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Leveling the Playing Field? Davis v. Federal Election Commission (2008)

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The Supreme Courts Latest Pronouncement On Federal Campaign Financing: Leveling the Playing Field for Self-Financed Candidates and Non-Self-Financed Candidates -- Davis v. Federal Election Commission, 128 S. Ct. 2759, 2008 U.S. LEXIS 5267 (2008).

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SUMMARY: The Supreme Court examines the constitutionality of a provision of the BIPARTISAN CAMPAIGN REFORM ACT of 2002 (BCRA) called the Millionaires Amendment which Congress passed to level the playing field between the wealthy self-financed candidate for public office, and non-self-financed candidates for the same federal position in Davis v. Federal Election Commission.

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ARTICLE: The Supreme Courts Latest Pronouncement On Federal Campaign Financing: Leveling the Playing Field for Self-Financed Candidates and Non-Self-Financed Candidates -- *Davis v. Federal Election Commission, 2008 U.S. LEXIS 5267* (U.S. June 26, 2008).

In this decision the Supreme Court strikes down the Millionaires Amendment, n1 the second attempt by Congress to equalize opportunity for candidates for federal office. This decision will impact both wealthy and non-wealthy individuals considering running for federal office, and, importantly, also for candidates for state or local office wherever similar self-financing restrictions have been adopted. The Court examines the constitutionality of a provision of the Bipartisan Campaign Reform Act of 2002 (BCRA) called the Millionaires Amendment which Congress passed to level the playing field between the wealthy self-financed candidate for public office, and non-self-financed candidates for the same federal position.

(1) Distinctions Between Limitations on Contributions and Limitations on Expenditures in Federal and State Campaign Restrictions

The Supreme Court has sustained congressional and state efforts to address the perceived harmful effects of large campaign contributions, which would appear to afford access or favors to those individual, corporate or organized entities able to make them. n2 In doing so, the Court has consistently viewed the legislatively imposed limitations on *contributions* more favorably than attempted limitations on campaign *expenditures*.

Buckley v. Valeo

In the seminal case of *Buckley v. Valeo*, n3 the Court held that the provisions in the **Federal Election Campaign Act of 1971** (**FECA**) that limited individual *contributions* to federal campaigns were constitutional, but other provisions limiting the amount candidates can spend on their own behalf, and on the total amount spent in various campaigns, were not. The *expenditure* limitations impermissibly violated the candidates freedom of speech. n4 However, in reviewing Vermonts most stringent attempt to restrict both the amount that candidates for state office could spend on their own campaigns and contributions to the campaign from other sources, the Supreme Court found that both contribution and expenditure limits were unconstitutional. n5 The contribution limits were deemed not carefully tailored and violative of First Amendment speech protections because the limits (e.g., $200 limit per election on individual contributions to a campaign for governor) were too stringent and could prevent an effective campaign against an incumbent.

Davis v. Federal Election Commission

After the Supreme Court in *Buckley* found unconstitutional the limitation on the amount of personal money a candidate could spend under FECA, Congress added the so called Millionaires Amendment as part of BCRA (otherwise known as the McCain--Feingold Act) which amended FECA. n6 In this second attempt at leveling the candidates playing field, Congress provided that when a candidates expenditure of personal funds exceeds $350,000 (using a statistic formula referred to as opposition personal funds amount or OPFA), any non-self-financed candidate/opponent is permitted to accept individual contributions at treble the amount the self-financed candidate can accept under the general BCRA limitations. It also removed, for the non-self-financed candidate, any limit on coordinated party expenditures.

In *Davis v. Federal Election Commission, 2008 U.S. LEXIS 5267* (U.S. June 26, 2008), the Supreme Court declares the Millionaires Amendment unconstitutional, noting that it has never upheld a law that imposes different contribution limits for competing candidates. The Court says that Congress could have simply raised the contribution limits for all candidates. However, as written, this provision impermissibly burdens the plaintiffs right to spend his own money for campaign speech, thus violating his First Amendment rights. As noted by the Court, a candidate who wants to exercise his or her First Amendment right must choose either to abide by the BCRA limit on personal expenditures, or suffer a burden imposed on that right by a scheme of discriminatory contribution limits.

The Court rejects the governments arguments that such a provision is justified because it levels the electoral opportunities for non-wealthy individuals, finding no support for the premise that this is a legitimate government objective. Instead, it says, the Constitution confers upon voters, not Congress, the power to choose its representatives and Congress may not use the election laws to influence the voters choice. The Court also rejects the government argument that the provision is needed to ameliorate the deleterious effects from the tight limits which it had previously placed on individual campaign contributions and coordinated party expenditures. The Court concludes, in unequivocal terms, that imposing different contribution and coordinated party expenditure limits on candidates competing for the same seat is antithetical to the First Amendment.

(2) What it All Means

The lesson seems clear. In light of the Supreme Courts First Amendment standard established in this case, any legislative effort to level the playing field between candidates able to contribute significantly to their own campaign financing and those who do not have the ability to do so, must be constructed carefully. It will be an uphill battle for the following reasons:

- **First Amendment Political Speech.** It will not be constitutional if the wealthy candidate is prohibited from spending his or her own funds in the campaign (*Buckley v. Valeo, supra).* This would be a violation of the wealthy candidates First Amendment right to political speech, which includes the right to engage in discussion of public issues and advocate for his or her own election by underwriting the cost of doing so. Nor may any legislative effort to level the playing field include giving the non-self-financing candidate a benefit not granted the self-financing one (Davis v.

Federal Election Commission, supra). Candidates facing restrictions on using their own funds, or provisions that grant a non-self-financing opponent sole benefits triggered when the self-financing candidate uses his or her own funds, have a valid constitutional claim. Such legislation, in the Courts language, imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right.

- **Questionable Governmental Purpose.** The Supreme Court observes that limiting the use of personal funds is not justified as a means of preventing actual and apparent corruption. The use of personal wealth may, in fact, serve a beneficial purpose of reducing a candidates dependence on outside contributors. Reducing an advantage that wealthy individuals may have is not yet accepted by the Court as a legitimate government objective.
- **Usurping Power of Electorate.** The Supreme Court has said that it does not like government usurping powers of choice given the electorate. This applies to efforts to equalize electoral opportunities for candidates who are not using personal wealth to foster their own candidacy. Leveling this playing field means legislative judgments about the attributes of candidates are being made for the people. The Court recognizes that it is the right of the people to choose among different candidate merits, whether it be in favor of one who is wealthy, one who has wealthy supporters, one who is a celebrity, or one who has a well-known family name. This right to choose belongs to the people, not to government.

The question of what options legislative bodies have for leveling the playing field remains open, with the Supreme Court providing little guidance. We are expressly told by the Court, in *Davis*, that government can constitutionally raise the contribution limits for all candidates if closely drawn to serve a sufficiently important interest such as preventing corruption. n7 Whether this increase can constitutionally be triggered by the option of using ones own funds, seems to be answered in the affirmative by the Courts statement that if S319(a)s elevated contribution limits applied across the board, Davis would not have any basis for challenging those limits. Therefore, it would appear that it would be constitutionally acceptable to adopt legislation providing that if a candidate chooses to spend his or her own personal funds, beyond a designated amount, the contribution levels for all candidates for the same office may either be suspended or raised to a higher level.

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n1 *116 Stat. 81,* amending FEDERAL ELECTION CAMPAIGN ACT of 1971, *86 Stat 11,* as amended, *2 U.S.C. § 431* et seq.

n2 The Supreme Court traces this history in *McConnell v. FEC, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003).* For information on campaign financing law and cases, see Chapter 88 in *Antieau on Local Government Law*.

n3 *Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).* For further discussion of the issues addressed in *Buckley*, see § 88.02 in *Antieau on Local Government Law*.

n4 *Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 120 S. Ct. 897, 145 L. Ed.2d 886 (2000).* The Court has found constitutional a FECA limit on political party contributions to candidates for House and Senate offices. *See FEC v. Colorado Republican Federal Campaign Committee, 533 U.S. 431, 121 S. Ct. 2351, 150 L. Ed. 2d 461 (2001).* For further discussion of the Courts application of *Buckley* to state imposed limits, see §88.02 of *Antieau on Local Government Law*.

n5 *Randall v. Sorrell, 548 U.S. 230, 126 S. Ct. 2479, 165 L. Ed. 2d 482 (2006).*

n6 *116 Stat. 81*, amending FEDERAL ELECTION CAMPAIGN ACT of 1971, *86 Stat 11*, as amended, *2 U.S.C. § 431* et seq. The majority of these provisions were sustained in *McConnell v. Federal Election Commission, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003).* For discussion of the McCain-Feingold Act, see § 88.02 of *Antieau on Local Government Law*.

n7 *Davis v. Federal Election Commission, 128 S. Ct. 2759, 2770, 2008 U.S. LEXIS 5267 (2008).*

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