Davis v. FEC and the Constitutionality of "Clean Elections" Systems

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In a "clean elections" system, taxpayer funded candidates must agree to limit their campaign spending. Imposing limits on campaign spending for candidates who forego taxpayer dollars and instead run traditional campaigns would be unconstitutional. Most clean elections schemes thus rely on "matching," "rescue," or "trigger" funds to level the playing field between publicly funded and traditional candidates and to discourage traditional candidates from exceeding the spending limits imposed on the taxpayer funded candidate. When a traditional candidate raises or spends more money than the taxpayer financed candidate's initial subsidy, the government gives additional money to the taxpayer financed candidate to counteract the amount the privately financed candidate collects or spends. In other words, once a privately financed candidate raises or spends above the "trigger" amount, her exercise of her First Amendment rights results in a direct government subsidy to her opponent. For almost a decade, federal courts have largely upheld such systems against First Amendment challenges. The U.S. Supreme Court's decision in *Davis v. FEC* undermines the reasoning of these decisions and likely spells the end of this new wave of regulating political speech.

The Promise of Reform: Five Years Later

In March 2007, the country marked the five-year anniversary of the Bipartisan Campaign Reform Act of 2002 ("McCain-Feingold"). This coincided with the announcement of fund-raising totals for presidential candidates for the first quarter of 2007.[1] The candidates together collected over $125 million in donations over a year-and-a-half before the 2008 general election. Since then, the country has witnessed both a wave of political scandals and the most expensive presidential election in history.[2]

This was not supposed to happen. McCain-Feingold's proponents argued that the law was necessary to get "soft money" out of campaigns in order to overcome "corruption and the appearance of corruption" associated with large contributions.[3] However, the difference between the law's goal and its results suggests that money in politics will not go away. As this latest "reform" fails to achieve its goals, proponents of regulating political speech continue to propose more expansive regulatory systems.

The most radical idea is a form of taxpayer financed campaigns that proponents call "clean elections," or sometimes "fair elections."[4] According to the proponents, "Fair Elections are a bold solution to the problem of money in politics."[5] Under this system, taxpayers and others are either forced or incentivized to finance the political campaigns of those politicians who participate in the system, regardless of whether the taxpayer supports, opposes, or is disinterested in such politicians' campaigns. In addition, the government attempts to "level" the political playing field by providing funds to counteract the speech of privately financed candidates and independent groups.

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"Clean Elections": The New Wave of Speech Regulation

"Clean elections" systems have been propagating. In Maine,[6] Arizona,[7] and Connecticut,[8] taxpayers and fee payers finance all statewide and state legislative races. Other states finance the campaigns only for certain offices. North Carolina mandates financing of judicial elections,[9] while New Mexico mandates financing of campaigns for state Public Regulation Commission and statewide judicial offices.[10] In the First Session of the 110th Congress, Senator Durbin introduced Senate Bill 1285, the "Fair Elections Now Act."[11] As a Senator, Barack Obama was a co-sponsor of this legislation.[12]

A leading proponent of such "Clean Election" systems has identified some common features of these laws.[13] These include:

- When the system is implemented, it is often accompanied by drastic reductions in the amount of money individuals and groups may contribute to traditional candidates that eschew taxpayer funding.
- A candidate wishing to run his campaign with taxpayer funds must demonstrate a modicum of support by collecting small "seed money" donations and a limited number of small monetary contributions in the $5 to $10 range to establish the viability of their campaigns.
- Once a candidate agrees to run his campaign with public funds, he can no longer accept private contributions, spend personal money on their campaigns, and must agree to limit the amount of money they spend to reach voters.[14]
- Taxpayer financed candidates—and often their opponents—are subject to additional reporting requirements so that the government may track their political activities and ensure that the candidates are complying with the system's restrictions.
- The government makes available generous amounts of "matching," "trigger," or "fair fight" funds, through which it provides additional funds to taxpayer financed candidates when his traditionally funded opponent collects or spends funds greater than those the taxpayer financed candidate receives from the government.

These schemes have had good luck surviving legal challenges. The U.S. Courts of Appeal for the First,[15] Fourth,[16] and Sixth Circuits[17] each upheld facial challenges to such laws. Until recently, only the Eighth Circuit in *Day v. Holahan* had struck down a "clean elections" style system.[18]

Davis v. FEC

The outlook for such systems became significantly dimmer in 2008. In *Davis v. FEC,*[19] the U.S. Supreme Court struck

down a portion of the McCain-Feingold law commonly called the "Millionaire's Amendment." McCain-Feingold limited the size of donations federal candidates may receive from individuals and how much parties may spend on campaign activities coordinated with federal candidates.[20] These restrictions changed, though, when a federal candidate's opponent exceeded an "opposition personal funds amount" (OPFA) by $350,000. The OPFA included both personal funds and other fundraising. Once the personally financed candidate went past the $350,000 limit, the non-self-financing candidate was permitted to receive individual contributions at treble the normal limit, including from individuals who reached the aggregate contributions cap, and was permitted to accept coordinated party expenditures without limit.[21]

Jack Davis, a Democratic candidate for the U.S. House of Representatives, sued to overturn the Millionaire's Amendment. A three-judge panel of the District Court granted summary judgment in favor of the FEC. Davis appealed directly to the U.S. Supreme Court, which reversed.

Justice Alito, writing the majority opinion, began by noting that while contribution limits may be challenged for being too low, they cannot be unconstitutional for being too high. However, the Millionaire's Amendment did not raise contribution limits across the board. Instead, it raised contribution limits only for the non-self-financing candidate and did so only when that candidate's expenditure of personal funds causes the OPFA threshold to be exceeded. The Court had made clear in *Buckley v. Valeo*[22] that the expenditure of personal funds both combated corruption and was constitutionally protected free speech.

The Court found that the Millionaire's Amendment imposed "an unprecedented penalty" on any candidate who robustly exercised their First Amendment right to expend personal funds. In other words, the Millionaire's Amendment "require[d] a candidate to choose between the First Amendment right to engage in unfettered speech and subjection to discriminatory fundraising limitations."[23] Even though a candidate could choose to make large personal expenditures to support their campaigns, "they must shoulder a special and potentially significant burden if they make that choice."[24] Notably, the Court cited to the Eighth Circuit's decision in *Day* for this proposition.[25]

Having identified the burden, the Court then turned to whether it was justified by a compelling state interest. The Court concluded that it was not.[26] The FEC justified the Millionaire's Amendment not on the basis that it eliminated corruption or the appearance of corruption, but on the basis that it "level[led] electoral opportunities for candidates of different personal wealth."[27] This argument, the Court concluded, has "ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office…. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election."[28] The Court concluded, "it is a dangerous business for Congress to use the election laws to influence voters' choices."[29]

Davis and the Future of "Clean Elections"

Does *Davis* spell the end of "clean elections" systems? The answer would seem to be almost certainly, "Yes."

The Court in *Davis* held that the Millionaire's Amendment was unconstitutional because (i) it was discriminatory because one candidate was rewarded by the government while the other was not, (ii) it forced a candidate to choose between vigorously exercising her free speech rights and providing her opponent with government benefits, and (iii) the government sought to "level" the electoral playing field through this policy. "Clean elections" systems possess, and even magnify, all these problems.

First, these systems are notably discriminatory. Where the Millionaire's Amendment gave a non-self-financing candidate the *opportunity* to raise additional money, "clean elections" systems simply give the publicly financed candidate more money and this gift of public funds is entirely dependent on the actions of the privately financed candidate. Where the Millionaire's Amendment gave the non-self-financing candidate a chance to counteract the self-financing-candidate's speech, "clean elections" makes that money a certainty.

Such laws are asymmetrical because the government's money goes to all the privately financed candidate's opponents. Take for instance, Matt Salmon's experience as the 2002 Republican gubernatorial candidate for governor in Arizona. Salmon first had to fight a primary against two publicly funded Republican candidates. He won, but his campaign was broke and many of his contributors had already maxed out their contributions. His two general election opponents, an independent and a Democratic candidate, on the other hand, picked up checks for $615,000 from the state the day after the primary. The state Republican Party made $200,000 in independent expenditures on behalf of Salmon—but that money was matched dollar-for-dollar by additional subsidies directly to his two publicly funded opponents.[30] Even a fundraiser with President George W. Bush did little to alleviate Salmon's financial disparity. As a spokeswoman for Salmon's Democratic opponent explained, "I'm not sure the President realizes he's raising money for both candidates," referring to the Bush event as a "dual fund-raiser."[31] In fact, it was a triple fundraiser given that Salmon had two opponents. In this case, matching funds not only counteracted Salmon's speech, they overwhelmed it. At the end of the campaign, Salmon raised $2,116,203.05[32] but his Democratic opponent received a total of $2,254,740.00.[33]

Worse still, many of these laws also fail to adequately take into account the cost of raising money. In the example above, all of Salmon's opponents were matched based on Salmon's gross fundraising totals, though Salmon estimated that he spent 25 cents for every dollar he raised.[34]

In these circumstances, "clean elections" systems give government funded candidates a free ride on their privately financed opponents' coattails. The result is that a privately funded candidate, like the self-financed-candidate in *Davis,* faces two choices, both bad: accept expenditure limits by running for office with government funds or suffer the punitive provisions of the public campaign finance scheme.

This discriminatory system is not supported by any compelling, or even legitimate, government interest. The proponents of "clean elections" systems have been quite clear (or they were until *Davis* was released) that the entire purpose of a "clean elections" system is to "level the playing field."[35] One candid proponent of King County, Washington's proposed "clean elections" system said that matching funds will have "the benefit of discouraging me from raising a whole bunch of money because I know you're going to get the same amount and so it's a level playing field at whatever that amount is."[36] Undoubtedly, proponents of such systems will now attempt to argue that "clean elections" seeks to accomplish some other governmental goal. This argument seems particularly unpersuasive after these people had been promoting this system as a means to "level the playing field" for years.

Conclusion

Some commentators have argued that the differences between the Millionaire's Amendment and "clean elections" systems are so significant that *Davis* should have little impact on their continued viability.[37] In constitutional terms, however, "clean elections" systems are *worse* than the Millionaire's Amendment because they are more discriminatory than McCain-Feingold. To say that any difference between the two means that "clean elections" systems should presumed to be constitutional is like saying a person is healthy because he has pneumonia instead of a cold.

Both courts and policy makers are beginning to recognize that *Davis* has changed the rules governing "clean elections."[38] *Davis* makes existing laws an area ripe for constitutional challenge and should serve as a warning to legislative bodies seeking to restrict speech by imposing such systems. In that regard, *Davis* makes it likely that advocates of regulation will need to develop different mechanisms in their efforts to suppress speech and association in the coming years.

Endnotes

1 *See Flood of Campaign Cash Shows the Failure of McCain-Feingold,* Examiner.com, Apr. 4, 2007, http://www.examiner.com/a-655501Flood_of_campaign_cash_shows_the_failure_of_McCain_Feingold.html?cid=all-hp-featured_editorial (discussing amounts raised by candidates for 2008 presidential election).

2 Jeanne Cummings, *2008 campaign costliest in U.S. history,* Politico, Nov. 5, 2008, http://www.politico.com/news/stories/1108/15283.html.

3 McConnell v. FEC, 540 U.S. 93, 132-34, 142 (2003).

4 It appears that the proponents' real goal is not to reform how campaigns are financed, but to have their favored policies become law, a situation reformers believe will become more likely once "clean elections" removes the influence of monied interests. *See* Brennan Center for Justice et al., Breaking Free with Fair Elections: A New Declaration of Independence for Congress 1 (March 2007) (hereinafter, *"Breaking Free"*) ("If we want to protect the environment, design a better health care system or improve our energy policy, we need a political system that encourages lawmakers to listen more to voters than to oil and gas companies, pharmaceutical giants and other industries").

5 *Breaking Free*, *supra* note 4, at 1.

6 An Act to Reform Campaign Finance, Me. Rev. Stat. Ann. tit. 21-A, §§ 1121-1128.

7 Citizens Clean Elections Act, Ariz. Rev. Stat. Ann., §§ 16-940 to - 961.

8 An Act Concerning Comprehensive Campaign Finance Reform for State-Wide Constitutional and General Assembly Offices, Conn. Gen. Stat. §§ 9-700 to - 751.

9 North Carolina Judicial Campaign Reform Act, N.C. Gen. Stat. §163-279.61-.70.

10 Voter Action Act, N. M. Stat. § 1-19A-1 to -17. Taxpayers also fund municipal campaigns in cities such as Albuquerque, New Mexico, Article XVI, Charter of the City of Albuquerque; Tucson, Arizona, Tucson City Code, Ch. XVI, Sub. B; and Portland, Oregon, Portland City Code Ch. 2.10.

11 S. 1285, 110th Cong. (2007).

12 http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN01285:@@@P.

13 *See Breaking Free*, supra note 4, at 6-7.

14 This is a key constitutional problem with "clean elections" systems. The Supreme Court has repeatedly and consistently held that limits on spending by campaigns are unconstitutional. *See Randall v. Sorrell,* 548 U.S. 230, 242 (2006). Thus, if a taxpayer financed scheme coerces a candidate into the system, then the expenditure limits are, in effect, mandatory and therefore unconstitutional.

15 *See* Vote Choice, Inc. v. DiStefano, 4 F.3d 26 (1st Cir. 1993) (upholding Rhode Island's taxpayer financing scheme); Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445 (1st Cir. 2000) (upholding Maine's scheme).

16 North Carolina Right to Life Comm. v. Leake, 524 F.3d 427 (4th Cir. 2008).

17 Gable v. Patton, 142 F.3d 940 (6th Cir. 1998).

18 Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) (striking down Minnesota's "equal funding" provision with regard to independent expenditures). The Ninth Circuit also reinstated a challenge to Arizona's "clean elections" system after the U.S. District Court dismissed it for failing to state a claim, but the Ninth Circuit's order did not contain any substantive discussion. Ass'n of Am. Physicians & Surgeons v. Brewer, 497 F.3d 1056 (9th Cir. 2007).

19 __ U.S. __, 128 S. Ct. 2759 (2008).

20 2 U.S.C. § 441a-1.

21 *Id.*

22 424 U.S. 1, 52-53 (1976) (per curiam).

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

24 *Id.* at 2772.

25 *Id.* (citing *Day,* 34 F.3d at 1359-60).

26 *Id.*

27 *Id.* at 2773.

28 *Id.* at 2773-74.

29 *Id.* at 2774.

30 Clint Bolick, *Fundraising Arizona: We've Just Seen the Future of Campaign Finance Reform, and it's Not Pretty,* The Weekly Standard, Dec. 2, 2002.

31 Michelle Rushlo, *Bush to Stump for Fellow Republicans in Arizona,* Associated Press, Sept. 26, 2002.

32 http://www.azsos.gov/cfs/PublicReports/2002/94398CFF-CA9F-4BF0-B9C0-746A1E3D6D95.pdf.

33 http://www.ccec.state.az.us/ccecweb/ccecays/elections/candAccts02.asp.

34 *See* Bolick, *supra*, note 30.

35 *See* Public Campaign, *Fair Elections: Leveling the Playing Field* (Undated), *available at* http://library.publicampaign.org/sites/default/files/09-24_fair-elections_factsheet.pdf ("If a candidate runs under the Fair Elections system and is outspent by a privately financed opponent, Fair Fight Funds are available to the candidate, up to a limit, to level the playing field.").

36 Transcript of Interview with King County Councilman Bob Ferguson, http://www.kingcounty.gov/Ferguson/Multimedia/transcript/ComcastNewsmakers.aspx?print=1.

37 Note, 122 Harv. L. Rev. 375, 380 (2008) ("This reading of *Davis* is understandable, but ultimately incorrect. It oversimplifies and overbroadens the Court's reasoning, and it ignores the critical constitutional distinction between government restrictions on speech and government subsidies of speech.").

38 *See* McComish v. Brewer, No. cv-08-1550-PHX-ROS, slip op. at 15 (D. Ariz. Oct. 17, 2008) (findings and conclusions supporting order denying motions for preliminary injunction, but nonetheless holding that constitutional challenges to Arizona's Clean Elections Act have "a high likelihood of success on the merits"); Letter from Albert Porroni, Executive Director & Legislative Counsel, New Jersey State Legislature Office of Legislative Services, to William Castner, Executive Director, New Jersey Assembly Democratic Office (July 21, 2008) (on file with the authors) (legislative counsel concludes that the "rescue money provisions [of "The 2009 New Jersey Fair and Clean Elections Pilot Project Act"]… violate the First Amendment," and relying on *Davis*).