. *Id.* at 90–108.

79. *Id.* at 96.

80. *See id.* at 93 n.127 (stating that government promotion of speech, unlike religion, "is the rule, not the exception").

81. *Id.* at 92–93.

82. *Id.* at 57 n.65.

83. *Id.*; *see also* *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1549 (8th Cir. 1996) (explaining *Buckley*'s holding, which made it permissible for the government to establish a voluntary public financing system that conditioned a candidate's receipt of the public subsidy on acceptance of expenditure limits).

84. *Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976) (*per curiam*) (emphasis added).

presidential elections, which imposes expenditure limits as a condition to receiving public funds, does not burden a candidate's First Amendment rights by imposing expenditure limits as a condition on receiving public funds.<sup>85</sup> According to the *RNC* court, nothing about the scheme makes it coercive such that candidates feel compelled to participate involuntarily.<sup>86</sup> Instead, the court in *RNC* found that, under the program, presidential candidates remain free to opt out of the system and to raise private money beyond the available subsidy grant.<sup>87</sup> A rational presidential candidate, therefore, *RNC* declared, chooses the option most beneficial to her campaign, and a plain increase in campaign financing options imposes no First Amendment burden.<sup>88</sup>

#### *IV. The Rise of State and Local Public Funding Programs, Clean Elections, and Rescue Funds*

##### *A. State and Municipal Public Campaign Funding Systems*

During the decade following Watergate, states and municipalities also sought to reform their campaign finance laws.<sup>89</sup> As part of these reforms, after *Buckley* upheld the constitutionality of the presidential election public funding system, several states even implemented their own public funding programs. In 1973, four states—Iowa, Maine, Rhode Island, and Utah—enacted the first state-level campaign subsidy systems.<sup>90</sup> By 1984, nineteen states had some form of candidate or party public financing.<sup>91</sup> These schemes, like the presidential elections' program, sought equity in access to, and utilization of,

85. *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 283–86 (S.D.N.Y. 1980) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980).

86. *Id.* at 283.

87. *See id.* (declaring that the scheme did not compel presidential candidates to accept public funding because "[e]ach candidate remain[ed] free under the [system], instead of opting for public funding, to attempt through private funding to raise more than the . . . public funding limit and to spend . . . without any ceiling").

88. *Id.* at 285.

89. *See* MICHAEL J. MALBIN & THOMAS L. GAIS, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* 13 (1998) (describing the explosion in state-level campaign finance reform during the half-dozen years following Watergate).

90. Ruth S. Jones, *State Public Financing and the State Parties*, in *PARTIES, INTEREST GROUPS, AND CAMPAIGN FINANCE LAWS* 283, 283 (Michael J. Malbin ed., 1984). In 1979, Seattle, Washington, became the first municipality to implement public campaign funding in city elections. National Civic League, *Local Campaign Finance Reform: Case Studies, Innovative and Model Legislation*, [http://www.ncl.org/npp/lcfr/lcfr\\_first\\_ed\\_summary.html](http://www.ncl.org/npp/lcfr/lcfr_first_ed_summary.html) (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

91. *See* MALBIN & GAIS, *supra* note 89, at 22.

campaign money; reduction of campaign costs; and limited dependence (or apparent dependence) on large campaign contributors.<sup>92</sup> By the mid-1980s, these high ambitions succumbed to increasing anti-tax movements and heightening fiscal constraints, and, for the subsequent decade, the proliferation of state and local public campaign funding systems stalled.<sup>93</sup>

In the mid-1990s, however, elevated cynicism towards the role private money played in politics delivered new support for adoption of state and local-level public campaign funding schemes.<sup>94</sup> Today, twenty-three states and fourteen municipalities provide for some form of campaign subsidy program.<sup>95</sup> Among the states and municipalities that have enacted public campaign funding over the past fifteen years, a handful—beginning with Maine in 1996—have adopted a reform measure called "Clean Elections."<sup>96</sup>

### B. Clean Elections Programs

Clean Elections operate similarly to the system for public financing of presidential general elections by calling for state and local governments to provide participating candidates full public funding, which supporters have nicknamed "Clean Money."<sup>97</sup> This Clean Money seeks to eradicate all but small sums of private contributions from campaign fundraising to create "clean elections."<sup>98</sup> In general, the programs aspire to accomplish this purge by dictating that a candidate who voluntarily agrees to accept public funds from a state or municipality—which vary in amount by state and city, and by the elected position sought—must in return forego virtually all private

92. See Jones, *supra* note 90, at 283 (presenting the justifications proffered for adoption of state-level public financing systems).

93. MALBIN & GAIS, *supra* note 89, at 22.

94. *Id.*

95. Ctr. for Governmental Studies, MAPPING PUBLIC FINANCING IN AMERICAN ELECTIONS 1, 2 (2009), available at [http://www.cgs.org/images/publications/pfae\\_map\\_final\\_2009.pdf](http://www.cgs.org/images/publications/pfae_map_final_2009.pdf).

96. Thomas E. Mann, *Reform Agenda*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 264, 266 (2005); see also Maine Commission on Governmental Ethics & Election Practices, The Maine Clean Elections Act, <http://www.state.me.us/ethics/mcea/index.htm> (last visited Sept. 29, 2009) (discussing the 1996 voter initiative that led to enactment of the Maine Clean Elections Act) (on file with the Washington and Lee Law Review).

97. Mann, *supra* note 96, at 266; see also *supra* note 32 (discussing the presidential election full public funding program as established by the Revenue Act of 1971).

98. See Mann, *supra* note 96, at 266 ("[C]hampions of full public financing seek to banish all but nominal qualifying private contributions from election campaigns. . . . [The] approach is similar to the full public financing program currently in place for presidential general elections.").



contributions to run her campaign, excluding small sums of "qualifying contributions" and "seed money."<sup>99</sup>

The popularity of Clean Elections is rising, largely pushed by increasing grassroots efforts aimed at encouraging adoption of Clean Elections by state and local legislatures.<sup>100</sup> As of January 2009, seven states—Arizona, Connecticut, Maine, Massachusetts, New Mexico, North Carolina, and Vermont—and two municipalities—Portland, Oregon, and Albuquerque, New Mexico—have enacted Clean Elections.<sup>101</sup> In August 2008, California also passed a Clean Elections bill that now awaits enactment through a scheduled June 2010 voter initiative.<sup>102</sup> Additionally, in 2004, New Jersey launched a Clean Elections pilot project in two legislative districts for the state's November 2005 elections; the program's success led to the selection of three more districts for the 2007 Fair and Clean Elections Pilot Project.<sup>103</sup> Congress, too, has been considering Clean Elections legislation for congressional and

99. See, e.g., *id.* at 274 (explaining generally the operation of Clean Elections systems in Maine and Arizona). The term "qualifying contributions" refers to mandated levels of small private contributions, often ranging from \$5 to \$100, necessary to qualify for public funding that operate as a means of proving a candidate's viability by showing sufficient citizen support for her candidacy. See, e.g., Maine Commission on Governmental Ethics & Election Practices, Qualifying Contributions, <http://www.state.me.us/ethics/mcea/qualify.htm> (last visited Sept. 29, 2009) (explaining the operation and purpose of Maine's Clean Elections legislation's qualifying contributions) (on file with the Washington and Lee Law Review). The term "seed money" refers to a limited permissible amount of private contributions that a candidate may raise to sustain her campaign until it receives certification for the public grant. See, e.g., Mann, *supra* note 96, at 274 (discussing the purpose of seed money in the Maine and Arizona Clean Elections systems).

100. See, e.g., PublicCampaign.org Who We Are, <http://www.publiccampaign.org/about> (last visited Sept. 29, 2009) (discussing the organization's efforts to encourage state and local adoption of Clean Elections laws) (on file with the Washington and Lee Law Review); Alaskans for Clean Elections, <http://www.alaskansforcleanelections.org> (last visited Sept. 29, 2009) (advocating Clean Elections in Alaska) (on file with the Washington and Lee Law Review); Citizens for Clean Elections in West Virginia, <http://www.wvoter-owned.org> (last visited F Sept. 29, 2009) (advocating Clean Elections in West Virginia) (on file with the Washington and Lee Law Review).

101. See, e.g., The New Rules Project, <http://www.newrules.org/gov/clean.html> (last visited Sept. 29, 2009) (enumerating and discussing the states that had enacted Clean Elections laws through 2008) (on file with the Washington and Lee Law Review). Aspects of Vermont's scheme, however, were ruled unconstitutional by the U.S. Supreme Court. *Id.* The Massachusetts state legislature repealed that state's law in 2003. See Mann, *supra* note 96, at 274 (discussing the repeal of Massachusetts's Clean Elections law).

102. CaliforniaCleanMoneyCampaign.com, California Fair Elections Act to Appear on June 8, 2010 Ballot!, <http://www.caclean.org/progress/news.php> (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

103. See New Jersey Legislature, <http://www.njleg.state.nj.us/committees/njcleanelec.asp> (last visited Sept. 29, 2009) (discussing the New Jersey Clean Elections pilot projects) (on file with the Washington and Lee Law Review).

senatorial contests.<sup>104</sup> At the state level, the elected offices covered by Clean Elections schemes vary. Arizona, Maine, and Connecticut, for instance, provide full public funding for all statewide and legislative races, while North Carolina and New Mexico subsidize state high-court judicial candidacies.<sup>105</sup>

### C. Rescue Funds in Clean Elections

Clean Election systems' popularity has surged because indications exist that suggest the programs "increase[] the pool of candidates willing and able to run for state legislative office and increase[] the likelihood that an incumbent [will] have a competitive race."<sup>106</sup> To enhance competition, Clean Elections systems embrace an attribute foreign to the presidential election full public funding system, but deemed vital to their success,<sup>107</sup> known as "rescue funds" (or "matching funds") provisions.<sup>108</sup> In general, these stipulations entitle a candidate participating in a Clean Elections program (participating candidate) to receive an additional allowance of public money beyond her initial subsidy.<sup>109</sup> The participating candidate's receipt of this money occurs when some mixture of her nonparticipating opponent's (nonparticipating candidate) campaign expenditures and IEs in support of her nonparticipating opponent or

104. See, e.g., Fair Elections Now Act, S. 1285, 110th Cong. § 501 (2007) (calling for creation of a full voluntary system of public funding for Senate candidates that, like state Clean Elections programs, would require a candidate to raise seed money and collect qualifying contributions in order to become eligible for public funds).

105. See PublicCampaign.org, States/Localities with Clean Elections, <http://www.publiccampaign.org/where> (last visited Sept. 29, 2009) (showing the states and municipalities that have adopted Clean Elections and for which races public money is made available) (on file with the Washington and Lee Law Review).

106. Mann, *supra* note 96, at 274.

107. See *McComish v. Brewer*, No. 08-1550, 2008 WL 4629337, at \*7 (D. Ariz. Oct. 21, 2008) (presenting a statement from Professor Kenneth Mayer, a political science professor at the University of Wisconsin-Madison, declaring that "[rescue] fund provisions are crucial to the success of clean elections programs" and citing evidence that only 15.3% of candidates participate in Wisconsin's rescue fund-less public funding program); *Green Party of Conn. v. Garfield*, 537 F. Supp. 2d 359, 391 n.67 (D. Conn. 2008) (suggesting that the absence of rescue funds in a Clean Elections system "may have serious consequences" based on events in Vermont, which has no rescue funds, where Howard Dean withdrew from a governor race declaring he had "no way to keep up" with his nonparticipating opponent).

108. See, e.g., ME. REV. STAT. ANN. tit. 21-A, § 1125(9) (2008) (referring to Maine's rescue funds as "matching funds").

109. E.g., PublicCampaign.org How Clean Elections Works, <http://www.publiccampaign.org/node/34047> (last visited Sept. 29, 2009) (explaining generally how under a Clean Elections system a rescue funds provision, when activated, provides an additional grant of public funds to a participating candidate) (on file with the Washington and Lee Law Review).

in opposition to her candidacy (hostile IEs) exceeds the participating candidate's agreed-to statutory spending limit.<sup>110</sup> States enact Clean Elections that include rescue funds primarily for the purpose of providing an additional incentive to persuade candidate participation in the program.<sup>111</sup> The provisions do this by ensuring that a high-spending, nonparticipating candidate (or hostile IE-making group) does not greatly outspend her participating opponent.<sup>112</sup> This, in turn, equalizes political opportunity for a greater number of potential election contestants.<sup>113</sup> Despite this admirable purpose, questions over rescue funds' constitutionality have aroused a "hotbed of controversy" in the federal circuit courts.<sup>114</sup>

#### V. The Circuit Court Dispute over Rescue Funds' Constitutionality

Since *Buckley*, courts, "in considering the constitutionality of a host of campaign finance statutes . . . ha[ve] adhered to *Buckley*'s constraints,

110. See, e.g., ARIZ. REV. STAT. ANN. § 16-952 (2008) (providing rescue funds to candidates participating in Arizona's Clean Elections public financing scheme when their nonparticipating opponents make campaign expenditures, including hostile IEs made against the participating candidate, that exceed the amount of the original public subsidy given to the participating candidate); ME. REV. STAT. ANN. tit. 21-A, § 1125(9) (2008) (providing that a participating candidate in Maine's Clean Elections program may receive rescue funds based on her nonparticipating opponent's campaign contributions and expenditures, in conjunction with hostile IEs in favor of the nonparticipating candidate, subject to limits based on the office sought); N.C. GEN. STAT. § 163-278.67(2008) (providing for a participating judicial candidate's immediate receipt of rescue funds equal to the difference between her initial grant and the greater of the amount raised or spent by her nonparticipating opponent, including hostile IEs, subject to limits depending on whether it is a primary or general election). The Clean Elections laws of Connecticut, New Mexico, and New Jersey have all provided for similar rescue funds mechanisms. ARIZ. REV. STAT. ANN. §§ 16-941(B)(2), 16-952 (2006); CONN. GEN. STAT. §§ 9-712, 9-713, 9-714 (Supp. 2006); N.M. STAT. ANN. §§ 1-19A-9(E), 1-19A-14 (2007).

111. MALBIN & GAIS, *supra* note 89, at 60 (indicating that rescue funds are one of several "kinds of incentives [states use] to persuade candidates to do what the states want").

112. See, e.g., Maine Commission on Governmental Ethics & Election Practices, Matching Funds, <http://www.state.me.us/ethics/mcea/index.htm> (last visited Sept. 29, 2009) (expressing Maine's rescue funds' purpose in preventing a participating candidate from being greatly outspent by a nonparticipating candidate) (on file with the Washington and Lee Law Review).

113. See, e.g., Connecticut State Elections Enforcement Comm'n Overview of Citizens' Election Program 1 (2008), available at [http://www.ct.gov/seec/lib/seec/Basic\\_Requirements\\_for\\_2008\\_General\\_Assembly\\_Candidates2.pdf](http://www.ct.gov/seec/lib/seec/Basic_Requirements_for_2008_General_Assembly_Candidates2.pdf) (stating Connecticut's Clean Elections program's goal of providing candidates lacking access to sources of wealth a meaningful opportunity to seek state elective office).

114. *McComish v. Brewer*, No. 08-1550, 2008 WL 4629337, at \*5 (D. Ariz. Oct. 21, 2008).

including" that expenditure limits violate the First Amendment.<sup>115</sup> This framework has provoked a slight conflict among the circuit courts as to whether rescue funds serve as impermissible expenditure limits that implicate the First Amendment, as incorporated by the Fourteenth Amendment Due Process Clause.<sup>116</sup> Only the Eighth Circuit, however, has found rescue funds unconstitutional.<sup>117</sup>

That result occurred in *Day v. Holahan*,<sup>118</sup> which considered a challenge to a Minnesota statute that provided rescue funds to a publicly funded candidate in response to hostile IEs.<sup>119</sup> Under the challenged law, participating candidates facing a hostile IE had their own expenditure limits increased by the amount of that IE and received an additional public subsidy of one-half the IE's value.<sup>120</sup> By advocating via an IE campaign, therefore, "the individual or group intending to contribute to [the] defeat [of a participating candidate became] directly responsible for adding to [the participating candidate's] campaign coffers."<sup>121</sup> To the Eighth Circuit, this anomaly presented a sufficient First Amendment burden on a party intending to speak politically through an IE.<sup>122</sup>

This impairment arose because *Buckley* had made clear that IEs operate as protected political speech.<sup>123</sup> The *Day* court declared that because IEs serve as guarded speech, Minnesota's statute imposed an indirect burden, or "chill," on that protected speech of any person or group contemplating making an IE.<sup>124</sup>

115. *Randall v. Sorrell*, 548 U.S. 230, 232 (2006) (plurality opinion) (citing *McConnell v. FEC*, 540 U.S. 93, 134 (2003)).

116. *See, e.g.*, *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008), *cert. denied*, *Duke v. Leake*, 129 S. Ct. 490 (2008) (mem.) (discussing the existence of a circuit split regarding whether rescue funds implicate the First Amendment). The Supreme Court, in *Gitlow v. New York*, declared that the Fourteenth Amendment's Due Process Clause's liberty protections include the First Amendment rights. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

117. *Leake*, 524 F.3d at 437 (indicating that the Eighth Circuit has been the only circuit court to find a speech burden imposed by a rescue funds provision).

118. *See Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994) (declaring unconstitutional Minnesota statutes providing an increase in a political candidate's expenditure limit and public subsidies based on levels of IEs, denying exemptions from prohibitions against IEs for nonprofit corporations, and placing \$100 limits on contributions to and from political action committees).

119. *Id.* at 1359–60.

120. *Id.*

121. *Id.* at 1360.

122. *See id.* ("To the extent that a candidate's campaign is enhanced by the operation of the statute, the political speech of the individual or group who made the [IE] 'against her' . . . is impaired.").

123. *See supra* note 57 and accompanying text (discussing *Buckley*'s ruling establishing IEs as First Amendment-protected speech).

124. *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994) (citing *Buckley v. Valeo*, 424

This "chill" occurred because parties seeking to make an IE might choose not to make the expenditure out of unease that the statute essentially would penalize them by granting increased spending limits and a further public subsidy to the very candidate they aimed to defeat.<sup>125</sup> Such potential self-censorship, the Eighth Circuit ruled, "is no less a burden on speech that is susceptible to constitutional challenge than is direct government censorship."<sup>126</sup>

Having found fundamental First Amendment rights burdened, the Eighth Circuit applied strict scrutiny to determine whether the law had been "narrowly drawn to serve a compelling state interest."<sup>127</sup> The government avowed that the State's rescue funds sought to enhance public confidence in the political process by ensuring the viability of the public funding system through a scheme designed to encourage candidates to partake in public financing.<sup>128</sup> The court confessed that this served as a "noble goal" but questioned its "compelling" force in light of the First Amendment burden inflicted by the statute.<sup>129</sup> Yet, the court concluded that even if it deemed the State's interest compelling, that interest nevertheless failed to justify the law because the public funding program already received nearly 100% enrollment, and, therefore, did not necessitate rescue funds to encourage participation.<sup>130</sup>

Since *Day*, the First, Fourth, and Sixth Circuits have also considered rescue funds' constitutionality, but each has found them constitutional by either rejecting *Day*'s logic explicitly or ignoring it entirely.<sup>131</sup> For instance, in 2000, in *Daggett v. Commission on Governmental Ethics and Election Practices*,<sup>132</sup>

U.S. 1, 14 (1976) (per curiam)).

125. See *id.* (declaring that Minnesota's challenged rescue funds provisions burdened speech "even before the state implement[ed] the statute's mandates" by promoting self-censorship).

126. *Id.* (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757–58 (1988)).

127. See *id.* at 1361 ("[T]he statute may be upheld as against constitutional challenge if the state can show that it is narrowly drawn to serve a compelling state interest.").

128. *Id.*

129. See *id.* ("[W]e are not certain it is a sufficiently 'compelling' interest to justify the burden that the statute imposes upon speech.").

130. *Id.*

131. See *Green Party of Conn. v. Garfield*, 537 F. Supp. 2d 359, 391 (D. Conn. 2008) (stating that all other courts to consider the issue of rescue funds' constitutionality have refused to adopt *Day*'s logic). In *Green Party*, the district court, in ruling on the constitutionality of Connecticut's Clean Elections program's rescue funds, also rejected *Day*'s reasoning and found the rescue funds constitutional because they failed to burden speech. *Id.*

132. See *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 472 (1st Cir. 2000) (concluding that the Maine Clean Election Act's public financing scheme, including its rescue funds, met constitutional scrutiny).

the First Circuit considered Maine's Clean Elections rescue funds provision's constitutionality.<sup>133</sup> Maine's scheme grants a participating candidate additional money when her nonparticipating opponent's campaign contributions and expenditures (in conjunction with IEs hostile to the participating candidate) exceed the participating candidate's initial public funds.<sup>134</sup> The First Circuit declared that Maine's rescue funds do not restrict expenditures directly, which would "inherently burden speech" under *Buckley*'s framework.<sup>135</sup> Nor, the court determined, in opposition to *Day*, do they "chill" political speech indirectly.<sup>136</sup> Instead, the First Circuit viewed the additional disbursement of public money as simply providing the participating candidate an opportunity to respond to hostile political speech.<sup>137</sup> Because *Buckley* held that the First Amendment seeks to "secure the widest possible dissemination of information from diverse and antagonistic sources,"<sup>138</sup> the *Daggett* court explicitly refused to adopt *Day*'s logic equating responsive speech to a First Amendment burden.<sup>139</sup> In contrast, the court declared that there exists "no right to speak free from response."<sup>140</sup> Consequently, *Daggett* concluded that rescue funds present no burden on political speech because they "in no way limit[] the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor [do they] threaten censure or penalty for such expenditures."<sup>141</sup>

Having reached this conclusion, the First Circuit switched its focus away from rescue funds' impact on speech and instead analyzed their general impact on Maine's public funding scheme.<sup>142</sup> In so doing, the court adopted the logic of an earlier First Circuit decision, *Vote Choice, Inc. v. DiStefano*,<sup>143</sup> and

133. *Id.* at 463–66, 468–72.

134. *See supra* note 110 (presenting Maine Clean Election Act's rescue funds scheme).

135. *Daggett*, 205 F.3d at 464.

136. *See id.* ("[T]he provision of [rescue] funds does not indirectly burden donors' speech . . . rights.").

137. *Id.*

138. *Id.* (internal citations omitted) (citing *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam)).

139. *See id.* at 465 ("We cannot adopt the logic of *Day*, which equates responsive speech with an impairment to the initial speaker.").

140. *Id.* at 464 (citing *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 14 (1986) (plurality opinion)).

141. *Id.*

142. *Id.* at 468–72.

143. *See Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 43 (1st Cir. 1993) (finding constitutional provisions of Rhode Island's amended campaign finance law providing contribution cap gaps and free television time to publicly financed candidates, but declaring unconstitutional a provision that created a disclosure threshold for political action committee

upheld Maine's rescue funds provision.<sup>144</sup> *Vote Choice* considered a challenge to a Rhode Island statute that provided for a contribution "cap gap," which raised a participating gubernatorial candidate's contribution limits when triggered.<sup>145</sup> In *Vote Choice*, the First Circuit, based on the *Buckley* and *RNC* standards for the presidential public funding system, focused entirely on the voluntariness of Rhode Island's scheme and whether the "cap gap" coerced candidate participation.<sup>146</sup> No coercion existed in *Vote Choice* because the court found a "rough proportionality" between the benefits and burdens of participating and not participating in the scheme.<sup>147</sup> Similarly, the *Daggett* court focused on whether Maine's rescue funds impermissibly compelled candidate participation in the Clean Elections system and determined they do not.<sup>148</sup>

*Daggett* also endorsed an additional *Vote Choice* standard. This second principle, in contrast to the *Day* court's reluctance, unabashedly asserts that states possess a compelling interest in encouraging candidates to opt into their public financing systems "because such programs 'facilitate communication by candidates with the electorate,' free candidates from the pressures of fundraising, and, relatedly, tend to combat corruption."<sup>149</sup> *Daggett*, likewise, determined that candidates would prove less likely to partake in Maine's public

contributors, compared to a different disclosure threshold for candidate contributors).

144. *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 468–72 (1st Cir. 2000).

145. *See Vote Choice*, 4 F.3d at 29–30 (discussing the Rhode Island statute and public financing system for gubernatorial campaigns and the contribution cap gaps goal of promoting participation in the system). Rhode Island typically limited a gubernatorial candidate to \$1,000 contributions from individuals or political action committees; however, the "cap gap" measure, when triggered, permitted a participating candidate to receive double this contribution limit. *Id.* at 30, 38 n.13.

146. *Id.* at 39 (declaring that "voluntariness has proven to be an important factor in judicial ratification of government-sponsored campaign financing schemes" and that an incentive program like the "cap gap" measure could become impermissibly coercive) (citing *Buckley v. Valeo*, 424 U.S. 1, 95 (1976) (per curiam); *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 285–86 (S.D.N.Y. 1980) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980)).

147. *Id.*

148. *See Daggett*, 205 F.3d at 472 (declaring Maine's rescue funds non-coercive because they appeared to be a "hardly overwhelming" incentive and because there was a rough proportionality of benefits and burdens between participating and not participating in public funding).

149. *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (quoting *Buckley*, 424 U.S. at 91). *But see supra* note 129 and accompanying text (presenting a discussion of the *Day* court's doubt about the compelling weight of a state interest in encouraging participation in a public funding system).

funding program absent rescue funds and suggested that the state possesses an interest in encouraging such participation by offering the incentive.<sup>150</sup>

The Fourth Circuit, in *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake (Leake)*,<sup>151</sup> considered a challenge to the rescue funds provision of North Carolina's judicial Clean Elections statute.<sup>152</sup> The case's plaintiffs, utilizing *Day's* logic, argued that the rescue funds "chill" and "penalize" speech.<sup>153</sup> The Fourth Circuit, however, did not agree, and called *Day* an "anomaly."<sup>154</sup> Instead, like the First Circuit in *Daggett*, the *Leake* court explicitly rejected as "unpersuasive" *Day's* logic equating the potential self-censorship spurred by a rescue funds system with direct government restriction.<sup>155</sup> Quoting *Daggett*, *Leake* declared that the First Amendment does not give a candidate, or an IE-making party, "a 'right to outraise and outspend an opponent' nor a 'right to speak free from response.'"<sup>156</sup> Consequently, the Fourth Circuit found that North Carolina's rescue funds impose no First Amendment burden on nonparticipating candidates (or IE-making groups) because they "remain free to raise and spend as much money, and engage in as much political speech, as they desire."<sup>157</sup> Deterrence, if any, of speech, according to *Leake*, results from the "strategic, political choice" not to activate the rescue funds trigger, and "not from a threat of government

150. See *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 469 (1st Cir. 2000) (suggesting that the state has an interest in ensuring participation in its public funding system based on declaration that, in a system without rescue funds, "candidates would be much less likely to participate").

151. See *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 441 (4th Cir. 2008), *cert. denied*, *Duke v. Leake*, 129 S. Ct. 490 (2008) (mem.) (declaring constitutional North Carolina's granting of rescue funds in its public financing program for state-high court judicial campaigns).

152. *Id.* at 436–38; see also *supra* note 110 (presenting North Carolina's rescue funds provision).

153. *Leake*, 524 F.3d at 437.

154. *Id.* at 438.

155. See *id.* at 437–38 (discussing circuit conflict created by *Day*, but rejecting *Day's* rationale).

156. *Id.* at 438–39 (quoting *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000)); see also *Green Party of Conn. v. Garfield*, 537 F. Supp. 2d 359, 391 (D. Conn. 2008) (rejecting *Day's* logic and finding Connecticut's Clean Elections program's rescue funds constitutional because "[a]n individual or candidate may decide, as a strategic matter, not to speak as a result of the campaign financing system, but he is in no way prohibited from exercising his right to free speech").

157. *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008), *cert. denied*, *Duke v. Leake*, 129 S. Ct. 490 (2008) (mem.).



censure or prosecution."<sup>158</sup> Further, the *Leake* court, like the First Circuit in *Daggett*, adopted *Vote Choice*'s standard and ruled that North Carolina's rescue funds do not improperly coerce candidate participation in the state's public funding system.<sup>159</sup>

Finally, in *Gable v. Patton*<sup>160</sup>—a case decided prior to *Daggett* and *Leake*—the Sixth Circuit upheld a Kentucky rescue funds provision.<sup>161</sup> The Kentucky law at issue placed limits on "slates" of same-party candidates for Governor and Lieutenant Governor that participated in the state's public campaign financing scheme.<sup>162</sup> Once a nonparticipating slate collected campaign funds, including contributions of their own money, in excess of \$1.8 million, the law permitted the participating slate to raise unlimited private contributions, which became subject to a two-for-one public fund match.<sup>163</sup> In assessing the constitutionality of this scheme, the Sixth Circuit notably ignored *Day*'s logic entirely.<sup>164</sup> Instead, the court used *Vote Choice*'s framework exclusively to determine that the rescue funds provisions did not impermissibly compel participation in Kentucky's public funding system.<sup>165</sup> *Gable*, similar to *Vote Choice* and *Daggett*, also found that, even if the program pressured participation, Kentucky had a compelling interest because "a voluntary campaign finance scheme must rely on incentives for participation, which . . . means structuring the scheme so that participation is usually the rational choice."<sup>166</sup>

158. *Id.* at 438.

159. *Id.* at 437 (citing *Daggett*, 205 F.3d at 466–72).

160. *See Gable v. Patton*, 142 F.3d 940, 953 (6th Cir. 1998) (holding constitutional a Kentucky campaign finance law rescue funds provision, sponsor identification provision, candidate slating requirement, and twenty-eight day contribution window with respect to external contributions, but finding unconstitutional the twenty-eight day window when applied to personal contributions of a nonparticipating candidate to her own campaign).

161. *Id.* at 949.

162. *Id.* at 944.

163. *Id.*

164. *See, e.g.,* N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427, 437 (4th Cir. 2008), *cert. denied*, Duke v. Leake, 129 S. Ct. 490 (2008) (mem.) (describing *Gable* as "upholding a [rescue funds] scheme against a constitutional challenge without addressing the *Day* analysis") (citing *Gable*, 142 F.3d at 947–49).

165. *Gable*, 142 F.3d at 949 (stating that no clear demarcation existed to suggest that Kentucky's rescue funds provision acted more coercively than any of the other public financing incentive schemes that have been held constitutional).

166. *Id.*; *see also supra* note 149 (juxtaposing the *Vote Choice* logic, adopted by *Daggett* and *Gable*, that there exists a compelling state interest in encouraging public funding system participation, and the *Day* court's asserted apprehension to deem such an interest "compelling").

VI. Davis v. FEC: A New Standard?

Into this mix of circuit decisions came the June 2008 Supreme Court *Davis v. FEC* ruling.<sup>167</sup> *Davis* did not involve a challenge to a rescue funds provision. The opinion, which nevertheless proves highly pertinent to the rescue funds issue,<sup>168</sup> instead, pondered the constitutionality of the "Millionaire's Amendment" of BCRA.<sup>169</sup>

A. BCRA and the Millionaire's Amendment

For years after *Buckley*, FECA's remaining provisions functioned smoothly.<sup>170</sup> By the 1990s, however, FECA's regulatory scheme began decaying as campaigns started relying on "soft money"—funds spent by corporate, labor union, and individual contributors to pay for nonfederal activities, such as advertising, not "expressly advocating" the election or defeat of a candidate<sup>171</sup>—on which FECA placed no limits.<sup>172</sup> As a result, the amount of money unregulated by FECA during the 1996 presidential election nearly equaled the regulated sum.<sup>173</sup> In response to soft money's perceived deleterious effect, Congress enacted BCRA with two primary aims: first, "to restore meaningful contribution limits (as well as spending limits for publicly funded presidential campaigns) by prohibiting the unlimited soft money for national political parties that . . . had become end runs around [FECA]," and second, "to bring back corporate and labor spending restrictions, as well as disclosure, to electioneering speech by all persons other than candidates and parties."<sup>174</sup>

167. See *supra* notes 6–9 and accompanying text (introducing the Supreme Court's *Davis* decision).

168. See *McComish v. Brewer*, No. 08-1550, 2008 WL 4629337, at \*5 (D. Ariz. Oct. 21, 2008) (calling *Davis* "highly relevant to the question of [rescue] funds").

169. See *infra* notes 176–88 and accompanying text (presenting the Millionaire's Amendment in detail and providing excerpts from the statute's text).

170. See *Malbin*, *supra* note 7, at 5 (declaring that virtually all campaign spending up through the 1980 and 1984 presidential elections fell within FECA's boundaries).

171. See *id.* at 6 (defining the term "soft money").

172. See *id.* (stating that prior to BCRA, "if an advertisement did not contain words of express advocacy, a corporation or labor union could spend unlimited amounts to pay for the ad, and the ad's sponsors would not have to disclose where the money came from or how they spent it").

173. *Id.*

174. *Id.* at 6–7.

As part of BCRA, Congress amended FECA's provisions governing contributions to candidates.<sup>175</sup> BCRA, for instance, raised the 1974 FECA amendments' individual contributions ceiling from \$1,000 to \$2,300 per two-year election cycle, as well as the aggregate contribution limit that an individual could give to all candidates and their authorized committees.<sup>176</sup> BCRA also provided limits on the coordinated expenditures a candidate could accept from national and state political party committees.<sup>177</sup> Certain Senate and House candidates, however, garnered permissible flexibility in abiding by these limits via BCRA §§ 304 and 319, respectively.<sup>178</sup> These two regulations, collectively dubbed the "Millionaire's Amendment," addressed the issue of wealthy candidates supporting their own campaigns with substantial personal funds.<sup>179</sup> The Millionaire's Amendment aimed to "attack[] the rich candidate problem . . . [by] making it easier for self-financers' opponents to raise money."<sup>180</sup> In other words, much like rescue funds, the scheme intended to level political opportunities for candidates of varying wealth by creating an equal playing field.<sup>181</sup> It accomplished this by relaxing the campaign contribution limits for non-self-financing House and Senate candidates (non-self-financing candidates) facing self-financing opponents who spent personal funds beyond a certain threshold (self-financing candidates).<sup>182</sup> The alternative contribution scheme activated when a statistic, termed the "opposition personal funds amount" (OPFA), exceeded a "trigger" amount of \$350,000 because of the self-financing candidate's expenditure of personal funds.<sup>183</sup> In general, the OPFA calculation depended

175. See *supra* note 41 and accompanying text (discussing FECA's contribution limits).

176. *Davis v. FEC*, 128 S. Ct. 2759, 2765–66 (2008).

177. Malbin, *supra* note 7, at 7.

178. See *id.* at 14 (describing how the provisions that comprised the Millionaire's Amendment permitted House and Senate candidates higher contribution limits under certain circumstances).

179. Jennifer A. Steen, *Self-Financed Candidates and the "Millionaires' Amendment,"* in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT*, 204, 204 (Michael J. Malbin ed., 2006).

180. *Id.*

181. Compare *id.* at 206 (discussing the Millionaire's Amendment's equitable purpose and presenting a quote from the provision's legislative history declaring that the Millionaire's Amendment would "even[] the playing field for candidates who are challenging millionaires or who are challenged by millionaires") (citations omitted), with *supra* notes 112–14 and accompanying text (discussing rescue funds' purpose of leveling electoral opportunities for candidates of varying wealth).

182. *Davis v. FEC*, 128 S. Ct. 2759, 2765–66 (2008).

183. *Id.* at 2766. See 2 U.S.C.A. §§ 441a-1(a)(1)(A)–(B) (West 2002). The statute stated: [I]f the opposition personal funds amount with respect to a candidate for election to

on an FEC-devised formula that took the difference between a self-financing candidate's personal expenditures and her non-self-financing opponent's personal expenditures, offset by any fundraising advantage that the non-self-financing candidate may have enjoyed over the self-financing opponent.<sup>184</sup> Once the self-financing candidate's expenditure of personal funds drove the OPFA over \$350,000, the new asymmetrical contribution and expenditure regulatory scheme took effect.<sup>185</sup> Under this alternative scheme, the self-financing candidate remained subject to the ordinary limits.<sup>186</sup> Her non-self-financing opponent, however, could receive contributions from individual donors treble the usual \$2,300 maximum (\$6,900) and from individuals who had already met the ordinary aggregate campaign contribution ceiling and could make unlimited coordinated party expenditures.<sup>187</sup> Once the non-self-financing candidate's receipts exceeded the OPFA, she again became subject to the original limits.<sup>188</sup>

the office of Representative in, or Delegate or Resident Commissioner to, the Congress exceeds \$350,000[:] (A) the [\$2,300 individual contribution limit] with respect to the candidate shall be tripled; (B) the [aggregate contribution limit] shall not apply with respect to any contribution made with respect to the candidate if the contribution is made under the increased limit allowed under paragraph (A) during a period in which a candidate may accept such a contribution; and the limits . . . with respect to any expenditure by a State or national committee of a political party on behalf of the candidate shall not apply.

*Id.*

184. *Davis*, 128 S. Ct. at 2766. See 2 U.S.C.A. §§ 441a-1(a)(2)(A)–(B) (West 2002). The statute read:

(A) The opposition personal funds amount is an amount equal to the excess (if any) of[:] (i) the greatest aggregate amount of expenditures from personal funds . . . that an opposing candidate in the same election makes; over (ii) the aggregate amount of expenditures from personal funds made by the candidate with respect to the election. . . . (B)(i) For purposes of determining the aggregate amount of expenditures from personal funds under subparagraph (A), such amount shall include the gross receipts advantage of the candidate's authorized committee.

*Id.* The OPFA calculation for each candidate involved adding 50% of the funds raised for the current election—measured periodically throughout the year preceding the election—to the candidate's personal fund expenditures. *Davis*, 128 S. Ct. at 2766 n.5. The asymmetrical limits took effect if a \$350,000 or greater difference existed between the opponents' totals. *Id.*

185. § 441a-1(a)(1)(A); *supra* note 183.

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

187. *Id.* (citing § 441a-1(a)(1)(A)); *supra* note 183.

188. *Davis v. FEC*, 128 S. Ct. 2759, 2766 (2008) (citing 2 U.S.C.A. § 441a-1(a)(3) (West 2002)).

*B. The United States District Court for the District of Columbia Upholds the Millionaire's Amendment Against a First Amendment Challenge*

The Millionaire's Amendment's constitutionality came into question, however, when Jack Davis, a 2004 and 2006 Democratic House candidate from Buffalo, New York, challenged BCRA § 319 (the Millionaire's Amendment pertaining to House elections) as violative of his First Amendment rights. Davis, who lost both elections to the Republican incumbent, funded each campaign mainly with his own money.<sup>189</sup> In contrast, Davis's opponent spent no personal funds on the 2006 campaign.<sup>190</sup> When Davis decided to run in 2006, he declared his intentions to spend \$1 million in personal funds, and therefore to surpass the OPFA triggering limit.<sup>191</sup> Foreseeing the § 319 consequences of his expenditures, Davis sued the FEC in the United States District Court for the District of Columbia seeking to have the Millionaire's Amendment deemed unconstitutional and the FEC enjoined from enforcing the regulation during the 2006 election.<sup>192</sup>

In the subsequent litigation, Davis argued that the Millionaire's Amendment burdened his First Amendment right, established in *Buckley*, to make unlimited personal expenditures. Davis claimed that, because personal spending caused the OPFA imbalance that permitted his opponent to raise additional money to finance responsive speech, the Millionaire's Amendment chilled his political speech by diminishing its effectiveness.<sup>193</sup> A three judge panel of the district court, however—citing heavily to *Daggett*, *Gable*, and *Vote Choice*—rejected this argument.<sup>194</sup> The court determined that, like the public funding schemes utilizing rescue funds at issue in *Daggett* and *Gable*, the Millionaire's Amendment did "not limit in any way the use of a candidate's personal wealth in [her] run for office. Instead, it provide[d] a benefit to [her] opponent, thereby correcting a potential imbalance in resources available to each candidate."<sup>195</sup> Simply providing a benefit did not indicate to the district

---

189. *Id.* at 2767. Davis spent \$1.2 million of his personal funds in 2004 and \$2.3 million in 2005. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 2767–68.

193. *See id.* at 2770 (presenting Davis's First Amendment argument in opposition to the Millionaire's Amendment).

194. *See Davis v. FEC*, 501 F. Supp. 2d 22, 29–31 (D.D.C. 2007) (citing heavily to *Daggett* and *Gable*, as well as *Vote Choice*, for support in concluding that the Millionaire's Amendment did not burden speech), *rev'd*, 128 S. Ct. 2759 (2008).

195. *Id.* at 29 (citing *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 464–65 (1st Cir. 2000); *Gable v. Patton*, 142 F.3d 940, 948 (6th Cir. 1998)).

court that the self-financing candidate's "speech would be impermissibly chilled."<sup>196</sup> Also, based on *Vote Choice's* reasoning, the court declared the Millionaire's Amendment a permissible, non-coercive imposition. In other words, it did not impermissibly compel candidates into choosing not to self-finance because "whether a candidate incur[red] the burdens and benefits of the Amendment [was] entirely [her] option, and a statute whose application turns on such a choice does not impose an unconstitutional burden on First Amendment rights."<sup>197</sup> Consequently, the district court granted the FEC summary judgment, and Davis appealed directly to the Supreme Court, as BCRA permitted.<sup>198</sup>

*C. The Supreme Court Reverses and Declares the Millionaire's Amendment a First Amendment Violation*

*1. Davis's First Amendment Burden Analysis*

The Supreme Court, in a 5–4 decision penned by Justice Alito, reversed the lower court.<sup>199</sup> The Court, in dicta, concluded that Davis would have had no basis to challenge § 319's constitutionality if the provision had simply raised the contribution limits for all candidates.<sup>200</sup> The law, however, exclusively raised limits for the non-self-financing candidate and only when her self-financing opponent exceeded the OPFA threshold.<sup>201</sup> As a result of this asymmetrical scheme, the Court declared that it had "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other," and that the "scheme impermissibly burden[ed Davis's] First Amendment right to spend his own money for campaign speech."<sup>202</sup>

To reach this conclusion, the *Davis* Court emphasized *Buckley's* conclusion that there exists a fundamental right to use personal funds for

196. *Id.* at 30 ("Davis must demonstrate that a self-financed candidate's speech would be impermissibly chilled, not simply that his opponent would gain some benefit.").

197. *Id.* at 31 (citing *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993)).

198. *Davis v. FEC*, 128 S. Ct. 2759, 2768 (2008).

199. *Id.* at 2775.

200. *See id.* at 2771 (declaring that Davis would have had no constitutional challenge had Section 319 merely raised the contribution limits for all candidates because the constitution imposes no duty on Congress to enact campaign contribution limits and, if Congress found no risk of political corruption, then it could permit limitless contributions).

201. *Id.*

202. *Id.*

campaign speech.<sup>203</sup> Although § 319 did not subject a self-financing candidate to an expenditure limit, *Davis* found it nonetheless imposed an "unprecedented penalty" on First Amendment-protected speech.<sup>204</sup> The Court cited *Day* approvingly, ignoring the contrasting circuit opinions relied on by the district court,<sup>205</sup> to conclude that § 319 burdened the self-financing candidate's right to spend limitlessly on political speech.<sup>206</sup> The *Davis* Court found this burden because, it concluded, if a self-financing candidate opted to make unlimited expenditures, she would shoulder the "special and potentially significant burden" inflicted by § 319's asymmetrical contribution limits.<sup>207</sup> These disparate limits, the Court declared, penalized the self-financing candidate's speech by creating a fundraising advantage for her opponent in the competitive world of political elections.<sup>208</sup>

It also did not matter that the self-financing candidate could choose whether or not to suffer the First Amendment "drag" of benefiting her opponent.<sup>209</sup> The choice a self-financing candidate confronted under the Millionaire's Amendment, the *Davis* Court asserted, inherently differed from the expenditure limit conditions imposed on a publicly funded candidate upheld in *Buckley*.<sup>210</sup> To the contrary, *Buckley* involved a "quite different" choice because a candidate opting not to receive public funding retained an "unfettered right to make unlimited personal expenditures."<sup>211</sup> Section 319, however, ensured restriction on that right.<sup>212</sup> It did so by imposing on the self-financing candidate exclusively a choice between personal spending restraints: Either

---

203. See *id.* (calling *Buckley*'s emphasis on the fundamental nature of the right to spend personal funds for campaign speech "instructive").

204. See *id.* at 2771 ("While 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.").

205. *Supra* note 194.

206. *Davis v. FEC*, 128 S. Ct. 2759, 2772 (2008) (citing *Day v. Holahan*, 34 F.3d 1356, 1359-60 (8th Cir. 1994)).

207. *Id.*

208. *Id.* ("Under [Section] 319[], 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.") (citing *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 14 (1986)).

209. See *id.* (declaring that a First Amendment restraint "is not constitutional simply because it attaches as a consequence of a statutorily imposed choice"). *Contra supra* note 197.

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

211. *Id.*

212. See *id.* (concluding that Section "319[] does not provide any way in which a candidate can exercise [her First Amendment right to unlimited personal expenditures] without abridgment").

bear a self-imposed limit placed on personal expenditures or endure the burden placed on that right by the prompting of the disparate contribution limits.<sup>213</sup>

## 2. Davis's Strict Scrutiny Review

"Because § 319[] impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech, th[e] provision [could] not stand unless it [was] justified by a compelling state interest."<sup>214</sup> The Government, however, failed to proffer such a justification. Because the *Buckley* Court found that reliance on personal funds reduces the potential for corruption, the *Davis* Court ruled that § 319 undermined anticorruption interests.<sup>215</sup> More significantly, *Davis* deemed illegitimate the Government's averred secondary interest in "level[ing] electoral opportunities for candidates of different personal wealth" via reduction of the "natural advantage" that wealthy individuals possess in campaigns for federal office.<sup>216</sup> The *Davis* Court rejected this claimed interest because the Court's campaign finance precedents, including *Buckley*, indicated that thwarting corruption, or apparent corruption, served as the "only . . . government interests thus far identified for restricting campaign finances."<sup>217</sup> The *Davis* Court added that campaign finance restrictions aimed at leveling electoral opportunities presented "ominous implications."<sup>218</sup> Such a justification, declared the Court, would grant Congress domain over voters' determinations of a candidate's qualifications by making Congress the judge of which strengths of a candidate should influence an election.<sup>219</sup> Because "[d]ifferent candidates have different strengths," including wealth, Congress would gain too much leverage in determining election outcomes.<sup>220</sup> The Court would not accept this

213. *Id.*

214. *Id.* (citations omitted).

215. *See id.* at 2773 (declaring that the Millionaire's Amendment, "by discouraging use of personal funds, disserves the anticorruption interest").

216. *Id.* (quoting Brief for Appellee at 33, *Davis v. FEC*, 128 S. Ct. 2759 (2008) (No. 07-320)); *see also supra* notes 181–82 (discussing the Millionaire's Amendment's "leveling the playing field" purpose).

217. *Davis*, 128 S. Ct. at 2773 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting)); *cf. supra* notes 74–77 (presenting *Buckley*'s rejection of the equalizing of financial resources interest).

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

219. *Id.* at 2773–74.

220. *Id.* at 2774.



possibility.<sup>221</sup> Thus, because the Millionaire's Amendment lacked a compelling interest justifying the First Amendment drag it imposed through its "unprecedented[ly] penal[]" asymmetrical contribution limits, the law failed to pass constitutional muster.<sup>222</sup>

### VII. *How Does Davis Bear on the Assessment of Rescue Funds' Constitutionality?*

Since *Davis*, critical interpretations have varied regarding the ruling's impact on the constitutionality of the rescue funds provisions employed by Clean Elections programs. Some pundits argue that *Davis* makes tenuous rescue funds' viability.<sup>223</sup> Professor Richard L. Hasen of Loyola Law School Los Angeles, for example, in a *Davis* critique posted on his Election Law Blog the day of the decision, described the ruling as "calling [the use of] all [rescue funds] provisions in public financing systems into question."<sup>224</sup> Other commentators, however, depict such accounts as "overblown,"<sup>225</sup> and, instead, avow that *Davis*'s reasoning does not signal rescue funds' unconstitutionality.<sup>226</sup>

The courts, too, have begun weighing in on the issue, but with little resolution thus far. In October 2008, the District Court for the District of Arizona, ruling on a motion for preliminary injunction, concluded that *Davis* likely indicates that Arizona's Clean Elections Act's rescue funds violate the

---

221. *Id.*

222. *Id.* at 2775.

223. See Eliza Newlin Carney, *Campaign Finance Laws Under Siege*, NAT'L J., July 28, 2008, [http://www.nationaljournal.com/njonline/rg\\_20080728\\_5842.php](http://www.nationaljournal.com/njonline/rg_20080728_5842.php) (last visited Sept. 29, 2009) (declaring that some political scientists believe that *Davis* threatens the viability of state public finance rules, including rescue funds schemes) (on file with the Washington and Lee Law Review).

224. Posting of Rick Hasen at Election Law Blog, <http://electionlawblog.org/archives/011095.html> (June 26, 2008, 07:55 AM PDT) (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

225. See Posting of Paul S. Ryan at Campaign Legal Center Blog, [http://www.clcblog.org/blog\\_item-239.html](http://www.clcblog.org/blog_item-239.html) (July 23, 2008) (last visited Sept. 29, 2009) (claiming that media accounts have "overblown" *Davis*'s negative impact on rescue funds) (on file with the Washington and Lee Law Review).

226. See, e.g., Posting of Bob Bauer at More Money Hard Law Web Updates, <http://www.moresoftmoneyhardlaw.com/news.html?AID=1295> (last visited Sept. 29, 2009) (stating that *Davis* finding the Millionaire's Amendment unconstitutional does not compel a similar judgment with regards to rescue funds provisions) (on file with the Washington and Lee Law Review); Ryan, *supra* note 225 (arguing that rescue funds provisions remain constitutional notwithstanding *Davis*).

First Amendment.<sup>227</sup> Yet, in January 2009, despite anticipations of at least a grant, vacate, and remand order in light of *Davis*,<sup>228</sup> the Supreme Court denied, without comment, a certiorari petition to hear an appeal to the Fourth Circuit's *Leake* decision.<sup>229</sup> *Davis*'s impact on the long-debated question of rescue funds' constitutionality, therefore, remains muddled. Much needed clarity, however, arises in the following discussion. To deliver this result, the proceeding analysis scrutinizes whether, in light of *Davis*, rescue funds provisions burden fundamental First Amendment rights and, in so concluding, whether they can survive strict scrutiny.

### A. Burden Analysis

To recap, over the past fifteen years, the issue of rescue funds' constitutionality has centered on whether they impermissibly burden First Amendment rights. Two competing views have evolved in the circuit courts.<sup>230</sup> Rescue funds' critics have embraced the minority position that surfaced exclusively in the Eighth Circuit's *Day* decision.<sup>231</sup> This stance claims that rescue funds operate as unconstitutional expenditure limits that "chill" free expression by causing a nonparticipating candidate's (or IE-making group's) self-censorship and, thus, function as "no less a burden on speech . . . than . . . direct government censorship."<sup>232</sup> Rescue funds' supporters (supporters), in contrast, have endorsed the majority view—adopted by the First, Fourth, and Sixth Circuits—that suggests that rescue funds, by

227. See *McComish v. Brewer*, No. 08-1550, 2008 WL 4629337, at \*12 (D. Ariz. Oct. 21, 2008) (denying plaintiffs' motion for preliminary injunction but concluding that plaintiffs had shown a strong likelihood of success on the merits of their claim that, in light of *Davis*, Arizona's rescue funds violated the First Amendment); see also *supra* note 110 (presenting Arizona's rescue funds scheme).

228. See, e.g., Posting of Rick Hasen at Election Law Blog, <http://electionlawblog.org/archives/012061.html> (Oct. 27, 2008, 20:29 PM PST) (last visited Sept. 29, 2009) ("I think a GVR of the cert. petition in light of *Davis* . . . is a real possibility.") (on file with the Washington and Lee Law Review).

229. *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 441 (4th Cir. 2008), cert. denied, *Duke v. Leake*, 129 S. Ct. 490 (2008) (mem.); see *supra* notes 151–59 (presenting the Fourth Circuit's decision in *Leake* upholding the constitutionality of North Carolina's rescue funds scheme).

230. See *supra* Part V (presenting the circuit court split over, and the alternative stances the circuits have taken regarding, whether rescue funds impose a burden on fundamental First Amendment rights).

231. See *supra* notes 118–30 and accompanying text (discussing the Eighth Circuit's ruling in *Day*).

232. *Supra* note 126 and accompanying text.

simply aiding responsive speech, do not impose an expenditure limit-like freedom of expression burden on nonparticipating candidates (or IE-making groups).<sup>233</sup> This stance avows that no speech burden results because there is "no right to speak free from response"<sup>234</sup> and because nonparticipating candidates (and IE-making groups) "remain free to raise and spend as much money, and engage in as much political speech, as they desire."<sup>235</sup> Pursuant to this majority standard, the focus then shifts to whether the rescue funds benefit proves so exceptional that it makes the state's public campaign subsidy system unconstitutionally involuntary by coercing participation—no court has yet found this to be the case.<sup>236</sup> Courts now must reconcile whether *Davis* affects this apparent authority split.

### *1. Davis Undermines the Prevailing Arguments that Rescue Funds Do Not Burden a Nonparticipating Candidate's Speech*

Supporters aver that *Davis* fails to apply to the rescue funds issue due to the persistence of the majority view that responsive speech does not equate to an abridgement of the initial speaker's freedom of expression.<sup>237</sup> According to supporters, there exists a "crucial [jurisprudential] First Amendment distinction between government restrictions on speech and government subsidies of speech."<sup>238</sup> The *Davis* Court, they allege, mindful of these differences, remained "careful not to say that any policy measure that arguably gives one candidate more speech power" necessarily burdens the speech of an opponent.<sup>239</sup> Supporters suggest that the opinion instead stood for the proposition that a law abridges freedom of expression only when it imposes a "direct restriction" on a candidate's speech based on that candidate's decision to exercise her First Amendment rights.<sup>240</sup> On the other hand, supporters claim

233. See *supra* notes 131–66 and accompanying text (presenting the circuit courts' majority view that rescue funds do not burden First Amendment rights).

234. *Supra* notes 140, 156.

235. *Supra* note 157.

236. See *supra* notes 146–48, 159, 165 and accompanying text (presenting *Daggett's*, *Leake's*, and *Gable's* analysis of whether the availability of rescue funds coerces candidates to participate in public funding).

237. *Infra* note 247 and accompanying text.

238. *The Supreme Court, 2007 Term—Leading Cases*, 122 HARV. L. REV. 375, 381, 383 [hereinafter *Harvard 2007 Term Cases*].

239. *Id.* at 383.

240. See *id.* ("[*Davis*] merely reasoned that restricting a candidate's speech based on an opponent's decision to exercise his speech rights is an unconstitutional burden.").

that, because the *Buckley* Court declared that the First Amendment aims to "secure the widest possible dissemination of information from diverse and antagonistic sources,"<sup>241</sup> freedom of expression remains unburdened when a law simply promotes one candidate's speech based on her opponent's exercise of his speech rights.<sup>242</sup> Thus, supporters suggest that, "[w]hile both kinds of regulation seek to level the field between candidates, only [direct restrictions do] so by affirmatively limiting a candidate's First Amendment right to speak."<sup>243</sup>

Due to this alleged distinction, supporters claim that a "clear doctrinal line" exists between the public funding schemes that utilize rescue funds and the disparate private fundraising contribution restrictions at issue in *Davis*.<sup>244</sup> They contend that the Millionaire's Amendment's asymmetrical contribution limitations impermissibly restricted a self-financing candidate's speech by subjecting her to lower limits simply because she chose to exercise her freedom of expression rights.<sup>245</sup> This direct restriction, supporters aver, burdened speech and caused the Court to apply expenditure limit standards to its analysis of the Millionaire's Amendment.<sup>246</sup> In contrast, supporters claim that rescue funds impose no speech restraint because, as *Daggett* established, there exists no right to speak free from response.<sup>247</sup> "By providing additional funding to [participating] candidates," supporters declare, rescue funds "only promote speech [and] in no way do they directly restrict" the speech of the nonparticipating candidate.<sup>248</sup> Supporters contend, therefore, that *Davis* does nothing to undermine *Daggett's* and *Leake's* refusal to apply expenditure limit standards to rescue funds cases as rescue funds simply promote "the widest

241. *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam) (citations omitted).

242. *Harvard 2007 Term Cases*, *supra* note 238, at 383.

243. *Id.*

244. *See id.* at 384.

245. *Id.*; *see also* Response in Opposition to Petition for a Writ of Certiorari at 11, Duke v. Leake, 129 S. Ct. 490 (2008) (No. 08-120) ("[T]he discriminatory treatment that concerned the Court in *Davis* related to contribution limits in the context of private fundraising. There is no question under the governing precedent that contribution limits impose burdens on First Amendment rights . . .").

246. *Harvard 2007 Term Cases*, *supra* note 238, at 384.

247. *See supra* notes 140, 156, 234 and accompanying text (presenting the argument that there exists no right to speak free from response).

248. *Harvard 2007 Term Cases*, *supra* note 238, at 384; *see also* Response in Opposition to Petition for a Writ of Certiorari, *supra* note 245, at 12 (discussing how the legal context in *Davis* restricted speech while rescue funds, as part of a public funding scheme, fulfill the First Amendment's purpose of facilitating and enlarging speech) (citations omitted).

possible dissemination" of speech by providing the participating candidate the means to respond to her nonparticipating opponent (or to a hostile IE).<sup>249</sup>

*Davis*, however, calls into question the existence of the averred "crucial First Amendment distinction" between speech subsidies and speech restrictions. First, *Davis* usurps the contention that there exists no right to speak free from (state-aided) response.<sup>250</sup> The Court did so when it concluded that the Millionaire's Amendment impermissibly produced fundraising advantages for political opponents.

As discussed, the notion that candidates (and IE-making groups) have "no right to speak free from response" arose in *Daggett*.<sup>251</sup> The First Circuit in *Daggett* established this premise by citing to *Pacific Gas & Electric Company v. Public Utilities Commission*,<sup>252</sup> a First Amendment decision not involving campaign finance.<sup>253</sup> The *Daggett* court characterized *Pacific Gas* as standing only for the proposition that "there exists no right to speak 'free from vigorous debate.'"<sup>254</sup> The *Davis* Court, however, in finding that the Millionaire's Amendment unfairly created "fundraising advantages for opponents in the competitive context of electoral politics," also cited *Pacific Gas*, but for a converse principle. The *Davis* Court remarked that *Pacific Gas* discovered "infringement of speech rights where if the plaintiff spoke it could be forced . . . to help disseminate hostile views."<sup>255</sup> Further, the *Davis*-Court-endorsed portion of *Pacific Gas* expounds that, although one does not have the "right to be free from vigorous debate," she "does have the right to be free from government restrictions that abridge [her] own rights in order to enhance the relative voice of [her] opponent[]." <sup>256</sup> *Davis*, thus, stands in opposition to

249. See *Harvard 2007 Term Cases*, *supra* note 238, at 384 (declaring that *Daggett* and its progeny have recognized the crucial distinction between penalties and subsidies, and that this has led these circuit courts to refuse to apply expenditure limit standards when assessing rescue funds' constitutionality); see also *Response in Opposition to Petition for a Writ of Certiorari*, *supra* note 245, at 12 (discussing how the legal context in *Davis* restricted speech while rescue funds, as part of a public funding scheme, fulfill the First Amendment's purpose of facilitating and enlarging speech).

250. See *supra* note 247 and accompanying text (presenting this position of supporters).

251. *Supra* note 140 and accompanying text.

252. See *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 20–21 (1986) (plurality opinion) (concluding that the California Public Utilities Commission burdened a utility company's First Amendment rights by ordering the utility to place a newsletter of a third-party in its billing envelopes and that the order was not justified by a compelling state interest).

253. See generally *id.*

254. *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000) (quoting *Pac. Gas*, 475 U.S. at 14).

255. *Davis v. FEC*, 128 S. Ct. 2759, 2772 (2008) (quoting *Pac. Gas*, 475 U.S. at 14).

256. *Pac. Gas*, 475 U.S. at 14 (internal citations omitted); see also *McComish v. Brewer*,

*Daggett* and its progeny because it denotes that, in fact, a right to speak free from response does exist. This constitutional protection, however, only arises when the government places a "restriction" on the initial candidate-speaker that "abridges" that initial speaker's First Amendment rights in order to amplify the voice of her opponent. With this principle established, it proves necessary to determine whether supporters correctly assert that only "direct" government restrictions abridge political speech, as rescue funds have been classified only as indirect burdens on speech.<sup>257</sup>

The deeming of rescue funds as an indirect burden on candidate (or IE) speech, of course, solely arose in *Day*,<sup>258</sup> and the *Davis* Court explicitly endorsed *Day*.<sup>259</sup> In so doing, *Davis* calls into question supporters' stance that direct government restrictions on speech, alone, implicate the First Amendment.<sup>260</sup>

No. 08-1550, 2008 WL 4629337, at \*6 (D. Ariz. Oct. 21, 2008) (addressing how the *Davis* Court's approval of this language signals that the Court was focused on more than just the direct penalty that resulted from the Millionaire's Amendment's imposed asymmetrical contribution limits). The *Davis* Court's endorsement of this logic in the campaign finance realm hardly comes as a surprise. The stance appears as a corollary to *Buckley*'s declaration that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Supra* note 77 and accompanying text.

257. *See supra* notes 124–26 (presenting *Day*'s indirect First Amendment burden analysis).

258. *Supra* notes 124–26.

259. *See supra* notes 205–06 and accompanying text (mentioning that the *Davis* Court cited *Day* with approval). The *Davis* Court's endorsement of *Day* largely goes unmentioned by supporters when they formulate their arguments in support of why rescue funds do not burden speech. *See, e.g.*, Response in Opposition to Petition for a Writ of Certiorari, *supra* note 245 (presenting arguments for why rescue funds do not burden speech, notwithstanding *Davis*, without addressing the Court's approval of *Day*); *Harvard 2007 Term Cases*, *supra* note 238 (same); Ryan, *supra* note 225 (same). In the Harvard piece, for example, the author asserts that circuit courts have refused to apply expenditure limit precedent when analyzing the efficacy of rescue funds. *Supra* note 249 and accompanying text. The argument that circuit courts, such as the First Circuit in *Daggett*, have refused to find the existence of a burden in rescue funds cases comes with one significant qualifier—*Day*—the very, and only, one of these circuit decisions the *Davis* Court endorsed in finding the Millionaire's Amendment unconstitutional. *Supra* notes 205–06 and accompanying text. The Harvard piece, however, chooses not to address this endorsement. *See generally Harvard 2007 Term Cases*, *supra* note 238.

260. *See, e.g.*, Hasen, *supra* note 224 (exclaiming that the Court's endorsement of *Day* proves indicative of *Davis*'s threat to rescue funds); *see also* Letter from Albert Porroni, Legislative Counsel, New Jersey State Legislature Office of Legislative Services, to William Castner, Executive Director, New Jersey Assembly Democratic Office (July 21, 2008), [http://www.campaignfreedom.org/docLib/20080725\\_NJ\\_davis.pdf](http://www.campaignfreedom.org/docLib/20080725_NJ_davis.pdf) (last visited Sept. 29, 2009) (expressing the sentiment that the Court's endorsement of *Day* is "noteworthy" and indicates that a court would likely declare New Jersey's rescue funds provision unconstitutional) (on file with the Washington and Lee Law Review).

Again, only *Day* has "equat[ed] responsive speech with an impairment to the initial speaker."<sup>261</sup> The Eighth Circuit found that, "[t]o the extent . . . a candidate's campaign is enhanced by the operation of [a rescue funds] statute, the political speech of an individual or group who made the . . . expenditure 'against' her (or in favor of her opponent) is impaired."<sup>262</sup> The infringement, the court ruled, results from the rescue funds' "chilling effect" that occurs "even before the state implements the statute's mandates."<sup>263</sup> In other words, the Eighth Circuit determined that the sheer threat of rescue funds leads candidates (or IE-making groups) to choose not to speak, and does not provide a potential financial benefit to the candidate they oppose.<sup>264</sup> Further, the *Day* court concluded, the speech burden imposed by this resulting self-censorship proves indistinguishable from direct government restriction.<sup>265</sup>

*Davis* applied this same logic to its constitutional analysis of the Millionaire's Amendment. The Court, by citing *Day* and ignoring the other circuit decisions relied on so heavily by the district court,<sup>266</sup> disregarded the lower court's conclusion that the provision of a benefit fails to hamper speech.<sup>267</sup> Instead, *Davis*, like *Day*, found that granting a non-self-financing candidate the advantage of asymmetrical contribution limits "chilled" the self-financing candidate's speech.<sup>268</sup> Similar to *Day*, however, the freeze did not result directly from the self-financing candidate's subjection to the penalty of "discriminatory fundraising limitations," but from the potentiality of triggering those asymmetrical limits. The discriminatory ceilings meant that "the vigorous exercise of [the self-financing candidate's] right to use personal funds to

261. See *supra* note 139 and accompanying text (presenting *Daggett*'s refusal to accept *Day*'s logic, which *Daggett* declared equated responsive speech with an impairment on the initial speaker's First Amendment rights).

262. *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994).

263. *Id.*

264. See *supra* notes 125–26 and accompanying text (explaining *Day*'s conclusion that rescue funds provisions chill protected political speech by causing a potential political speaker's self-censorship because of the speaker's concern about providing a financial windfall to an opposed candidate).

265. *Supra* note 126 and accompanying text.

266. See *supra* notes 194–97 and accompanying text (discussing the district court's ruling on *Davis* in which it relied significantly on the circuit court opinions that stand in opposition to *Day* in order to rule that the Millionaire's Amendment did not burden speech).

267. See *supra* note 196 and accompanying text (presenting the district court's declaration that speech promoting benefits do not burden the First Amendment rights of the initial speaker who triggers the benefit through her expenditure of personal funds).

268. See Letter from Albert Porrioni to William Castner, *supra* note 260, at 5 (discussing *Davis*'s conclusion that the Millionaire's Amendment burdened speech by discouraging a self-financing candidate's expenditure of personal funds).

finance campaign speech [would] produce fundraising advantages for opponents in the competitive context of electoral politics.<sup>269</sup> As a result, a self-financing candidate's expenditure of too much personal wealth would benefit her opponent's political voice; too little spending would hamper her own. Consequently, as in *Day*, such a scheme could not stand because it had potential to lead to self-censorship as a self-financing candidate had to either "abide by a [self-imposed] limit on personal expenditures or endure the burden . . . placed on that right by activation of a scheme" that aided a rival candidate's political voice through increased campaign funding.<sup>270</sup>

*Davis* establishes, therefore, that a candidate has "the right to be free from government restrictions that abridge [her] own [First Amendment] rights in order to enhance the relative voice of [her] opponent," even when that abridgement arises indirectly out of a candidate's concern for a law's consequences.<sup>271</sup> A campaign finance regulation, like the Millionaire's Amendment, that inflicts an "unprecedented penalty" on a candidate's speech, therefore, substantially burdens the candidate's First Amendment rights if the law causes the candidate—even without mandating it directly—to limit her own political speech.

This framework by itself, however, does not answer the rescue funds issue. It remains unresolved whether rescue funds rise to the level of a Millionaire's Amendment-like "unprecedented penalty" that would invoke application of *Davis*'s burden standard. Supporters argue that rescue funds do not. They exclaim that the *Davis* Court did not consider rescue funds' validity, and that, therefore, *Davis* does not apply conclusively.<sup>272</sup> These supporters, to advocate that *Davis* does not affect the rescue funds question, primarily point to factual disparities in how rescue funds provisions and the Millionaire's Amendment operate.<sup>273</sup> As discussed, when triggered, the Millionaire's Amendment imposed discriminatory asymmetrical contribution limits on candidates.<sup>274</sup> In

269. *Supra* note 208 and accompanying text.

270. *Davis v. FEC*, 128 S. Ct. 2759, 2772 (2008).

271. *Supra* note 256 and accompanying text.

272. *See* Ryan, *supra* note 225 (reminding that rescue funds "were not analyzed by the Court in *Davis*" and that the differences between rescue funds and the Millionaire's Amendment should result in courts finding that rescue funds remain constitutional).

273. *See* Response in Opposition to Petition for a Writ of Certiorari, *supra* note 245, at 11–16 (arguing that there are key differences in the factual contexts of rescue funds and the Millionaire's Amendment); Ryan, *supra* note 225 (discussing the factual differences between the Millionaire's Amendment and rescue funds provisions and how they should lead courts to uphold rescue funds).

274. *See supra* notes 183–88 and accompanying text (explaining the Millionaire's Amendment's operative scheme).



other words, when a self-financing candidate activated the clause, similarly situated contestants for the same congressional seat, who "under the usual circumstances" faced the same fundraising limits, became subject to varying contribution regulatory requirements.<sup>275</sup> This, in turn, created the impermissible fundraising advantage for the non-self-financing candidate in the competitive world of elections that promoted the self-financing candidate's self-censorship.<sup>276</sup> Supporters argue that these discriminatory contribution limits alone made the Millionaire's Amendment a "penalty" that served "antithetical to the First Amendment."<sup>277</sup> They base this assertion on *Davis's* statement that the Millionaire's Amendment would have survived constitutional challenge had it raised each candidate's contribution limits—and thus absolved any disparate impact—when triggered.<sup>278</sup> Supporters claim that this dicta, when combined with the Court's conclusion that the Millionaire's Amendment's discriminatory fundraising limitations burdened speech, reveals that *Davis* stands solely for the proposition that such disparate limits abridge political speech.<sup>279</sup>

Pursuant to this interpretation, supporters declare that rescue funds cannot cause the same burdens that bothered the Court in *Davis*. For instance, supporters suggest that rescue funds, unlike the Millionaire's Amendment, do not treat similarly situated candidates differently and, therefore, do not discriminate amongst candidates.<sup>280</sup> Rather, "under the usual circumstances," supporters aver, the same restrictions *do not apply* to a participating and a nonparticipating candidate.<sup>281</sup> Instead, while a participating candidate receives the benefits of public money, a nonparticipating candidate, supporters claim,

275. See *Davis*, 128 S. Ct. at 2771 ("[The Millionaire's Amendment] raises the [contribution] limits *only* for the non-self-financing candidate and does so *only* when the self-financing candidate's expenditure of personal funds causes the OPFA threshold to be exceeded.") (emphasis added).

276. *Supra* notes 208, 269.

277. Response in Opposition to Petition for a Writ of Certiorari, *supra* note 245, at 13.

278. *Supra* note 200 and accompanying text.

279. See Response in Opposition to Petition for a Writ of Certiorari, *supra* note 245, at 8–9 ("The Court made clear that it was the discriminatory contribution limits before it in *Davis* that made the Millionaire's Amendment unconstitutional . . . . Indeed the Court emphasized that the statute would have imposed no burden on protected speech if Congress had simply raised contribution limits for both candidates.")

280. See, e.g., *id.* at 14 (declaring that participating and nonparticipating candidates are not similarly situated in North Carolina's full-public funding system).

281. See, e.g., Ryan, *supra* note 225 ("In short, under usual circumstances, the same restrictions *do not* apply to a candidate participating in a public financing program and a candidate who is not. A participating candidate accepts significant burdens and disadvantages vis-à-vis a nonparticipating candidate from the get-go.") (internal citations omitted).

always faces "less restrictive campaign finance laws than [her] publicly-funded opponent, even when a [rescue funds] provision is in effect."<sup>282</sup> Because of these alleged omnipresent discrepancies in fundraising limitations, supporters contend that *Davis's* penalty analysis cannot pertain to rescue funds because, when triggered, rescue funds, unlike the Millionaire's Amendment, cannot possibly provide discriminatory "fundraising *advantages* [to a participating candidate]."<sup>283</sup> The participating candidate, instead, always encounters a fundraising disadvantage compared with her nonparticipating opponent, regardless of rescue funds.<sup>284</sup>

Supporters also proffer a second claimed factual distinction for why *Davis's* concern with a candidate's being forced "to choose between the . . . right to engage in unfettered political speech and subjection to discriminatory fundraising limitations" cannot arise under a public funding system utilizing rescue funds.<sup>285</sup> They point out the fact that public financing programs do not subject the non-participating candidate to any additional "fundraising limitations" after she triggers her participating opponent's additional subsidy grant.<sup>286</sup> Rather, supporters claim, the public funding scheme only imposes strictures on the participating candidate subsequent to the rescue funds' distribution.<sup>287</sup>

Because of these alleged discrepancies between the function of the Millionaire's Amendment and rescue funds provisions, supporters contend that *Vote Choice* and its progeny still control the rescue funds issue. Supporters suggest that both public and private funding systems present their own associated benefits and burdens.<sup>288</sup> Because of these alternative costs and

282. *Id.*

283. *See id.* ("Whereas the *Davis* Court concluded that under the Millionaire's Amendment, 'the vigorous exercise of the right to use personal funds to finance campaign speech produce[d] *fundraising advantages* for opponents in the competitive context of electoral politics,' the same cannot credibly be said about public financing program [rescue funds].").

284. *Id.*

285. Response in Opposition to Petition for a Writ of Certiorari, *supra* note 245, at 14–15; *see also* Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445, 468 (1st Cir. 2000) (stating that "a non-participating candidate retains the ability to outraise and outspend her participating opponent with abandon after" the rescue funds' disbursement).

286. Response in Opposition to Petition for a Writ of Certiorari, *supra* note 245, at 14–15 (claiming that after the issuance of the rescue funds match, the nonparticipating candidate has no additional fundraising strictures imposed upon her by the public funding system).

287. *See id.* (stating that only the participating candidate faces the public funding system's restrictions on funding and expenditures); Ryan, *supra* note 225 (discussing the limitations that only the participating candidate faces).

288. *See, e.g.*, Response in Opposition to Petition for a Writ of Certiorari, *supra* note 245, at 14.

benefits, supporters avow that, unless the relative burdens and benefits between the public funding and private funding options become so extreme that they obliterate the voluntary nature of the public financing alternative, each candidate presumably selects the most rational preference for her campaign.<sup>289</sup> So long as the participation remains voluntary, supporters argue, rescue funds do not concern the First Amendment.<sup>290</sup>

These contentions, however, fall short. Admittedly, the Millionaire's Amendment and rescue funds are not the same, and the *Davis* Court did furnish great attention to the existence of the asymmetry in the contribution limits.<sup>291</sup> Supporters' factual discrepancy arguments, nevertheless, ignore the broad reach of the *Davis* opinion's analysis of the "fundamental nature of the right to spend personal funds for campaign speech."<sup>292</sup> The Court, for instance, established that this First Amendment right means a "right to engage in *unfettered* political speech."<sup>293</sup> The Court's use of the word "unfettered," defined as "free" or "unrestrained," proves telling.<sup>294</sup> The word choice suggests that the Court views the right to spend money on campaign speech as absolute, and leads one to infer that even slight "restraint" on the right to spend limitless personal funds penalizes speech broadly. Such an understanding receives some support from *Buckley's* declaration that the First Amendment "cannot tolerate . . . restriction upon the freedom of a candidate to speak without legislative limit on behalf of [her] own candidacy."<sup>295</sup> Yet, *Davis*, itself, provides clear indication of this inference's validity.

---

289. *See id.* (declaring that so long as participation in public funding remains voluntary, the "rational candidate having knowledge of all . . . respective benefits and burdens—including the [rescue] funds provisions—will choose the option that she feels will maximize her communication with the electorate"); *see also supra* notes 147, 148 and accompanying text (presenting *Vote Choice's* voluntariness standard and the *Daggett* court's application of that standard to rescue funds); *cf. supra* note 88 and accompanying text (discussing *RNC's* declaration that when a public funding scheme does not coerce participation it merely presents an option for a candidate and the rational candidate will choose the best alternative for her campaign).

290. *See* Response in Opposition to Petition for a Writ of Certiorari, *supra* note 245, at 14 (declaring that no First Amendment impairment occurs as long as the differences between the relative burdens and benefits of the two campaign funding alternatives do not coerce participation) (citing *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 450 (1st Cir. 2000)).

291. *See* *McComish v. Brewer*, No. 08-1550, 2008 WL 4629337, at \*6 (D. Ariz. Oct. 21, 2008) (admitting that the Millionaire's Amendment and rescue funds operate differently).

292. *Davis v. FEC*, 128 S. Ct. 2759, 2771 (2008).

293. *Id.* (emphasis added).

294. RANDOM HOUSE WEBSTER'S DICTIONARY 2068 (2d ed. 2009).

295. *Supra* note 77 and accompanying text.

The *Davis* Court did so by referencing a brief filed by the FEC in the case.<sup>296</sup> This citation appears to have received little, if any, attention from commentators. However, the reference undeniably signals that rescue funds serve as an impermissible penalty on the speech of a nonparticipating candidate (or IE-making group) that, consequently, encourages their self-censorship. The citation's accompanying parenthetical reads: "[C]onceding that [the Millionaire's Amendment] does impose *some consequences* on a candidate's choice to self-finance *beyond certain amounts*."<sup>297</sup> This parenthetical sweeps broadly. *Davis*'s use of the word "some" suggests that if a campaign finance law imposes *any* "consequences" on the right to spend limitless amounts of personal funds, then that law penalizes speech. Pursuant to the Court's endorsement of *Day* and *Pacific Gas*, this expansive First Amendment protection indicates that any campaign finance regulation that promotes one candidate's speech based off another candidate's (or IE-making group's) exercise of her right to spend personal funds shall be deemed to impermissibly penalize, and, thus, chill the initial candidate-speaker's (or IE-making group's) speech.<sup>298</sup>

This includes rescue funds. A nonparticipating candidate (or IE-making group) faces "some consequences," in the form of her opponent's receipt of an additional public subsidy, on her choice to expend personal funds beyond a "certain amount"—the statutorily imposed triggering threshold.<sup>299</sup> The specific benefit-granting mechanism triggered by candidate spending, therefore, has no bearing on whether the regulation burdens speech, as any benefit-granting scheme tied to personal expenditures burdens speech under *Davis*—including rescue funds provisions.<sup>300</sup> The Millionaire's Amendment's fate, despite supporters' claims, rested not on its specific disparate contribution limits penalty, but on the general fact that the law tied "consequences" to candidate spending.

296. *Davis*, 128 S. Ct. at 2772 (2008) (quoting Brief for Appellee at 33, *Davis v. FEC*, 128 S. Ct. 2759 (2008) (No. 07-320)).

297. *Id.* (emphasis added) (quoting Brief for Appellee at 29, *Davis v. FEC*, 128 S. Ct. 2759 (2008) (No. 07-320)).

298. See *supra* notes 251–71 (discussing the constitutional framework established by *Davis* through the endorsement of logic from *Pacific Gas* and *Day*).

299. See *supra* note 110 and accompanying text (describing generally how the timing and right to a disbursement of rescue funds to a participating candidate depends on a nonparticipating candidate's (or IE-making group's) expenditure of personal money beyond a triggering threshold amount).

300. See Letter from Albert Porroni to William Castner, *supra* note 260, at 5 (declaring that rescue funds, like the Millionaire's Amendment, deter the freedom of expression of a nonparticipating candidate or a group making an independent expenditure).

Also, the *Davis* Court's broad language provides no support for the view that candidates must be similarly situated in order for a First Amendment burden to exist.<sup>301</sup> Because rescue funds provisions place the consequence of granting additional funding to an opponent on the participating candidate's expenditure of money, judicial focus should center on the burden placed on the nonparticipating candidate and not on the posture of her opponents.<sup>302</sup> Further, rescue funds provisions, pursuant to *Davis*, undermine the voluntariness of public funding schemes.<sup>303</sup> As in *Davis*, a nonparticipating candidate must abide either by the expenditure restrictions inflicted by the rescue funds or those imposed by the public funding scheme—"no option for 'unfettered political speech'" exists.<sup>304</sup>

The expansive First Amendment right established in *Davis* also undermines a prevalent common sense-based argument that supporters posit. In short, supporters claim that, because *Buckley* established the State's right to publicly finance campaigns,<sup>305</sup> there exists no logical justification for proscribing rescue funds as a means to administer the available public money.<sup>306</sup> Because, under *Buckley*, "one lump-sum distribution of the maximum amount available would not chill the First Amendment rights of the nonparticipating candidates or prevent them from raising or spending as much as they desire," supporters contend, "incremental distributions surely cannot do so."<sup>307</sup> This argument, however, loses its prudential force in light of a candidate's (or IE-making group's) right to spend personal funds without

301. See Reply to Respondents' Brief in Opposition at 3, *Duke v. Leake*, 129 S. Ct. 490 (2008) (No. 08-120) ("Nothing in *Davis* requires a candidate to be similarly situated as her opponents in order to assert a burden on her free speech rights . . . . The capacities of the other candidates for office have no bearing on the credibility of the burden placed on a candidate seeking relief from it.").

302. See, e.g., *id.* (declaring that, under *Davis*, it is the burden on the candidate and not the analogous posture of candidate that is relevant to the First Amendment).

303. See *McComish v. Brewer*, No. 08-1550, 2008 WL 4629337, at \*6 (D. Ariz. Oct. 21, 2008) (referring to rescue funds as imposing a "coercive choice" on non-participating candidates).

304. See Reply to Respondents' Brief in Opposition, *supra* note 301, at 3 (stating that, under North Carolina's public funding system offering rescue funds, candidates lose any option of whether to spend without limit on campaign speech because, either way, their spending will be constrained).

305. See *supra* notes 78–84 and accompanying text (presenting *Buckley*'s finding of public campaign financing's constitutionality).

306. See Response in Opposition to Petition for a Writ of Certiorari, *supra* note 245, at 16 (stating that the argument that "First Amendment rights are infringed merely because the [government] provides funds to participating candidates incrementally rather than in one lump sum . . . finds no support in . . . precedent . . . or in logic").

307. *Id.*

bounds.<sup>308</sup> If the statute divorced the participating candidate's receipt of the additional funds from the nonparticipating candidate's (or IE-making group's) expenditure of personal money, this would avert all First Amendment concerns.<sup>309</sup> However, once again, due to the fact that the distribution of rescue funds relies entirely on the nonparticipating candidate's (or IE-making group's) spending, the provisions impose "some consequences on [the] choice to self-finance beyond [a] certain amount[]" and impermissibly burden speech.<sup>310</sup> It is the potentiality of self-censorship that results from the imposition of these consequences that raises the First Amendment concerns.<sup>311</sup>

## 2. Summary of Why Rescue Funds Burden Speech

In sum, *Davis* confirms that rescue funds impose a substantial burden on a nonparticipating candidate's (or IE-making group's) exercise of First Amendment-protected freedom of expression. Contrary to *Daggett* and its progeny, *Davis* establishes that candidates (and IE-making groups) do, occasionally, have a right to speak free from response.<sup>312</sup> Protection of this right, under *Davis*, however, only manifests itself when the government seeks to amplify the responsive speech of one candidate to such an extent that the state abridges the First Amendment rights of an opponent.<sup>313</sup> Yet, this limitation proves meaningless as *Davis* also indicates that there exists a boundless First Amendment right to spend unlimited amounts of personal funds on campaign speech.<sup>314</sup> Rescue funds, consequently, impermissibly abridge this right because, although they do not directly restrict a nonparticipating candidate's (or IE-making group's) speech, they do impose a substantial penalty on any nonparticipating candidate (or IE-making group) who opts to exercise her right to engage in unrestrained spending.<sup>315</sup> This penalty, pursuant

---

308. *Supra* notes 293–98 and accompanying text.

309. See Reply to Respondents' Brief in Opposition, *supra* note 301, at 5 (arguing that if a public funding scheme disbursed additional subsidy grants to participating candidates in predetermined amounts and at predetermined times then no burden on free speech would be incurred by her nonparticipating opponent).

310. *Supra* note 299 and accompanying text.

311. See *supra* note 299 and accompanying text (suggesting that rescue funds provisions, rather than disbursing additional money at predetermined times and in predetermined amounts, burden speech because they make subsequent financing entirely contingent upon a nonparticipating candidate's speech).

312. *Supra* notes 251–57 and accompanying text.

313. *Supra* notes 255–57 and accompanying text.

314. *Supra* notes 293–98 and accompanying text.

315. *Supra* notes 300–01 and accompanying text.

to *Davis*, results because rescue funds provisions attach "some consequences"—the disbursement of campaign money to an election opponent—on the nonparticipating candidate's (or IE-making group's) expenditure of personal funds beyond a triggering threshold.<sup>316</sup> Such a "consequence" on campaign spending, just like a direct expenditure limit, reduces outlays of personal funds.<sup>317</sup> After *Davis*, such a scheme substantially burdens speech.

### B. Strict Scrutiny Review

"Because [rescue funds] impose[] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech, [the] provision[s] cannot stand unless [they are] justified by a compelling state interest."<sup>318</sup> Pursuant to *Davis*'s narrow compelling state interest standard, rescue funds appear doomed.<sup>319</sup> *Davis*, for instance, entirely usurps the most common justification for rescue funds. Supporters aver that rescue funds help to close the gap between wealthy candidates, who can afford to spend large sums of their personal fortune on their campaign, and candidates receiving public funding, who as a consequence face restrictive expenditure limitations.<sup>320</sup> After *Davis*, the "level electoral opportunities for candidates of different personal wealth" argument no longer adequately justifies a campaign finance law.<sup>321</sup>

Supporters, however, have suggested that rescue funds serve other state interests as well. For instance, some rescue funds advocates contend, like *Vote*

---

316. *Supra* note 299 and accompanying text.

317. *Supra* notes 266–70 and accompanying text.

318. *Supra* note 214 and accompanying text.

319. *See supra* Part VI.C.2 (presenting *Davis*'s application of strict scrutiny to the Millionaire's Amendment and the limited scope of compelling state interests that the Court viewed as justifying campaign finance regulations).

320. *See supra* note 112 and accompanying text (describing Clean Elections' rescue funds' aim of leveling electoral opportunities for candidates of varying wealth); Letter from Albert Porrioni to William Castner, *supra* note 260, at 4–5 ("[T]he only purpose served by providing additional public funds to candidates participating in a public financing program in order to counter an opponent's expenditures above a threshold amount, or [IEs] that have a negative effect, is to create a more level playing field by equalizing funding between candidates.").

321. *See supra* notes 216–21 and accompanying text (discussing *Davis*'s rejection of the government's equal playing field interest as justification for the Millionaire's Amendment's imposed First Amendment burden); *McComish v. Brewer*, No. 08-1550, 2008 WL 4629337, at \*6 (D. Ariz. Oct. 21, 2008) (explaining that *Davis* explicitly rejected the idea that leveling political opportunities served as a compelling state interest).

*Choice*, *Daggett*, and *Gable*, that governments have a compelling interest in ensuring the success of their public funding schemes via incentives, like rescue funds, that encourage candidate participation in the programs.<sup>322</sup> Other supporters claim that states have a compelling interest in protecting efficient allocation of the public fisc.<sup>323</sup> This second assertion arises out of *Buckley*. The *Buckley* Court, in analyzing a Fifth Amendment equal protection challenge against the presidential election public funding system's higher allocation of funds to major party candidates,<sup>324</sup> stated that, due to the scarcity of public resources, there existed an important state interest in protecting the public wealth that justified treating candidates differently.<sup>325</sup> Based on this declaration, supporters claim that governments have a compelling justification for retaining as much supplementary public money as they can until they are able to identify the campaigns most in need of added subsidies.<sup>326</sup>

Admittedly, each of these laudable interests appears important but neither likely rises to the level of "compelling."<sup>327</sup> *Davis* declares that the Court's campaign finance precedents indicate that only the prevention of political process corruption (or appearance of corruption) has thus far been deemed adequate to justify a campaign finance regulation.<sup>328</sup> This statement by the Court suggests that "few interests indeed would be sufficient to justify such

322. See *supra* notes 150–51, 166 and accompanying text (presenting *Vote Choice's*, *Daggett's*, and *Gable's* conclusions that encouraging participation in the public financing system serves as a compelling interest to justify using rescue funds as incentives).

323. See, e.g., Ryan, *supra* note 225 (claiming that rescue funds are necessary for the efficient allocation of public resources and therefore help to protect the public fisc).

324. See *supra* note 78 (mentioning that, in addition to a First Amendment challenge, the presidential election public funding system was also challenged on Fifth Amendment grounds in *Buckley*).

325. See *Buckley v. Valeo*, 424 U.S. 1, 96 (1976) (per curiam) (stating that Congress has an important "interest in not funding hopeless candidacies with large sums of public money," which justifies "the withholding public assistance from candidates without significant public support").

326. See Response in Opposition to Petition for a Writ of Certiorari, *supra* note 245, at 18 (stating that rescue funds help with the important government interest in conserving scarce public resources); Ryan, *supra* note 225 ("[A] court following *Buckley* should recognize that just as the presidential public financing program's provisions allocating precious limited public resources to races where they are most needed . . . advances the governmental interest in protecting the public fisc, so too do [rescue funds]."); cf. *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 469 (1st Cir. 2000) (claiming that rescue funds provisions allow a state to "effectively dispense limited resources while allowing participating candidates to respond in races where the most debate is needed").

327. See, e.g., *supra* note 129 (presenting *Day's* doubt regarding the compelling nature of a government interest in encouraging candidates to participate in public funding via rescue funds).

328. *Supra* note 217 and accompanying text.



restraints,<sup>329</sup> and neither of the supporters' asserted additional interests appear to serve an anti-corruption purpose. The important interest in preservation of public money and the efficient allocation of limited resources, for example, clearly serves no anticorruption objective and, nevertheless, likely would fail on narrowly tailored grounds because alternatives exist for altering initial allocations that do not require burdening speech.<sup>330</sup>

A stronger argument exists regarding the anticorruption purpose behind the interest in encouraging public funding system participation. *Buckley* stated that public financing itself serves an anticorruption function by eliminating the influence of large private contributions.<sup>331</sup> This could suggest that, because a state has a goal of reducing corruption (or apparent corruption), to achieve the aim of eradicating corruption, "the state has a related compelling interest in assuring reasonable levels of participation in the program, by convincing candidates to opt in and to forgo their right to raise and spend an unlimited amount of private funds."<sup>332</sup> The flaw with this claim lies in the fact that it switches focus back to the public funding scheme and away from the burden imposed on the nonparticipating candidate's (or IE-making group's) First Amendment right to make "unfettered" campaign expenditures. *Buckley* established that candidate personal expenditures reduce the corruption threat.<sup>333</sup> Rescue funds, however, discourage the expenditure of personal funds. Therefore, "[t]he burden imposed by [rescue funds] on the expenditure of personal funds is not justified by any governmental interest in eliminating corruption or the perception of corruption" because discouraging the expenditure of personal money "disserves the anticorruption interest."<sup>334</sup> Thus in light of *Davis*'s limited compelling state interest standard, and the absence of an apparent anticorruption purpose, the substantial First Amendment burden imposed by Clean Elections' rescue funds provisions proves unconstitutional.

---

329. *McComish v. Brewer*, No. 08-1550, 2008 WL 4629337, at \*9 (D. Ariz. Oct. 21, 2008).

330. *See, e.g., id.* (acknowledging a flaw in the efficient allocation of public funds as a compelling state interest argument because alternative options for adjusting public funding without burdening a nonparticipating candidate's speech exist).

331. *Supra* note 79 and accompanying text.

332. Response in Opposition to Petition for a Writ of Certiorari, *supra* note 245, at 17–18.

333. *Supra* notes 72–73 and accompanying text.

334. *Supra* note 215.

VIII. Conclusion

Clean Elections have been trumpeted by supporters as the "wave of the future" in campaign finance reform.<sup>335</sup> Advocates suggest that these full public funding programs serve as the most effective way to obviate lobbyist influence on political policy because once the campaign "money chase" ends, "elected officials [become] far less susceptible to some of the attractions that lobbyists can offer," and can focus, instead, on their agenda while on the campaign trail.<sup>336</sup> The primary impediment to effective administration of Clean Elections has long been the risk of candidates being deterred from accepting public funds because of the threat of limitless spending by nonparticipating opponents and, more significantly, independent groups making hostile IEs.<sup>337</sup> Believing that "there is no good reason to allow disparities in wealth to be translated into disparities in political power,"<sup>338</sup> states and municipalities created rescue funds to alleviate this one-sided spending and to encourage participation in their public funding systems.<sup>339</sup> In *Davis's* wake, however, these special benefits no longer function as a constitutionally viable response to one-sided spending and legislatures in Clean Elections jurisdictions must anticipate litigation seeking to invalidate their rescue funds provisions. And, they should expect the courts to rule in the challengers' favor.<sup>340</sup> Similarly, legislators in other jurisdictions should be wary of any calls for Clean Elections reforms, in general, and Clean Elections programs utilizing rescue funds provisions, specifically. Congress, too, should abandon its thoughts of including rescue funds in federal Clean Elections legislation.<sup>341</sup>

335. Peggy Fikac, *Clean Elections Might Wash Away Money's Imprint*, SAN ANTONIO EXPRESS-NEWS, [http://www.mysanantonio.com/news/MYSA041506\\_1A\\_lobby\\_solutions\\_22383de4\\_html2151.html](http://www.mysanantonio.com/news/MYSA041506_1A_lobby_solutions_22383de4_html2151.html) (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

336. *Id.*

337. See Hasen, *supra* note 224 (discussing how one-sided IEs serve as the biggest concern to effective state and local public funding systems).

338. *Davis v. FEC*, 128 S. Ct. 2759, 2781 (2008) (Stevens, J., dissenting) (internal citations omitted).

339. See, e.g., Marin Clean Elections FAQ, <http://marincleanelections.org/recent-posts> (last visited Sept. 29, 2009) (calling Clean Elections "the most effective reform to reduce the frequency and influence of IEs" due to the allowance of rescue funds) (on file with the Washington and Lee Law Review).

340. See, e.g., Letter from Albert Porrioni to William Castner, *supra* note 260, at 5 ("[I]t is our opinion that if [New Jersey's rescue funds legislation] is enacted into law . . . , a reviewing court would likely find the rescue money provisions to violate the First Amendment.")

341. See Fair Elections Now Act, S. 1285, 110th Cong. § 511 (2007) (calling for the law to provide "Fair Fight" rescue funds for participating Senate candidates).

Thus, *Davis*, by invalidating rescue funds, has "blown a hole in effective public financing plans."<sup>342</sup> As a consequence, the once-proclaimed "wave of the future" appears on the verge of crashing. For that very reason, although "Heller [was] a huge case[,] . . . in terms of affecting policies that might actually be enacted, it may not be as important as . . . *Davis*."<sup>343</sup>

---

342. Hasen, *supra* note 224.

343. Esenberg, *supra* note 12.