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## *Davis v. FEC: Closing the Road to Washington for Joe the Plumber*

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## Note

### **DAVIS V. FEC: CLOSING THE ROAD TO WASHINGTON FOR JOE THE PLUMBER**

SAMEER VADERA\*

In *Davis v. FEC*,<sup>1</sup> the Supreme Court of the United States considered whether the financing regulatory scheme contained in Section 319(a) of the Bipartisan Campaign Reform Act of 2002 (“BCRA”)<sup>2</sup> violated a self-financing candidate’s First Amendment rights.<sup>3</sup> The Court held that the asymmetrical contribution limits that Section 319(a) imposed on candidates campaigning for the same seat in the United States House of Representatives impermissibly burdened the self-financing candidate’s freedom of speech.<sup>4</sup> In so holding, the Court incorrectly applied strict scrutiny to Section 319(a)’s contribution limits, instead of the “closely drawn” standard that prior case law established.<sup>5</sup> By failing to apply the “closely drawn” standard to the Act’s contribution limits, the Court increased barriers for non-wealthy candidates running for political seats by (1) failing to protect fair and competitive elections and (2) jeopardizing public funding as a viable method for clean elections.<sup>6</sup> Had the Court applied the “closely drawn” scrutiny standard to Section 319(a), it would have validated effective campaign finance reform that treats the concerns of corruption in politics.<sup>7</sup>

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\* Sameer Vadera is a second-year student at the University of Maryland School of Law where he is a staff member for the *Maryland Law Review*. The author wishes to thank Professor Gordon G. Young for providing great insight into the constitutional issues of campaign finance regulations. The author owes special thanks to Kerry T. Cooperman and Heather R. Pruger for their limitless goodwill, excellent editing, and invaluable intellectual support. Finally, the author is forever grateful to his family and friends for their continued encouragement.

1. 128 S. Ct. 2759 (2008).

2. Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C.).

3. *Davis*, 128 S. Ct. at 2770.

4. *Id.* at 2771.

5. *See infra* Part IV.A.

6. *See infra* Part IV.B.

7. *See infra* Part IV.C.

I. THE CASE

Section 319 of the BCRA, known as the “Millionaires’ Amendment,”<sup>8</sup> regulates the expenditures of candidates running for election to the United States House of Representatives (“House”).<sup>9</sup> Section 319(a) imposes asymmetrical contribution limits on candidates when (1) one candidate spends more than \$350,000 of personal funds and (2) the opposing candidate does not finance his own campaign.<sup>10</sup> When Section 319(a) takes effect, the self-financing candidate must adhere to typical campaign contribution limits,<sup>11</sup> but the non-self-financing candidate may receive three times the typical contributions.<sup>12</sup> Section 319(b) compels the self-financing candidate to disclose more information than the non-self-financing candidate.<sup>13</sup>

In March 2006, Democrat Jack Davis ran for New York’s 26th Congressional District seat in the House.<sup>14</sup> To commence his candidacy, Davis filed a “Statement of Candidacy” with the Federal Election Commission (“FEC”).<sup>15</sup> Unlike his opponent, Davis self-financed his campaign and disclosed that he anticipated spending \$1 million in personal funds, which triggered Section 319(a)’s asymmetrical regulatory scheme.<sup>16</sup> Two months later, Davis sued the FEC, asking the United States District Court for the District of Columbia to enjoin the FEC from enforcing

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

9. BCRA § 319, 2 U.S.C. § 441a-1 (2006). The BCRA also includes a provision regulating elections for the United States Senate that is similar, but not identical, to § 319(a). *See* 2 U.S.C. § 441a(i) (2006).

10. 2 U.S.C. § 441a-1(a); *see also Davis*, 128 S. Ct. at 2766. A non-self-financing candidate may begin receiving increased contribution amounts when his opponent’s Opposition Personal Funds Amount (“OPFA”) surpasses \$350,000. 2 U.S.C. § 441a-1(a)(1). To calculate the self-financing candidate’s OPFA, the non-self-financing candidate must add his opponent’s expenditures of personal funds to “50% of the funds raised for the election at issue.” *Id.* § 441a-1(a)(2)(A)-(B).

11. 2 U.S.C. § 441a-1(a)(1). The contribution limit for individual donors is currently set at \$2,300. *Id.* § 441a(a)(1)(A); 72 Fed. Reg. 5295 (Feb. 5, 2007). However, Congress adjusts the contribution limits for inflation every two years. 2 U.S.C. § 441a(c). In addition, a candidate may not accept funds from a donor who has contributed a total of \$42,700 to other candidates and their committees. 2 U.S.C. § 441a(a)(3)(A); 72 Fed. Reg. 5295 (Feb. 5, 2007).

12. 2 U.S.C. § 441a-1(a)(1)(A). During the period of increased contribution limits, the non-self-financing candidate may receive up to \$6,900 from each individual donor. *See id.*

13. *Davis*, 128 S. Ct. at 2766–67. Specifically, the self-financing candidate must (1) reveal the amount of personal funds he or she intends to spend beyond the \$350,000 threshold, (2) notify the FEC when the OPFA has surpassed \$350,000, and (3) notify the FEC regarding each additional \$10,000 expenditure of personal funds. *Id.* The non-self-financing candidate need only notify the FEC of receipt of the self-financing candidate’s notice indicating an OPFA greater than \$350,000. *Id.* at 2767.

14. *Id.* at 2767.

15. *Id.*

16. *Id.*

Section 319 during the 2006 campaign on the grounds that Section 319 violated the First and Fifth Amendments.<sup>17</sup> Both parties filed cross-motions for summary judgment.<sup>18</sup>

Granting summary judgment in favor of the FEC, the United States District Court for the District of Columbia concluded that, although Davis had standing to sue, his claims lacked merit.<sup>19</sup> The court held that, because Section 319(a) did not impose any burden on the self-financing candidate's freedom to speak, it did not violate the First Amendment.<sup>20</sup> In addition, the court held that, because Section 319(a) merely equalized the candidates' financial strength, it did not violate the Equal Protection Clause.<sup>21</sup> Davis appealed directly to the Supreme Court of the United States under the BCRA's exclusive appellate review provision.<sup>22</sup>

## II. LEGAL BACKGROUND

Because “virtually every” form of political speech requires the expenditure of money, the Supreme Court has consistently held that any regulation on campaign financing implicates freedom of speech concerns.<sup>23</sup> The Court mainly applies the First Amendment to two aspects of campaign finance regulations: (1) contributions and (2) expenditures.<sup>24</sup> First, the Court invalidates campaign contribution limits unless they are “closely drawn” to serve a sufficiently important governmental interest.<sup>25</sup> Second, the Court strikes down limits on campaign expenditures unless they are narrowly tailored to serve a compelling governmental interest.<sup>26</sup> Recently, however, a number of state and federal courts have broken away from traditional campaign finance notions and have held that expenditure limits are not per se unconstitutional.<sup>27</sup>

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17. *Id.* Davis argued that § 319(a) burdened his First Amendment right to fund his own speech because it let his opponent raise more money to finance contradictory speech. *Id.* at 2770.

18. *Id.* at 2768.

19. *See* Davis v. FEC, 501 F. Supp. 2d 22, 27, 32, 34 (D.D.C. 2007) (acknowledging that Davis suffered the requisite injury to satisfy standing requirements, but holding that § 319(a) did not violate the First or Fifth Amendments).

20. *Id.* at 31.

21. *Id.* at 33–34.

22. *Davis*, 128 S. Ct. at 2768. The BCRA mandates that a final decision shall be reviewable only by appeal directly to the Supreme Court of the United States. Bipartisan Campaign Reform Act of 2002, § 403(a)(3), 2 U.S.C. § 437h note (2006). The Court must “advance on the docket and . . . expedite to the greatest possible extent the disposition of the . . . appeal.” *Id.* § 403(a)(4), 2 U.S.C. § 437h note.

23. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam); *see also infra* Part II.A.

24. *See infra* Part II.B.

25. *See infra* Part II.B.1.

26. *See infra* Part II.B.2.

27. *See infra* Part II.C.

A. *The Supreme Court Views Campaign Spending as Protected Speech Under the First Amendment Because “Virtually Every” Means of Political Speech Requires the Expenditure of Money*

The First Amendment to the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech.”<sup>28</sup> Its purpose is to preserve an “uninhibited marketplace of ideas” where the truth ultimately prevails.<sup>29</sup> In addition, the Constitution grants Congress the power to “make or alter” rules governing federal elections.<sup>30</sup> In applying the First Amendment to campaign finance legislation, the Supreme Court has consistently held that, because money enables political speech, restrictions on campaign funding restrain free speech.<sup>31</sup>

The Supreme Court first determined that campaign finance limits regulated speech, not conduct, in *Buckley v. Valeo*,<sup>32</sup> where several politicians claimed that certain provisions of the amended Federal Elections Campaign Act (“FECA”)<sup>33</sup> violated their First Amendment rights.<sup>34</sup> In applying the First Amendment to the FECA, the Court observed that limits on funding seriously impaired the quality, depth, and range of political expression.<sup>35</sup> Thus, the Court rejected the notion that restrictions on spending targeted conduct, not speech.<sup>36</sup> The Court further explained that the dependence of communication on expenditures of money does not reduce the level of scrutiny that the First Amendment requires.<sup>37</sup> Since *Buckley*, the Court has strictly adhered to this belief.<sup>38</sup>

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28. U.S. CONST. amend. I.

29. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

30. U.S. CONST. art. I, § 4.

31. *See infra* notes 32–38 and accompanying text.

32. 424 U.S. 1 (1976) (per curiam).

33. Federal Elections Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified at 2 U.S.C. §§ 431–442).

34. *Buckley*, 424 U.S. at 6–9.

35. *Id.* at 19.

36. *Id.* at 16 (“We cannot share the view that the [FECA’s] contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O’Brien*.”).

37. *Id.*

38. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 242 (2006) (noting that during the previous thirty years, the Supreme Court has repeatedly adhered to *Buckley*’s constraints on expenditure limits); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990) (applying the *Buckley* framework to determine the constitutionality of Michigan’s campaign finance laws).

*B. Statutes Imposing Direct Contribution and Expenditure Limits for Campaign Spending Implicate First Amendment Concerns Because Both Reduce Political Expression*

In attempting to reform campaign finance regulatory schemes, Congress has consistently targeted “big money” because of the belief that large contributions and expenditures corrupt the electoral process.<sup>39</sup> To address this problem, Congress has established a limits-based approach.<sup>40</sup> The Court scrutinizes Congress’s limits in two ways. First, the Court invalidates contribution limits unless they are closely drawn to serve a substantially important governmental interest.<sup>41</sup> Second, the Court strikes down expenditure limits unless Congress has narrowly tailored them to serve a compelling governmental interest.<sup>42</sup>

*1. Because Contribution Limits Reduce Corruption and the Appearance of Corruption, the Supreme Court Sustains These Limits Unless They Are so Low as to Prevent Effective Campaigning*

The first enactment aimed at reducing the harmful influence of “big money” campaign contributions followed President Theodore Roosevelt’s call for legislation forbidding all contributions by corporations.<sup>43</sup> In response, Congress enacted the Tillman Act of 1907,<sup>44</sup> which completely banned corporate contributions in connection with any federal election.<sup>45</sup> As corporations used loopholes to bypass regulations, Congress responded by enacting the Federal Corrupt Practices Act,<sup>46</sup> which broadened “contributions” to include “anything of value.”<sup>47</sup> The Act withstood an attack in *Burroughs v. United States*,<sup>48</sup> where directors of a political action committee violated the Act’s disclosure requirements by accepting contributions without filing reports.<sup>49</sup> The defendants challenged

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39. See *McConnell v. FEC*, 540 U.S. 93, 115 (2003) (stating that Congress “has repeatedly enacted legislation” that prevents “great aggregations of wealth”).

40. See *id.* at 115–22 (discussing the history of the limits-based approach to address campaign finance issues).

41. See *infra* Part II.B.1.

42. See *infra* Part II.B.2.

43. *United States v. UAW-CIO*, 352 U.S. 567, 571–72 (1957).

44. Pub. L. No. 59-36, ch. 420, 34 Stat. 864.

45. *Id.* 34 Stat. at 864–65.

46. Pub. L. No. 68-506, §§ 301, 313, 43 Stat. 1070, 1074 (1925) (codified as amended at 2 U.S.C. §§ 241–248).

47. *Id.* § 302(d). The Act criminalized both the giving and receiving of corporate contributions. *Id.* § 313.

48. 290 U.S. 534 (1934).

49. *Id.* at 543.

Congress's authority to require disclosure of political contributions, arguing that the Constitution limited Congress's role to choosing the date and time of elections.<sup>50</sup> In upholding the Act, the Court rejected the defendants' argument and concluded that Congress had the inherent power to protect the elections, "on which its existence depends,"<sup>51</sup> from corruption.<sup>52</sup>

Shortly after World War II, Congress extended its prohibition to campaign contributions made by unions.<sup>53</sup> Following the expansive trend of campaign regulations, Congress also expanded its restrictions to cover both primary and general elections.<sup>54</sup> Consistently, Congress justified its increasingly prohibitive campaign finance reform by emphasizing the growing concern of the parasitic effects of large campaign contributions on the electoral system.<sup>55</sup>

In 1974, Congress further strengthened federal election laws by enacting the FECA.<sup>56</sup> The Act limited (1) contributions that a candidate could receive, (2) expenditures of personal funds a candidate could make, and (3) expenditures an individual or organization could make in support of a candidate.<sup>57</sup> In 1976, the Supreme Court in *Buckley* addressed whether the First Amendment invalidated the FECA's campaign finance restrictions.<sup>58</sup> In a per curiam decision, the Supreme Court upheld the FECA's contribution restrictions.<sup>59</sup> Distinguishing contributions from expenditures, the Court found that, although both "implicate fundamental First Amendment interests," direct limits on expenditures cause more severe restrictions on the protected freedom of political expression.<sup>60</sup> In contrast, the Court observed that contribution limits allow individuals to

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50. *Id.* at 544. The defendants argued that Article II, Section 1 only granted Congress the authority to determine "the time of choosing the electors, and the day on which they shall give their votes." *Id.* (quoting U.S. CONST. art. II, § 1).

51. *Id.* at 546 (quoting *Ex parte Yarbrough*, 110 U.S. 651, 658 (1884)).

52. *See id.* at 547 ("The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress.").

53. *See* War Labor Disputes Act of 1943, Pub. L. No. 78-89, ch. 144, § 9, 57 Stat. 167. Congress regulated unions because they made "enormous financial outlays" in connection with national elections. *United States v. UAW-CIO*, 352 U.S. 567, 579 (1957).

54. *See* Labor Management Relations Act of 1947, Pub. L. No. 80-101, ch. 120, §§ 304, 313, 61 Stat. 136, 159 (codified as amended at 29 U.S.C. §§ 141-187).

55. *See* 93 CONG. REC. 3428, 3522 (1947); H.R. REP. NO. 245 (1947); S. REP. NO. 1 (1947).

56. *See also* *McConnell v. FEC*, 540 U.S. 93, 117-18 (2003) (documenting Congress's "steady" improvement of election law over the years).

57. FECA § 101. *See also* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified at 2 U.S.C. §§ 431-442).

58. *Buckley v. Valeo*, 424 U.S. 1, 13-14 (1976) (per curiam).

59. *Id.* at 35 ("[W]e conclude that the impact of the [FECA's] . . . contribution limitation on major-party challengers and on minor-party candidates does not render the provision unconstitutional on its face.").

60. *Id.* at 23.

associate with a political party, and that limiting the amount of the contribution places a permissible burden on the First Amendment rights of voters.<sup>61</sup> Additionally, the Court determined that the government's interest in limiting corruption and the appearance of corruption resulting from large financial contributions was "a constitutionally sufficient" justification for contribution limits, but not for expenditure limits.<sup>62</sup>

In 2000, the Court in *Nixon v. Shrink Missouri Government PAC*<sup>63</sup> reemphasized the constitutional validity of contribution limits by holding that *Buckley* was "authority for comparable state regulations."<sup>64</sup> In *Nixon*, a candidate for public office challenged a Missouri campaign finance law that limited contributions to \$1,075.<sup>65</sup> Upholding the contribution limits after applying "closely drawn" scrutiny, the Court revisited *Buckley*'s analysis and concluded that "[t]here [was] no reason in logic . . . to doubt" *Buckley*.<sup>66</sup> The Court highlighted *Buckley*'s reasoning that, although contribution limits marginally impaired political communication, Congress had a valid interest in reducing corruption by limiting political donations.<sup>67</sup> Lastly, the Court explained that *Buckley* did not specify a constitutional minimum contribution limit, but that Congress may legislate these limits so long as they do not "render political association ineffective."<sup>68</sup>

In 2002, Congress enacted the Bipartisan Campaign Reform Act ("BCRA")<sup>69</sup> to close the FECA's loopholes and to address the state of political campaigning since *Buckley*.<sup>70</sup> The BCRA imposed asymmetrical contribution limits on candidates when a self-financing candidate surpassed \$350,000 in expenditures.<sup>71</sup> In 2003, a group of public officials and other various organizations challenged portions of the BCRA in *McConnell v. FEC*.<sup>72</sup> The Court reaffirmed that it must pay special deference to Congress when scrutinizing contribution limits because such limits do not implicate severe First Amendment concerns.<sup>73</sup> The Court explained further that the less rigorous "closely drawn" standard is the appropriate standard to

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61. *Id.* at 20–22.

62. *Id.* at 26.

63. 528 U.S. 377 (2000).

64. *Id.* at 382.

65. *Id.* at 382–83. The plaintiff claimed that, with inflation since *Buckley*, the limit of \$1,075 was too low. *Id.* at 383–84.

66. *Id.* at 386–88, 397.

67. *Id.* at 387–88.

68. *Id.* at 397.

69. Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2 U.S.C.)

70. *McConnell v. FEC*, 540 U.S. 93, 132–33 (2003).

71. BCRA § 319, 2 U.S.C. § 441a-1(a) (2006).

72. 540 U.S. 93; *see also* *McConnell v. FEC*, 251 F. Supp. 2d 176, 220–27 (2003).

73. *McConnell*, 540 U.S. at 137.



allow Congress to effectively improve campaign finance regulations.<sup>74</sup> Justice Kennedy dissented in part, commenting that the majority's decision "expand[ed] Congress' regulatory power," even though *Buckley* did not grant Congress the power to "shape[] and form[]" campaign finance regulations.<sup>75</sup>

Most recently, in *Randall v. Sorrell*,<sup>76</sup> the Court expressed the need for restrictions on Congress's ability to impose contribution limits in elections.<sup>77</sup> In *Randall*, several politicians challenged Vermont's contribution limits as unconstitutionally low.<sup>78</sup> The *Randall* plurality<sup>79</sup> explained that if limits are too low, they may "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders."<sup>80</sup> Thus, the plurality acknowledged that, although the Court "ordinarily . . . defer[s] to the legislature's determination," it does not do so when limits are so low as to be counterproductive.<sup>81</sup>

2. *Limits on Campaign Expenditures Involve More Serious First Amendment Concerns Than Limits on Campaign Contributions Because Expenditure Limits Infringe on a Candidate's Constitutional Right to Promote His or Her Platform*

The FECA was the first campaign finance legislation to directly limit a candidate's expenditures.<sup>82</sup> The *Buckley* Court observed that the FECA's expenditure limits substantially reduced the amount of political speech in campaigns.<sup>83</sup> Specifically, the Court noted that, although the restrictions on

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74. *Id.* For example, before enactment of the BCRA, federal law permitted corporations and unions to make unlimited contributions directly to a political party, instead of to a specific candidate, thus circumventing FECA regulations and disclosure requirements. *Id.* at 122–23. However, Title I of the BCRA attempted to improve campaign finance by "plug[ging] the soft-money loophole." *Id.* at 133.

75. *Id.* at 286–87 (Kennedy, J., concurring in part and dissenting in part).

76. 548 U.S. 230 (2006).

77. *Id.* at 248–49 ("Nonetheless, as *Buckley* acknowledged, we must recognize the existence of some lower bound.").

78. *Id.* at 239–40. Vermont's campaign contribution statute limited contributions from individuals to \$200 per election per candidate. VT. STAT. ANN. tit. 17, § 2805(a) (2002).

79. Chief Justice Roberts, Justice Breyer, and Justice Alito were members of the *Randall* plurality. *Randall*, 548 U.S. at 236.

80. *Id.* at 248–49.

81. *Id.*

82. *McConnell v. FEC*, 540 U.S. 93, 118–19 (2003).

83. *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (per curiam) ("It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates.").

expenditures are neutral as to content,<sup>84</sup> they “limit political expression ‘at the core of our electoral process and of the First Amendment freedoms.’”<sup>85</sup> The Court reasoned that the government’s interests in limiting personal expenditures did not justify infringing on candidates’ “unfettered” right to voice their platforms to the electorate.<sup>86</sup> First, the Court determined that the primary governmental interest in preventing corruption and the appearance of corruption did not support limitations on a candidate’s expenditures of personal funds.<sup>87</sup> Specifically, a candidate using personal funds can rely less on outside contributions, thereby counteracting “coercive pressures” and eliminating the need for expenditure limits.<sup>88</sup> Second, the government’s interest in equalizing candidates’ financial resources did not sufficiently justify the FECA’s severe infringement on candidates’ protected right to advance their own political platforms.<sup>89</sup>

Justice White wrote a separate opinion in which he dissented from the judgment invalidating the expenditure limits and concurred in the judgment upholding contribution limits.<sup>90</sup> Justice White explained that, because the FECA’s expenditure limits were content-neutral, the Court should have upheld the FECA’s expenditure limits “so long as the purposes they serve[d] [were] legitimate and sufficiently substantial.”<sup>91</sup> Justice White noted that the Court should defer to congressional judgment because Congress legitimately sought to reduce corruption by imposing expenditure limits.<sup>92</sup>

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84. Prior case law indicates that content-based restrictions are subject to strict scrutiny because the First Amendment bars the government from restricting speech based on its message, idea, or subject matter. *See, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 774, 788 (2002) (invalidating a judicial election statute because it prohibited speech based on its content); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (invalidating a statute because it significantly burdened speech of a particular content); *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 94 (1972) (invalidating a disorderly conduct ordinance because it permitted picketing based on its subject matter). *But see* *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (upholding content-based regulations because the exercise of free speech within 100 feet of a polling station conflicts with the fundamental right of voting free from intimidation and fraud). In contrast, the Court applies the less rigorous intermediate scrutiny to content-neutral regulations. *See, e.g.*, *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (holding that content-neutral regulations are constitutional when they are “no greater than is essential” to furthering an important or substantial governmental interest).

85. *Buckley*, 424 U.S. at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

86. *Id.* at 52–53.

87. *Id.* at 53.

88. *Id.*

89. *Id.* at 54.

90. *Id.* at 257 (White, J., concurring in part and dissenting in part).

91. *See id.* at 259–60, 263–64.

92. *Id.* at 261 (“Congress was . . . of the view that these expenditures . . . have corruptive potential; but the Court strikes down the provision . . . claiming more insight as to what may improperly influence candidates than is possessed by the majority of Congress that passed this bill and the President who signed it.”).

In 1986, in *FEC v. Massachusetts Citizens for Life, Inc.*,<sup>93</sup> the FEC sued a nonprofit corporation for making political expenditures from its general treasury fund.<sup>94</sup> The Court held that, although for-profit corporations must make independent campaign expenditures from segregated funds, nonprofit political associations may make campaign expenditures directly from their treasury funds.<sup>95</sup> Justice Brennan, writing for the majority, reasoned that individuals who contribute to political associations are aware of their political purposes, and thus the political associations should not have to spend from segregated political funds.<sup>96</sup>

Four years later, in *Austin v. Michigan State Chamber of Commerce*,<sup>97</sup> a corporation challenged a Michigan law that allowed corporations to make independent expenditures for a campaign from their segregated funds, but not from their general treasury funds.<sup>98</sup> Applying strict scrutiny, the Court upheld the statute, finding that the Michigan legislature designed the restriction to assure that funds accumulated and used for campaign expenditures correlated to public support of the corporation's political ideas.<sup>99</sup>

In 1996, in *Colorado Republican Federal Campaign Committee v. FEC* ("Colorado I"),<sup>100</sup> the Colorado Republican Party challenged a FECA provision limiting political party expenditures.<sup>101</sup> Protecting political party spending, the Court struck down the provision and held that the First Amendment prohibits limits on party expenditures made independently, "without coordinating with a candidate."<sup>102</sup> The Court reasoned that a political party, like a candidate, has a protected First Amendment right to independently express its political views.<sup>103</sup>

The Court, however, resolved an issue left open by *Colorado I* in *FEC v. Colorado Republican Federal Campaign Committee* ("Colorado II"),<sup>104</sup>

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93. 479 U.S. 238 (1986).

94. *Id.* at 241.

95. *Id.* at 241, 263–64.

96. *Id.* at 260–61. The Court noted that the treasury funds of nonprofit political associations "reflect popular support for the [organization's] political positions." *Id.* at 258.

97. 494 U.S. 652 (1990).

98. *Id.* at 654–55. The segregated funds were required to be designated for political purposes only. *Id.* Under Michigan law, only certain individuals could donate funds to a corporation's segregated political fund. *Id.* at 656 (citing Michigan Campaign Finance Act, MICH. COMP. LAWS §§ 169.255(2), (3) (1979)).

99. *Id.* at 660.

100. 518 U.S. 604 (1996).

101. *Id.* at 608. The FECA provision imposed dollar limits on political party "expenditures in connection with a general election campaign for [a] congressional [candidate]." *Id.* (citation and internal quotation marks omitted).

102. *Id.*

103. *Id.* at 615–16.

104. 533 U.S. 431 (2001).

finding that coordinated party expenditures are similar to contributions, and thus the “closely drawn” standard should apply to those spending limits.<sup>105</sup> The *Colorado II* Court held that unlimited coordinated party expenditures would increase corruption by enabling parties to circumvent the contribution limits that the FECA imposed and therefore upheld the expenditure limits.<sup>106</sup>

In 2006, the Supreme Court rejected the opportunity to overturn *Buckley* when reexamining whether a limit on candidates’ expenditures violated the First Amendment.<sup>107</sup> In *Randall v. Sorrell*, the Vermont Republican State Committee challenged Vermont’s mandatory spending limits as a violation of free speech.<sup>108</sup> The Court held that the Vermont election law violated the *Buckley* standard, and thus the First Amendment.<sup>109</sup> The Court declined this opportunity to overturn *Buckley* by determining that, because contribution limits adequately reduced corruption, there was no need to limit expenditures.<sup>110</sup> Recognizing that Vermont’s justification for its expenditure limits mimicked those set forth in *Buckley*, the Court also refused to limit *Buckley*’s holding with respect to spending restrictions.<sup>111</sup>

*C. Recently, a Number of State and Federal Courts Have Broken Away from Buckley’s Traditional View that No Governmental Interest Justifies Limits on a Candidate’s Expenditures of Personal Funds*

Because many courts have criticized *Buckley*,<sup>112</sup> a number of lower federal and state courts have held that *Buckley*’s holding does not foreclose limitations on a candidate’s expenditures.<sup>113</sup> For instance, in *Kruse v. City of Cincinnati*,<sup>114</sup> a candidate for City Council challenged the city’s campaign finance regulations that imposed expenditure limitations on candidates.<sup>115</sup> Although the United States Court of Appeals for the Sixth

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105. *Id.* at 456.

106. *Id.* at 455, 465.

107. *Randall v. Sorrell*, 548 U.S. 230, 243 (2006).

108. *Id.* at 240. Vermont’s law imposed mandatory expenditure limits on the total amount a candidate for state office could spend during an election cycle. VT. STAT. ANN. tit. 17, § 2805a(a) (2002). The law imposed expenditure limits in the following amounts: governor, \$300,000; lieutenant governor, \$100,000; state senator, \$4,000; state representative (two member district), \$3,000; and state representative (single member district), \$2,000. *Id.*

109. *Randall*, 548 U.S. at 246.

110. *Id.* at 244.

111. *Id.* at 244–46.

112. As of May 18, 2009, 100 court opinions viewed *Buckley* negatively on Westlaw’s Citing References.

113. *See infra* notes 114–123.

114. 142 F.3d 907 (6th Cir. 1998).

115. *Id.* at 910.

Circuit invalidated the spending limits, the court observed that *Buckley* left open the question of whether *any* governmental interest would justify expenditure limits.<sup>116</sup> Judge Cohn concurred separately, writing that *Buckley* did not declare all expenditure limits to be unconstitutional.<sup>117</sup> Rather, he suggested, a factual record may be developed that establishes a valid need for spending limits.<sup>118</sup>

A few years later, in *Homans v. City of Albuquerque*,<sup>119</sup> the United States District Court for the District of New Mexico heard a challenge to Albuquerque's mandatory expenditure limits from a candidate for mayor.<sup>120</sup> Judge Vazquez, relying on Judge Cohn's concurring opinion in *Kruse*, determined that *Buckley*'s holding was not a per se prohibition on spending limits because the *Buckley* Court only considered a limited set of interests.<sup>121</sup> Judge Vazquez held that the city had developed a comprehensive factual record indicating the need for a limit on campaign spending and that these limits effectively reduced corruption and significantly increased voter turnout.<sup>122</sup> On appeal, the Tenth Circuit affirmed the district court's determination that *Buckley*'s holding did not foreclose expenditure limits per se.<sup>123</sup>

### III. THE COURT'S REASONING

In *Davis v. FEC*,<sup>124</sup> the United States Supreme Court reversed the judgment of the United States District Court for the District of Columbia by holding that Sections 319(a) and (b) of the BCRA violated the First Amendment.<sup>125</sup> Writing for a five-to-four majority, Justice Alito began by describing Section 319's asymmetrical regulatory scheme.<sup>126</sup> First, the Court noted that, when triggered, Section 319(a) allows a non-self-

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116. *Id.* at 918–19.

117. *Id.* at 920 (Cohn, J., concurring) (“The Supreme Court’s decision in *Buckley*, however, is not a broad pronouncement declaring all campaign expenditure limits unconstitutional.”).

118. *Id.* (“It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling . . .”).

119. 160 F. Supp. 2d 1266 (D.N.M. 2001), *aff’d*, 366 F.3d 900 (10th Cir. 2004).

120. *Id.* at 1267.

121. *Id.* at 1271–72 (citing *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998)). The *Buckley* Court only considered three governmental interests: corruption, the appearance of corruption, and equalizing the playing field. *Buckley v. Valeo*, 424 U.S. 1, 53–54 (1976) (*per curiam*).

122. *Homans*, 160 F. Supp. 2d at 1272.

123. *Homans v. City of Albuquerque*, 366 F.3d 900, 906 (10th Cir. 2004) (“The [*Buckley*] Court’s chosen language leaves open the possibility that at least in some circumstances expenditure limits may withstand constitutional scrutiny.”).

124. 128 S. Ct. 2759 (2008).

125. *Id.* at 2775.

126. *Id.* at 2766–67.

financing candidate to receive contributions from individuals at three times the normal limit.<sup>127</sup> Second, the Court explained that Section 319(b) requires the self-financing candidate to make additional disclosures during the period Section 319(a) is active.<sup>128</sup>

After determining that the Court had jurisdiction to hear Davis's appeal,<sup>129</sup> the Court examined the merits of Davis's claim that Section 319(a) violated the First Amendment.<sup>130</sup> First, the *Davis* Court noted that if Section 319(a) had increased the contribution limits for all candidates, Davis's claim would have failed because there is no constitutional basis for arguing that such limits were too high.<sup>131</sup> Second, the Court emphasized that *Buckley* established that a cap on personal expenditures directly restrained a candidate's First Amendment right to discuss public issues and advocate for his own election.<sup>132</sup> Thus, Justice Alito explained, although the BCRA did not cap personal funds, it penalized a candidate for personally funding his First Amendment right.<sup>133</sup> Further, Justice Alito noted that the Court had "never upheld [a campaign finance statute] that impose[d] different contribution limits for candidates . . . competing against each other."<sup>134</sup> Justice Alito concluded that, because no compelling state or government interest justified the substantial burden imposed on the self-financing candidate, Section 319(a) was unconstitutional.<sup>135</sup>

Finally, the *Davis* Court explained that Section 319(b) also violated the First Amendment because the provision imposed unjustified compelled

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127. *Id.* at 2766. The normal limit is \$2,300 and the enhanced limit under the BCRA is \$6,900. *Id.*

128. *Id.* at 2766–67.

129. In discussing standing, Justice Alito noted that Davis's undisputed standing to challenge § 319(b) did not necessarily establish his standing to challenge § 319(a). *Id.* at 2768–69. Davis could challenge § 319(b) because he faced the imminent threat of submitting additional notifications after he passed the \$350,000 threshold. *Id.* at 2768. In addition, invalidating § 319(b) would have been an appropriate remedy for Davis. *Id.* The FEC argued that Davis lacked standing to challenge § 319(a) because Davis's opponent did not use the asymmetrical limits. *Id.* at 2769. However, the Court concluded that, even though the harm was not actualized, Davis's threatened injury was real, immediate, and direct, thus establishing his standing to contest § 319(a). *Id.* Justice Alito then explained that Davis's claims were not moot because the case "fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *Id.* (quoting *FEC v. Wisc. Right to Life, Inc.*, 127 S. Ct. 2652, 2662 (2007)). The "exception applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.* (quoting *Wisc. Right to Life*, 127 S. Ct. at 2662) (internal quotation marks omitted).

130. *Id.* at 2770.

131. *Id.* at 2770–71.

132. *Id.* at 2771 (citing *Buckley v. Valeo*, 424 U.S. 1, 52 (1976) (per curiam)).

133. *Id.*

134. *Id.*

135. *Id.* at 2772–74.

disclosure.<sup>136</sup> Justice Alito applied heightened scrutiny to Section 319(b) because compelled disclosure seriously infringed on the privacy of association guaranteed by the First Amendment.<sup>137</sup> Justice Alito concluded that, in light of the Court's holding that Section 319(a) was unconstitutional, Section 319(b)'s disclosure requirements could not be justified because they implemented the contribution limits.<sup>138</sup>

Justice Stevens dissented separately, agreeing that Davis's case was justiciable, but disagreeing that the BCRA's contribution limits imposed a substantial burden on the self-financing candidate's freedom of speech.<sup>139</sup> Justice Stevens first stressed that Congress enacted Section 319(a) to reduce the self-financing candidate's advantage by relaxing the contribution limits the non-self-financing candidate would normally face.<sup>140</sup> Further, Justice Stevens explained that the BCRA's reasonable limits are justified because they free candidates from the burden of endless fundraising and have the effect of improving the overall quality of the speech.<sup>141</sup> Next, Justice Stevens explained that Section 319(a) did not restrain speech, but rather it enabled a non-self-financing candidate to obtain enough money to make his voice heard.<sup>142</sup> Last, in addressing Davis's equal protection argument, Justice Stevens explained that because "Congress is fully entitled to consider . . . real-world differences" in campaign finance laws, the Constitution does not require identical treatment of all candidates.<sup>143</sup>

Justice Ginsburg wrote a short dissenting opinion, agreeing that Davis had standing to sue but ultimately agreeing with the lower court's decision.<sup>144</sup> Justice Ginsburg explained that she did not join the part of Justice Stevens's opinion that addressed *Buckley*'s holding that expenditure limits restricted political communications.<sup>145</sup> Justice Ginsburg noted that the FEC did not ask the *Davis* Court to overrule *Buckley*, and thus a reconsideration of *Buckley* was inappropriate.<sup>146</sup>

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136. *Id.* at 2774–75.

137. *Id.*

138. *Id.* at 2775.

139. *Id.* at 2777, 2780 (Stevens, J., dissenting).

140. *Id.*

141. *Id.* at 2779.

142. *Id.* at 2780.

143. *Id.* at 2782 (alteration in original) (quoting *McConnell v. FEC*, 540 U.S. 93, 188 (2003)).

144. *Id.* (Ginsburg, J., dissenting).

145. *Id.*

146. *Id.* at 2782–83.

IV. ANALYSIS

In *Davis v. FEC*,<sup>147</sup> the United States Supreme Court invalidated Section 319(a) of the BCRA, holding that it impermissibly burdened free speech because its limits chilled the self-financing candidate's right to make unlimited expenditures by benefitting his or her opponent.<sup>148</sup> In so holding, the Court improperly raised the scrutiny standard applied to campaign contribution limits from "closely drawn" scrutiny to strict scrutiny.<sup>149</sup> The Court's decision effectively blocks non-wealthy candidates from competing against wealthy candidates seeking congressional seats by (1) exacerbating unfair competition and (2) bringing public funding into constitutional uncertainty.<sup>150</sup> Had the Court applied "closely drawn" scrutiny to uphold the BCRA's contribution limits, non-wealthy candidates would have the opportunity for fair campaigns, public funding would be constitutionally secure, and voter confidence in politics would increase.<sup>151</sup>

*A. The Supreme Court Improperly Increased Scrutiny of Campaign Contribution Limits by Applying Strict Scrutiny, Which the Court Has Exclusively Reserved for Direct Expenditure Limits*

The *Davis* Court incorrectly applied strict scrutiny to the BCRA's contribution limits, which had an unclear effect on Davis's political speech,<sup>152</sup> instead of the historically applicable "closely drawn" standard of scrutiny.<sup>153</sup> Justice Alito suggested that, because Section 319(a)'s contribution limits impose a substantial burden on a candidate's freedom of speech, the limits were only valid if Congress could justify them with a compelling governmental interest.<sup>154</sup> But, because contribution limits "entail[] only a marginal restriction upon the contributor's ability to engage

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147. 128 S. Ct. 2759.

148. *Id.* at 2774 (majority opinion).

149. *See infra* Part IV.A. The Court has traditionally applied the latter standard only in cases involving direct expenditure limits. *See supra* Part II.B.2

150. *See infra* Part IV.B.

151. *See infra* Part IV.C.

152. During oral arguments, Justice Souter expressed reservations as to the chilling effect of § 319(a): "[D]on't we expect a chill argument to at least have a ring of plausibility? . . . It didn't deter your client. There is no indication that it would deter anybody else and I have to say I don't see why it would." Transcript of Oral Argument at 7, *Davis*, 128 S. Ct. 2759 (No. 07-320).

153. *Davis*, 128 S. Ct. at 2772. Some commentators argue that campaign finance laws do not create First Amendment concerns, and therefore that these laws do not warrant application of strict scrutiny. *See, e.g.*, Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1821 (1999) (arguing that other areas of the law, including contracts, warranties, deeds, fraud, and securities, are seen as regulating speech without any First Amendment scrutiny).

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



in free communication,”<sup>155</sup> the Court has historically applied a “closely drawn” scrutiny test.<sup>156</sup> Indeed, in *Nixon*, where candidates challenged Missouri’s contribution limits, the Court reversed the Eighth Circuit, which strictly scrutinized the limits, and instead applied “closely drawn” scrutiny.<sup>157</sup> In doing so, the *Nixon* Court declared that “restrictions on contributions require less compelling justification than restrictions” on expenditures.<sup>158</sup> Thus, because Section 319(a) imposed limits on contributions, not expenditures, the *Davis* Court incorrectly applied strict scrutiny.

Under the “closely drawn” scrutiny standard, the *Davis* Court should have upheld Section 319(a). First, because the BCRA enables a non-self-financing candidate to freely initiate debate and to respond to his opponent’s speech without restriction, the BCRA’s contribution limits do not impair political communication.<sup>159</sup> Instead, as Justice Stevens noted in dissent, Section 319(a) does not quiet speech, but rather assists the non-wealthy candidate spread his message.<sup>160</sup> The BCRA’s limits are distinguishable from the expenditure limits in *Buckley* because they do not impose a direct restraint on a candidate’s communication.<sup>161</sup> In fact, the self-financing candidate’s ability to make unlimited expenditures counters the argument that Section 319(a) imposes a substantial burden on his political expression.<sup>162</sup>

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155. *Buckley v. Valeo*, 424 U.S. 1, 20–21 (1976).

156. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (applying “closely drawn” scrutiny to contribution limits because they do not significantly impair political communication); *McConnell v. FEC*, 540 U.S. 93, 136 (2003) (same); *FEC v. Beaumont*, 539 U.S. 146, 161–62 (2003) (same); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 387–88 (2000) (same).

157. *Nixon*, 528 U.S. at 384–85, 387–88.

158. *Id.* at 387 (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259–60 (1986)). *See also* Deborah Goldberg & Brenda Wright, *Defending Campaign Contribution Limits After Randall v. Sorrell*, 63 N.Y.U. ANN. SURV. AM. L. 661, 671–72 (2008) (commenting on the *Nixon* Court’s rejection of arguments in favor of applying strict scrutiny to contribution limits).

159. *See Davis*, 128 S. Ct. at 2780 (Stevens, J., dissenting) (noting that § 319(a) does not impose any burden on the self-financing candidate because he has the option to make unlimited expenditures from his personal funds); *Davis v. FEC*, 501 F. Supp. 2d 22, 29 (D.D.C. 2007) (same).

160. *Davis*, 128 S. Ct. at 2780 (“On the contrary, it does no more than assist the opponent of a self-funding candidate in his attempts to make his voice heard . . .”). Justice Stevens also noted that the self-financing candidate may structure his campaign as he pleases—either funding it himself without limits, or relying on contributions alone. *Id.* at 2780 n.6.

161. *Compare Davis*, 501 F. Supp. 2d at 29 (stating that the “Millionaires’ Amendment does not limit in any way the use of a candidate’s personal wealth” for political elections), *with Buckley*, 424 U.S. at 39 (holding that FECA’s expenditure limits impose “direct and substantial restraints on the quantity of political speech”).

162. *Davis*, 128 S. Ct. at 2780 (“The self-financing candidate’s ability to engage meaningfully in the political process is in no way undermined by [§ 319(a)].”).

Second, because the Court consistently defers to Congress when scrutinizing contribution limits,<sup>163</sup> the *Davis* majority should have accepted Congress's good-faith attempt to "regulate, within the bounds of the Constitution," campaign finance.<sup>164</sup> As Justice Stevens pointed out, Congress "carefully tailored" Section 319(a) to address the unequal financial strength of candidates by creating the Opposition Personal Funds Amount formula, which prevents non-self-financing candidates from reaping windfalls.<sup>165</sup> Moreover, as the Court has conceded in earlier cases, legislators are better equipped to make judgments on campaign finance reform because they have expertise in "matters related to the costs and nature of running for office."<sup>166</sup> Thus, heightening the level of scrutiny applied to the BCRA's contribution limits was improper and created substantial roadblocks for non-wealthy candidates attempting to run for public office.<sup>167</sup>

*B. Davis Creates Substantial Barriers for Non-Wealthy Candidates Who Compete Against Wealthy Candidates for Seats in the House Because Competition Is Unfair and the Availability of Public Funding Is Declining*

The *Davis* Court's improper application of strict scrutiny to contribution limits disincentivizes non-wealthy candidates from running for public office for two reasons: (1) unfair campaign competition<sup>168</sup> and (2) lack of public funding.<sup>169</sup>

*Davis*'s invalidation of the BCRA's contribution limits reduces fair competition in House races in two ways. First, in striking down the BCRA's asymmetrical contribution limits for impermissibly chilling the self-financing candidate's speech, the *Davis* Court failed to address the advantage that wealthy candidates naturally have in House elections.<sup>170</sup>

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163. See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (stating that the Court ordinarily defers to the legislature in assessing the validity of campaign finance regulations because Congress is better equipped in matters related to running for office).

164. See *Davis*, 128 S. Ct. at 2779.

165. *Id.* at 2780, 2782 ("[T]he self-funder's opponent may avail himself of the enhanced contribution limits only until parity is achieved, at which point he becomes again ineligible for contributions above the normal maximum."); see also *supra* note 10. The two rationales of the Millionaires' Amendment are "reducing the importance of wealth as a criterion for public office and countering the perception that seats in the United States Congress are available for purchase by the wealthiest bidder." *Id.* at 2779–80.

166. *Randall*, 548 U.S. at 248.

167. See *infra* Part IV.B.

168. See *infra* notes 170–176 and accompanying text.

169. See *infra* notes 176–191 and accompanying text.

170. During the 2004 congressional elections, in 95% of House races and 91% of Senate races, the candidate who spent the most money won the seat. 2004 Election Outcome: Money Wins,

Absent the BCRA's protections, a non-wealthy candidate begins the campaign at a disadvantage because he lacks the benefit of immediately available funding, which a self-financing candidate enjoys.<sup>171</sup> Thus, the *Davis* Court's determination that each election is a zero-sum game<sup>172</sup> is only accurate when both candidates have equal funding.<sup>173</sup> Otherwise, a non-wealthy candidate must spend more time fundraising, which prevents him from debating issues and promoting his platform.<sup>174</sup> In contrast, because a wealthy candidate personally funds his campaign, he may communicate with the electorate without the additional time burden of fundraising.<sup>175</sup> Furthermore, the BCRA's asymmetrical contribution limits cease once a non-wealthy candidate's funds match a wealthy candidate's funds.<sup>176</sup> Thus, invalidating the BCRA's contribution limits reduces the fairness and competitiveness of campaigns by returning wealthy candidates' natural advantage.

Second, the *Davis* Court neglected to recognize that political equality is a "time-honored" principle and was a major concern for the Framers of the Constitution.<sup>177</sup> *Davis*'s invalidation of Section 319(a)'s asymmetrical contribution limits jeopardizes viable public financing schemes by delegitimizing the need to level the playing field in the electoral process. Under the current campaign finance regime, non-wealthy members of the public campaigning for seats in the House may elect to receive public

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<http://www.opensecrets.org/news/2004/11/2004-election-outcome-money-wi.html> (last visited May 18, 2009).

171. See *Davis v. FEC*, 128 S. Ct. 2759, 2774 (2008) (acknowledging that wealthy candidates have an advantage while campaigning).

172. See *id.* at 2771–72 (inferring that BCRA's enhanced contribution limits are a penalty to the self-financing candidate who "robustly exercises [his] First Amendment right").

173. See Brief of Appellee at 31, *Davis*, 128 S. Ct. 2759 (No. 07-320) ("More fundamentally, however, appellant cannot have it both ways. If he claims constitutional injury from his opponent's increased funding options, he cannot turn around and deny that he derives a benefit from keeping the baseline limits in place.").

174. See *Davis*, 128 S. Ct. at 2779 (stating that § 319(a)'s increased contribution limits would reduce the non-self-financing candidate's burden of fundraising).

175. See *Randall v. Sorrell*, 548 U.S. 230, 245–46 (2006) (discussing the "increased fundraising demands" of the non-wealthy candidate). While the *Randall* plurality rejected a government interest in protecting a candidates time, one commentator suggests that the court is not foreclosed from recognizing such a governmental interest because *Randall* was decided on stare decisis grounds rather than on the merits. Jessica Furst, *Money and Politics: Will Expenditure Limits Take Candidates Out of the Money Race and Put Them Back in the Office?*, 59 FLA. L. REV. 873, 903 (2007). Furst suggests that the *Randall* plurality's rejection of the government's interest in protection of candidates' time presents an opportunity for challenge in the future because the plurality did not support its judgment with precedent. *Id.* at 890.

176. 2 U.S.C. 441a-1(a)(3) (2006).

177. Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1392 & n.11 (1994) (citing 14 JAMES MADISON, THE PAPERS OF JAMES MADISON 197 (Robert A. Rutland et al. eds., 1983)).

funding.<sup>178</sup> However, a candidate that chooses public funding must abide by a statutory cap,<sup>179</sup> whereas a candidate who personally funds his own campaign may make unlimited expenditures.<sup>180</sup> Today, many states allow a publicly funded candidate to receive additional “matching” funds whenever a self-financing candidate makes expenditures above a certain limit.<sup>181</sup> However, under *Davis*, self-financing candidates claim that they must chill their expenditures to avoid providing the benefit of “matching funds” to the non-wealthy candidate.<sup>182</sup> Thus, even though candidates have equal contribution limits in most states, matching-funds provisions are now constitutionally unsecure and non-wealthy candidates lack an avenue to effectively campaign against their wealthy opponents.<sup>183</sup>

*Davis* has already impacted public financing “matching funds” laws in several states. First, in *McComish v. Brewer*,<sup>184</sup> candidates for public office sought to enjoin the state’s distribution of funds under Arizona’s “matching funds” public financing law.<sup>185</sup> The United States District Court for the District of Arizona found that the statute most likely violated the First Amendment in light of *Davis*’s holding.<sup>186</sup> The Court determined that the statute penalized self-financing candidates for funding their own campaigns whenever the state distributed additional funds to publicly funded

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178. *Davis*, 128 S. Ct. at 2772 (majority opinion). Currently, only fifteen states provide direct public financing to candidates; however, the financing schemes differ widely. Public Financing in the States, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4773825> (last visited May 18, 2009).

179. For example, in Maryland, candidates for governor who elect to publicly fund their campaigns are limited to spending the product of twenty cents times the population of the state. MD. CODE ANN., ELEC. LAW § 15-104 note (2003).

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

181. See, e.g., ME. REV. STAT. ANN. tit. 21-A §§ 1121–1128 (2008); MASS. GEN. LAWS ch. 55C, §§ 1–12 (2007); MICH. COMP. LAWS § 169.265 (2005).

182. E.g., *McComish v. Brewer*, No. cv-08-1550-PHX-ROS, 2008 WL 4629337, at \*2–\*3 (D. Ariz. Oct. 17, 2008) (stating claims of various plaintiff-candidates alleging that Arizona’s public financing laws chill their speech).

183. See, e.g., Adam Bonin, Opinion, *Average Joes Struggle To Be Heard as Campaign System Favors the Rich*, PHILA. INQUIRER, Aug. 7, 2008, at A15, available at <http://njcitizenaction.org/news/cfr167.html> (“Because [asymmetrical public funding] reforms call for government spending to boost the speech of some candidates and not others, however, the Supreme Court decision now calls them into constitutional doubt.”). But see Paul S. Ryan, *Public Financing After Davis: “The Reports of My Death Are Greatly Exaggerated.”* CAMPAIGN LEGAL CENTER BLOG, Jul. 23, 2008, [http://www.clcblog.org/blog\\_item-239.html](http://www.clcblog.org/blog_item-239.html) (arguing that *Davis* should not lead courts to hold that public financing statutes are unconstitutional).

184. No. cv-08-1550-PHX-ROS, 2008 WL 4629337.

185. *Id.* at \*1.

186. *Id.* at \*6–\*9 (stating that the plaintiffs had shown a high likelihood of success in challenging Arizona’s Citizens Clean Elections Act, which matched publicly funded candidates to privately funded candidates).

candidates.<sup>187</sup> Second, primarily as a result of concerns over the effect of *Davis*, the New Jersey legislature refused to reenact the successful 2007 New Jersey Fair and Clean Elections Pilot Project Act,<sup>188</sup> which was similar to the BCRA.<sup>189</sup> Lastly, California's similar fund-matching statute, the California Clean Money and Fair Elections Act,<sup>190</sup> has been criticized as likely violating the First Amendment after *Davis*.<sup>191</sup> Thus, *Davis* calls into question many viable and effective public financing schemes that merely aid the non-wealthy candidate in making his voice heard.<sup>192</sup>

*C. Had the Court Applied "Closely Drawn" Scrutiny to BCRA's Section 319(a), the Result Would Have Furthered the First Amendment Interests of Both Candidates*

By applying strict scrutiny to the BCRA's contribution limits, the Court invalidated a law that increased the amount of free speech possible in

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187. *Id.* at \*1 ("Once a traditional candidate's contributions and expenditures exceed the base-level grant given to participating candidates, her participating opponent or opponents will receive almost dollar-for-dollar matching funds from the [Arizona fund].").

188. Assemb. B. 100, 212th Leg., Reg. Sess. (N.J. 2007). The 2009 version of the law would have established a maximum of \$75,000 in public funding for party candidates in both the primary and general elections. Assemb. B. 100, 213th Leg., Reg. Sess. (N.J. 2008). The speaker of the New Jersey Assembly, Joseph Roberts, decided to put the 2009 Clean Elections bill on hold so that the courts and Congress could determine the constitutionality of "matching funds" provisions. See James Ahearn, *Calling A Time Out On Clean Elections*, NORTHJERSEY.COM, Sept. 10, 2008, <http://www.northjersey.com/opinion/moreviews/28123569.html> (stating that the speaker put the 2009 Clean Elections bill on hold to "leave the next steps to the courts and Congress").

189. See Letter from Albert Porroni, Legislative Counsel, New Jersey State Legislature, to William Castner, Executive Director, Assembly Democratic Office (July 21, 2008) (on file with author) (arguing that the New Jersey Clean Elections Pilot Project Act of 2009 would likely violate the First Amendment in light of the *Davis* decision); Editorial, *Campaign Finance Reform*, 194 N.J.L.J. 490 (2008) ("The decision to suspend the program and to scrap A-100 was predicated primarily on concerns over the effect that the U.S. Supreme Court's opinion in [*Davis v. FEC*] might have on the constitutionality of . . . 'rescue money' provision[s].") (citation omitted); see also Rick Esenberg, *Davis v. FEC: The Day's Most Important Decision*, SHARK AND SHEPHERD, June 26, 2008, <http://sharkandshepherd.blogspot.com/2008/06/davis-v-fec-days-most-important.html> ("*Davis* may signal the death of public financing.>").

190. CAL. ELEC. CODE § 91095 (West 2008). In 2006, California voters rejected Proposition 89, which was an earlier version of the Clean Elections Act, by almost 75%. Smartvoter.org, Proposition 89, <http://smartvoter.org/2006/11/07/ca/state/prop/89/> (last visited March 7, 2009). For further details on Proposition 89, see [http://www.ss.ca.gov/elections/vig\\_06/general\\_06/pdf/proposition\\_89/entire\\_prop89.pdf](http://www.ss.ca.gov/elections/vig_06/general_06/pdf/proposition_89/entire_prop89.pdf) (last visited May 18, 2009).

191. Ballot Access News, *California Senate Passes Public Funding Pilot Project Bill*, Aug. 30, 2008, <http://www.ballot-access.org/2008/08/30/california-senate-passes-public-funding-pilot-project-bill/> ("The [law] is probably unconstitutional . . . under this year's U.S. Supreme Court decision [*Davis v. FEC*].").

192. See, e.g., Laura MacCleery, *Protecting the Rights of Millionaires*, THE NATION, April 23, 2008, <http://www.thenation.com/doc/20080505/maccleery> ("In Maine, where 80 percent of statehouse candidates use public funding, a single mother and former waitress ran for office and won.").

political campaigns.<sup>193</sup> Instead, the Court should have upheld the BCRA's contribution limits under the "closely drawn" standard, as established by *Buckley* and its progeny.<sup>194</sup> Doing so would have improved political fairness and efficiency in several ways.

First, Section 319(a) increases the amount of free speech in the electoral process. When a non-wealthy candidate receives higher contributions, political campaigns will experience more free speech, thus furthering the purpose of the First Amendment.<sup>195</sup> With Section 319(a), Congress merely enabled the non-wealthy candidate to promote his platform so voters can make informed decisions on election day.<sup>196</sup> As Justice Stevens emphasized, if only the wealthy candidate can promote his platform because he has the resources to do so, voters may make less informed decisions.<sup>197</sup>

Second, Section 319(a) allows both wealthy and non-wealthy candidates to spend more time meeting voters and discussing issues and less time fundraising.<sup>198</sup> The self-financing candidate does not suffer the burden of fundraising, but instead puts pressure on his opponent to "raise and spend amounts that will match the high-spenders."<sup>199</sup> The BCRA's enhanced contribution limits alleviate that pressure because the candidate may receive funds from fewer donors to match his opponent, thus saving time.<sup>200</sup> A reduction in fundraising time would benefit the political system because candidates would spend more time speaking to the voters and debating issues.<sup>201</sup> In contrast, without support, a non-wealthy candidate must struggle to fundraise from more sources in order to make his voice heard, thus decreasing his ability to exercise his right to free speech in the campaigning process.<sup>202</sup>

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193. See *Davis v. FEC*, 128 S. Ct. 2759, 2780 (2008) (Stevens, J., dissenting) ("Enhancing the speech of the millionaire's opponent . . . advances [the First Amendment's] core principles.").

194. See *supra* Part IV.A.

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

196. See *id.*

197. *Id.* ("If only one candidate can make himself heard, the voter's ability to make an informed choice is impaired."). In contrast, without §319(a), a wealthy candidate can dominate the media simply by outspending his non-wealthy opponent. Cf. *supra* note 170.

198. *Davis*, 128 S. Ct. at 2779; see also Richard Briffault, *The Return of Spending Limits: Campaign Finance After Landell v. Sorrell*, 32 *FORDHAM URB. L.J.* 399, 429–32 (2005) (arguing that the most disturbing consequences of our current campaign finance system are the distraction of officeholders from their official duties, and "the increasing tendency of the fundraising system to discourage" non-wealthy candidates from campaigning).

199. Briffault, *supra* note 198, at 424–25.

200. *Davis*, 128 S. Ct. at 2779; see also *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996) (stating that reducing the time candidates spend fundraising, "thereby increasing the time available for discussions of the issues," is a compelling state interest).

201. See Furst, *supra* note 175, at 890.

202. *Davis*, 128 S. Ct. at 2779.

Lastly, Section 319(a) promotes the notion that congressional seats are not for sale.<sup>203</sup> The perception that public office can be purchased reduces voter confidence,<sup>204</sup> which increases the risk that voters may drop out of the electoral process.<sup>205</sup> However, effective and healthy democracy depends on the participation of the electorate.<sup>206</sup> Thus, by providing an avenue for a non-wealthy candidate to promote his platform equally against a wealthy, self-financing opponent, voter confidence in the electoral process will increase.

## V. CONCLUSION

In *Davis v. FEC*, the Supreme Court of the United States held that Section 319(a) of the BCRA violated the First Amendment because it impermissibly chilled a self-financing candidate's speech.<sup>207</sup> In so holding, the Court incorrectly struck down Section 319(a) by applying strict scrutiny, rather than "closely drawn" scrutiny.<sup>208</sup> Failing to apply the appropriate standard to Section 319(a), the Court closed off viable avenues for non-wealthy candidates to compete against wealthy candidates for congressional seats.<sup>209</sup> Had the Court properly applied "closely drawn" scrutiny, it would likely have upheld the BCRA's contribution limits, which would have legitimized campaign finance reform by allowing non-wealthy candidates to compete equally with wealthy candidates for a seat in the House.<sup>210</sup>

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203. *Davis*, 128 S. Ct. at 2779–80. See also 148 CONG. REC. S2142 (2002) (statement of Sen. McCain) ("Congress has concluded that the contribution limits—despite their fundamental importance in fighting actual and apparent corruption—should be relaxed to mitigate the countervailing risk that they will unfairly favor those who are willing, and able, to spend a small fortune of their own money to win election.").

204. A majority of Americans are bothered by the high levels of campaign spending, and "half are dissatisfied with the nation's campaign finance laws." Furst, *supra* note 175, at 875–76. See also COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM ii (2005), available at [http://www.american.edu/ia/cfer/report/full\\_report.pdf](http://www.american.edu/ia/cfer/report/full_report.pdf) (stating that Americans are losing faith in the electoral process).

205. Furst, *supra* note 175, at 876.

206. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000) ("Democracy works 'only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.'" (quoting *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1961))); *Homans v. City of Albuquerque*, 160 F. Supp. 2d 1266, 1269 (2001) (finding that voter turnout significantly dropped when Albuquerque temporarily suspended its mandatory spending limits, indicating low voter confidence in the electoral process).

207. *Davis*, 128 S. Ct. at 2771 (majority opinion).

208. See *supra* Part IV.A.

209. See *supra* Part IV.B.

210. See *supra* Part IV.C.