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HOW NOT TO REFORM JUDICIAL ELECTIONS: *DAVIS*, *WHITE*, AND THE FUTURE OF JUDICIAL CAMPAIGN FINANCING

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INTRODUCTION

Judicial elections are nothing new. Thirty states select some or all of their judges through elections, and the practice of electing judges has been common since the early days of the republic.[1] There are good reasons to do so. Since state court judges have a robust role in making law through the development of common law, democratic theory requires that they do so with the consent of the people through elections.[2] Elections make sure that judges are accountable to the people, rather than political elites and insiders.[3] And judicial elections also provide a means for the people to keep judges within their legitimate bounds by providing an opportunity for the people to remove judicial activists from the bench.[4]

Despite this history and the significant benefits of judicial elections, some commentators have raised concerns about the practice of judicial

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1. Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176, 176-78 (1980) *reprinted and updated in* AM. JUDICATURE SOC'Y, JUDICIAL POLITICS: READINGS FROM JUDICATURE 44-45 (Elliot E. Slotnick ed., 2d ed. 1999), *available at* http://books.google.com/ (search "Search Books" for "Judicial Politics"; then follow "Judicial Politics: Readings from Judicature" hyperlink).

2. Republican Party of Minn. v. White, 536 U.S. 765, 784 (2002) ("Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well. Which is precisely why the election of state judges became popular.") (citations omitted); *see also* James Bopp, Jr., *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism*, 6 FIRST AMENDMENT L. REV. 180, 181-82 (2007) ("[J]udicial elections are different from elections for the legislative or executive branch in a very important way because, unlike other public officials, judges have a dual role. One of the roles that state court judges share with the political branches is to make law, most notably in the development of the common law.").

3. *See* Bopp, *supra* note 2, at 185 ("If judges were given a predominant role in setting public policy, then it would deny popular sovereignty and democracy to make them independent of appropriate accountability to the people.").

4. *Id.* at 190-91 (citing instances of judges who were defeated at the polls based on judicial activism).

elections.[5] Chief among these concerns has been the way in which judicial elections are financed.[6] To some extent, objections to private fundraising by judges and judicial candidates are pedestrian. Fundraising is unpleasant and time consuming for candidates and awkward for potential contributors.[7] Other objections, such as that privately funded judicial campaigns erode public confidence in the judiciary, are, if true, much more serious.

In this article, we examine both the supposed ills of a privately financed judicial election system, as well as one possible cure: public funding of judicial elections. Part I looks at the current system of privately funded judicial campaigns. We argue that a common criticism of this system—that it leads to corruption and imperils judicial impartiality—is overblown. In Part II, we look at two methods currently used to fight alleged corruption within the privately funded system: (1) contribution limits, and (2) restrictions on personal solicitation by candidates. We argue that contribution limits are constitutional, so long as the limits are high enough to allow candidates to wage an effective campaign. We conclude that bans on personal solicitation by candidates, however, do not serve an interest in preventing corruption and are inconsistent with the Supreme Court's decision in *Republican Party of Minnesota v. White*.[8] Part III looks at public funding of judicial elections. We conclude that while public funding of judicial elections is not per se unconstitutional, many public funding schemes contain features, such as the provision of so-called "rescue funds" based on spending by a publicly funded candidate's opponent or by an independent group, as well as burdensome asymmetrical disclosure requirements needed to effectuate rescue funds, which are unconstitutional under the Supreme Court's recent decision in *Davis v. FEC*.[9]

I. WHAT'S THE MATTER WITH CAMPAIGN CONTRIBUTIONS?

Criticism of the role of money in judicial campaigns comes in a variety of forms. Many such objections are quotidian. Candidates generally do not enjoy asking others for money, and the costs of fundraising to the candidate both in money and in time can be significant. Those solicited may feel uncomfortable turning down contribution requests. And some people may feel a general uneasiness about the level of spending

5. *E.g.*, Roy A. Schotland, Professor of Law, Georgetown University, Remarks at the Conference entitled Bulwarks of the Republic: Judicial Independence and Accountability in the American System of Justice (December 1998), *in* 61 SUM. LAW & CONTEMP. PROBS. 149, 150 (1998) (arguing that judicial elections have gotten "nastier, noisier, and costlier" in recent years).

6. *See generally* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 61-80 (Matthew J. Streb ed., 2007).

7. *See generally* Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 37 LOY. U. CHI. L.J. 669 (2006).

8. 536 U.S. 765 (2002).

9. 128 S. Ct. 2759 (2008).

on political campaigns divorced from any specific objection. While these sorts of criticisms may explain some of the hostility to the idea of privately funded judicial campaigns, they hardly justify the degree of opposition that this system has endangered.

Two objections, however, are more serious. First, it is claimed that campaign contributions threaten judicial impartiality.[10] If a judge receives a contribution from a particular individual or group, it is argued, he will be more likely to rule in favor of that individual or group should they appear before him as litigants.[11] Money, then, tips the scales of justice towards certain parties and away from others not according to the merits of their claims, but according to the size of their contributions.

Corruption is a serious charge, and serious charges demand serious evidence. To date, however, evidence supporting claims of corruption based on contributions has been mixed at best.[12] Judges are human beings, and it is always possible that they may be influenced by factors other than the law and the facts of a given case.[13] Judges can be tempted to alter their decisions in order to get re-elected,[14] to receive appointment to higher office,[15] or even simply to receive praise or avoid criticism.[16]

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10. Lawrence Baum & David Klein, *Voter Responses to High-Visibility Judicial Campaigns*, *in* RUNNING FOR JUDGE, *supra* note 6, at 140, 140; *see also* Penny J. White & Malia Reddick, *A Response to Professor Fitzpatrick: The Rest of the Story*, 75 TENN. L. REV. 501, 542 (2008) ("According to recent national surveys, between two-thirds and three-fourths of Americans believe that the need to raise money to conduct their campaigns influences judges' decisions."); George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1560-61 (2008) (surveying popular opinion polls in New York, Ohio, & Pennsylvania, as well as a national poll, which show registered voters believing judges influenced by campaign contributions ranging from 75 percent to 95 percent); Thomas J. Basting, Sr., *Gutter Politics and the Wisconsin Supreme Court*, WIS. LAW., May 2008, at 5 (citing a January 2008 survey in which 78 percent of Wisconsin registered voters believed that campaign funding influenced judges' decisions).

11. Brown, *supra* note 10, at 1563 ("Public perception of [state courts] as places where all citizens can receive impartial justice may falter. Extensive campaign promises and political debts may lead to prejudgment. Campaign contributions, in particular, may create a class of favored litigants."). Curiously, those who support public funding of elections do not likewise conclude that government contributions will make a judge more likely to rule in favor of the government. *See* Jessica Gall, *Living with Republican Party of Minnesota v. White: The Birth and Death of the Judicial Campaign Speech Restrictions*, 13 COMM. L. & POL'Y 97, 120 (2008) (suggesting that a candidates agreement to participate in public funding of judicial campaigns could "lessen the suspicions of ties between money and judicial behavior.").

12. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 394 (2000) (noting conflict among academic studies on the effect of contributions on candidate behavior).

13. Del Vecchio v. Ill. Dep't of Corr., 31 F.3d 1363, 1372 (7th Cir. 1994) ("Judges are human; like all humans, their outlooks are shaped by their lives' experiences. It would be unrealistic to suppose that judges do not bring to the bench those experiences and the attendant biases they may create.").

14. *See* Republican Party of Minn. v. White, 536 U.S. 765, 782 (2002) (noting that "elected judges . . . *always* face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench.") (emphasis in original).

15. *See* Guido Calabresi, Circuit Justice, 2d Cir., Remarks at Roundtable Discussion, Is There a Threat to Judicial Independence in the United States Today?, *in* 26 FORDHAM URB. L.J. 7, 26 (1998) ("If I were to identify the single greatest threat to judicial independence today, it would be the fact that judges want to move up.").

The danger to impartiality posed by such a judge is present under any system of judicial selection, and there is no reason to believe that campaign contributions pose a particularly strong danger in this regard.[17] To limit the danger that judges will succumb to temptation, courts have adopted various structural checks to limit the risk of injustice caused by the occasional "bad judge."[18] Ultimately, though, our judicial system presupposes that judges will take seriously the duty of their office to decide cases fairly and impartially.[19]

In addition to threatening actual impartiality, campaign contributions are said to threaten the perception of impartiality by the general public. This threat is particularly acute in the case of the judiciary because of its inherent weakness as a constitutional actor. As famously stated by Alexander Hamilton, the judiciary is the "least dangerous" branch, as it has "no influence over either the sword or the purse."[20] Because courts have neither the power to levy taxes nor command armies, the only way for their decisions to have effect is if they are widely perceived as being impartial arbiters of justice rather than mere political actors.[21]

As with charges of actual corruption, however, the evidence to support this argument is largely lacking. Polling data has consistently shown a generalized public cynicism about government institutions.[22]

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16. *See* Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 988-89 (2001) (noting a case where public criticism of a judge's decision regarding the admissibility of evidence led the judge to change his ruling).

17. Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech By Candidates for Judicial Office*, 35 UCLA L. REV. 207, 258 (1987) ("A sitting judge who is willing to manipulate his decisions in order to assure retention in office will find the opportunity to do so in either an appointive or an elective system."); *see also* Jonathan M. Hooks, *In Defense of Judicial Elections*, 68 ALA. LAW. 295, 298 (2007) (noting the error of thinking that "the elimination of elections will somehow result in the elimination of *ambition*.") (emphasis in original).

18. James Bopp, Jr. & Anita Y. Woudenberg, *An Announce Clause By Any Other Name: The Unconstitutionality of Disciplining Judges Who Fail to Disqualify Themselves For Exercising Their Freedom to Speak*, 55 DRAKE L. REV. 723, 727 (2007) ("A judge who is biased in favor of a particular side in a case cannot simply rule in favor of that case. A judge must provide a legal rationale for his decision, the weaknesses of which will often become readily apparent. The law also provides for a wide-ranging system of appeals in which legal errors committed by a judge due to bias can be corrected. Many cases are also heard by multiple judges, further diluting the chance that bias from an individual judge will lead to an incorrect result.").

19. Liteky v. United States, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring) ("[W]e accept the notion that the 'conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect.' The acquired skill and capacity to disregard extraneous matters is one of the requisites of judicial office." (citation omitted) (quoting *In re* J.P. Linahan, Inc., 138 F.2d 650, 652 (2d Cir. 1943))); Del Vecchio v. Ill. Dep't of Corr., 31 F.3d 1363, 1372 (7th Cir. 1994) ("We expect—even demand—that judges rise above these potential biasing influences, and in most cases we presume judges do.").

20. THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

21. James L. Gibson, *Nastier, Nosier, Costlier—And Better*, MILLER-MCCUNE, August 2008, at 27, *available at* http://www.miller-mccune.com/article/495 ("Because courts are weak, they require institutional legitimacy, the belief that an institution has the right to make binding decisions for a constituency and that such decisions must be complied with.").

22. *E.g.*, AMERICAN NATIONAL ELECTION STUDIES, THE ANES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR: ARE GOVERNMENT OFFICIALS CROOKED 1958-2004 (2005),

This is a good thing. Cynicism about the actions and motives of government officials can serve as a powerful check on the abuse of government power,[23] including by the judiciary.[24] And while some degree of perceived legitimacy is obviously necessary not only for the judicial but for other branches of government, experience has shown that democracy and cynicism about government institutions generally are capable of coexisting in the same society indefinitely.

The assumption that public concerns about campaign contributions translates into a lack of confidence in the judiciary is also not supported by the evidence. A 2002 poll by the American Bar Association, for example, found that 72% of respondents were at least "somewhat concerned" about whether "the impartiality of judges is compromised by the need to raise campaign money to successfully run for office."[25] Yet, the same poll found that 75% of respondents thought elected judges were more fair and impartial than appointed judges.[26] According to a recent poll, only five percent of respondents believed campaign contributions made to judges had no influence at all on decisions judges made in Minnesota state courts.[27] Nonetheless, the same poll found widespread public confidence in the courts, with 74% of respondents saying that they had "a great deal" or "some" confidence in the courts, and 76% saying that they had "a great deal" or "some" confidence in judges (higher rates than for any other category except the medical profession).[28] The courts are consistently among the highest ranked institutions in terms of public confidence.[29] And while the majority of Americans will express some

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http://electionstudies.org/nesguide/toptable/tab5a_4.htm (finding that, in 2004, 35% of respondents thought "quite a few of the people running the government are crooked," while 53% thought "not many" were crooked, and 10% said "hardly any" were crooked).

23. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (noting the "the value that free speech, a free press, and free assembly can serve in checking the abuse of power by public officials."); *see also* THE FEDERALIST No. 10 (Madison), *supra* note 20, at 80 ("It is in vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm.").

24. Bridges v. California, 314 U.S. 252, 270-71 (1941) ("The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion . . . . [A]n enforced silence, however limited, solely in the name of preserving the dignify [sic] of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.").

25. HARRIS INTERACTIVE, INC., HARRIS INTERACTIVE TELEPHONE OMNIBUS SURVEY: A STUDY ABOUT JUDICIAL IMPARTIALITY, PREPARED FOR THE AMERICAN BAR ASSOCIATION 6 (August 2002) (on file with author).

26. *Id.* at 4.

27. DECISION RESOURCES LTD., JUSTICE AT STAKE STUDY, MINNESOTA STATEWIDE 5 (2008), http://www.justiceatstake.org/files/MinnesotaJusticeatStakesurvey.pdf (last visited Oct. 22, 2008). This despite the fact that Minnesota prohibited judges and judicial candidates from personally soliciting campaign contributions.

28. *Id.* at 1-2.

29. According to a 2001-2002 survey, 96% of respondents rated the job being done by courts and judges of their state as being either "excellent" or "good." JUSTICE AT STAKE CAMPAIGN, STATE JUDGES FREQUENCY QUESTIONNAIRE (Nov. 5, 2001–Jan. 2, 2002) (on file with author). A 1999 survey found that 77% of respondents had either "a great deal" or "some" confidence in the United States Supreme Court, and 75% had similar confidence in local courts. And, 79% agreed

level of concern about the potentially corrupting effect of money in elections, this does not appear to be their most pressing concern.[30]

II. STOPPING CORRUPTION WITHIN A PRIVATELY FUNDED SYSTEM

While privately funded judicial elections may not be perfect, campaign contributions are a necessary part of the judicial election process. Campaigns cost money.[31] So long as judges are elected, funding for their campaigns is going to have to come from somewhere. As former Supreme Court Justice Sandra Day O'Connor has noted, "[u]nless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising."[32]

States have traditionally sought to combat any risk of corruption from campaign contributions by placing limits on judicial fundraising, rather than by abolishing it altogether. First, most states place limits on the size of contributions that can legally be made to a candidate by an individual or group.[33] Second, many states prohibit judicial candidates themselves from soliciting campaign contributions and require all such solicitations to be done through a committee.[34]

A. Contribution Limits

A majority of states place limits on the amount of at least some forms of contributions to judicial candidates.[35] While contribution limits "implicate fundamental First Amendment interests," namely the freedoms of "political expression" and "political association,"[36] they can be constitutional, as long as there is a demonstrable relationship between the size of the contributions allowed and a realistic threat of corruption, and

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with the statement that "[j]udges are generally honest and fair in deciding cases." NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY (1999) *available at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicView CrtsPub.pdf.

30. Scott Rasmussen, *55% Say Media Bias Bigger Problem Than Campaign Cash*, Aug. 11, 2008, http://www.rasmussenreports.com/public_content/politics/election_20082/2008_presidential_election/55_say_media_bias_bigger_problem_than_campaign_cash (last visited Oct. 22, 2008) (reporting poll finding 55% of respondents thought media bias posed a bigger problem in politics than large campaign contributions).

31. *See* Weaver v. Bonner, 309 F.3d 1312, 1322 (11th Cir. 2002) ("Campaigning for elected office necessarily entails raising campaign funds and seeking endorsements from prominent figures and groups in the community.").

32. Republican Party of Minn. v. White, 536 U.S. 765, 789-90 (2002).

33. *See* American Judicature Soc., Judicial Campaigns and Elections: Campaign Financing, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state= (last visited October 19, 2008).

34. *See id.*

35. *See id.*

36. Buckley v. Valeo, 424 U.S. 1, 23 (1976).

they are not so low as to prevent "candidates and political committees from amassing the resources necessary for effective advocacy."[37]

To the extent that large campaign contributions do pose an actual threat to judicial impartiality, reasonable contribution limits are an effective means of dealing with this threat. A judge is not likely to be swayed in favor of a particular litigant by the fact that the litigant has given him a small contribution in the past, nor by the hope of receiving a similarly sized contribution in the future.

B. Restrictions on Personal Solicitation by Judicial Candidates

In addition to limiting the amount of contributions, many states prohibit judicial candidates from personally soliciting campaign contributions, while allowing their campaign committee to make contribution solicitations. The extent to which this committee system actually insulates judges and judicial candidates from the supposed dangers of fundraising is unclear. Bans on personal solicitation by judicial candidates do, however, allow states to maintain the fiction that judges are not directly involved in the campaign fundraising process.

Early cases involving bans on personal solicitation by judicial candidates tended to uphold the provisions against constitutional challenges.[38] The legal landscape governing judicial elections changed dramatically, however, in 2002, when the United States Supreme Court decided *Republican Party of Minnesota v. White*,[39] involving a First Amendment challenge to a Minnesota judicial canon barring judicial candidates from announcing their views on disputed legal and political issues.[40] Previous cases had split on the question of whether a canon prohibiting judicial candidates from announcing their views was constitutional.[41] In *White*, however, the Supreme Court held that the Announce Clause violated the First Amendment.

Central to the Court's opinion in *White* was an analysis of the different possible state interests that fell under the term "judicial impartiality." As traditionally understood, judicial impartiality referred to impartiality towards parties and prohibited a judge from hearing a case when she had a bias for or against one of the litigants.[42] This interest, the Court held, was compelling and grew out of the right of due process, which would be violated if a litigant was forced to have his case heard by

37. *Id.* at 21; *see also* Randall v. Sorrell, 548 U.S. 230, 233 (2006) (finding Vermont contribution limits so low as to impede candidates' right to effective advocacy); *see generally* James Bopp, Jr & Susan Lee, *So There Are Campaign Contribution Limits That Are Too Low*, 18 STAN. L. & POL'Y REV. 266 (2007).

38. *See, e.g.*, Stretton v. Disciplinary Bd., 944 F.2d 137, 138 (3rd Cir. 1991).

39. 536 U.S. 765 (2002).

40. *Id.* at 768.

41. *Compare Buckley*, 997 F.2d at 225, *with Stretton*, 944 F.2d at 138.

42. *White*, 536 U.S. at 775-76.

a judge biased against him personally or biased in favor of his opponent in the case.[43] While *White* held that the state did have a compelling interest in preserving judicial impartiality towards parties, it concluded that the Announce Clause was "barely tailored to serve that interest at all, inasmuch as it does not restrict speech for or against particular parties, but rather speech for or against particular issues."[44]

The *White* court also considered the possibility that judicial impartiality could be defined in two non-standard senses. First, the Court considered whether impartiality includes a lack of preconceptions on legal issues.[45] Some had argued that just as a judge might be biased for or against a particular party, so she might be biased for or against a particular conclusion regarding a legal issue. The Court found, however, that the state's interest in judicial impartiality did not include a lack of preconceptions on legal issues, as having a judge with no such preconceptions was neither possible nor desirable.[46]

Finally, the Court considered whether judicial impartiality included judicial open-mindedness. Open-mindedness would require of a judge "not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case."[47] Judicial open-mindedness "seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so."[48] The Supreme Court declined to state whether open-mindedness was encompassed within the state's impartiality interest, holding instead that the Announce Clause was not narrowly tailored to that interest and thus could not be justified by it in any event.[49]

White went on to note that to the extent judges announcing their views on disputed legal and political issues did raise impartiality concerns, those concerns were inherent in the state's decision to elect judges in the first place. Quoting Justice Marshall, the Court stated that "[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles."[50] The *White* Court therefore concluded that states cannot use the impartiality concerns created by

43. *Id.* at 776

44. *Id.*

45. *Id.* at 777.

46. *See id.* at 778 ("Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972)).

47. *White*, 536 U.S. at 778.

48. *Id.*

49. *Id.* ("It may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose.").

50. *Id.* at 788 (quoting Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

their decision to popularly elect judges to justify restricting First Amendment rights.[51]

Since *White*, federal courts have struck down a variety of state judicial canons on First Amendment grounds.[52] In particular, four federal courts—two district courts and two courts of appeals—have enjoined state judicial canons prohibiting judicial candidates from personally soliciting campaign contributions.[53]

Like the Announce Clause, a judicial canon banning personal solicitation of funds by candidates "depends wholly upon the subject matter of the speech for its invocation."[54] As such, a solicitation clause is a content-based regulation of core political speech subject to strict scrutiny.[55] And while the justification for the solicitation clause—that there is a danger a judge will be biased in favor of a litigant or attorney if he knows that she has donated money to his campaign—might seem to be addressed to preserving judicial impartiality toward parties in a way the Announce Clause was not, federal courts since *White* have held that the solicitation clause is not narrowly tailored to that interest.[56] The reason for this is simple. What raises impartiality concerns is not the solicitation of funds, but rather a judge's knowledge of the source of the contribution itself. Since judges can know, and are often legally required to know,[57] who has donated money to their campaigns and in what amount, banning judicial candidates from personally soliciting funds does nothing

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51. *See id.* at 792 (O'Connor, J., concurring) ("Minnesota has chosen to select its judges through contested popular elections . . . . In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.").

52. *See* Republican Party v. White (*White II*), 416 F.3d 738, 744 (8th Cir. 2005); Family Trust Found. v. Ky. Judicial Conduct Comm'n, 388 F.3d 224, 226-27 (6th Cir. 2004) (order denying stay of preliminary injunction); Weaver v. Bonner, 309 F.3d 1312, 1319-20, 1322 (11th Cir. 2002); *Carey v. Wolnitzek*, 2008 WL 4602786 (E.D. Ky. Oct. 15, 2008); Bauer v. Shepard, No. 3:08-CV-196-TLS, slip op. at 20 (N.D. Ind. May 6, 2008) (preliminary injunction granted); Duwe v. Alexander, 490 F. Supp. 2d 968, 976 (W.D. Wis. 2007); Ind. Right to Life, Inc. v. Shepard, 463 F. Supp.2d 879, 890 (N.D. Ind. 2006), *rev'd on other grounds*, 507 F.3d 545 (7th Cir. 2007); Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209, 1232 (D. Kan. 2006) (preliminary injunction granted); Alaska Right to Life v. Feldman, 380 F. Supp. 2d 1080, 1082 (D. Alaska 2005), *rev'd on other grounds*, 504 F.3d 840 (9th Cir. 2007); N.D. Family Alliance v. Bader, 361 F. Supp. 2d 1021, 1042 (D. N.D. 2005); Family Trust Found. v. Wolnitzek, 345 F. Supp. 2d 672, 694 (E.D. Ky. 2004); Spargo v. State Comm'n on Judicial Conduct, 244 F. Supp.2d 72, 88-90 (N.D.N.Y. 2003), *vacated on other grounds*, 351 F.3d 65 (2d Cir. 2003); Smith v. Phillips, No. A-02 CV 111 JRN, 2002 U.S. Dist. LEXIS 14913, *1-3 (W.D. Tex. Aug. 6, 2002); O'Neill v. Coughlan, 511 F.3d 638, 639 (6th Cir. 2008).

53. *White II*, 416 F.3d at 765; *Weaver*, 309 F.3d at 1322; *Carey v. Wolnitzek*, No. 3:06-36-KKC, slip op. at *22 (E.D. Ky. Oct. 10, 2006); *Kan. Judicial Watch*, 440 F. Supp. 2d at 1237, *injunction modified on standing grounds by* 519 F.3d 1107 (10th Cir. 2008).

54. *White II*, 416 F.3d at 763 (citation omitted).

55. *Id.* at 763-64; *Weaver*, 309 F.3d at 1322.

56. *See* cases cited *supra* note 55.

57. *See, e.g.*, *White II*, 416 F.3d at 766 n.16 (noting that "very specific information about campaign contributions are [sic] publicly available, notably on the Internet").

to further a state's interest in preserving judicial impartiality towards parties.[58] In addition, as with the Announce Clause, any impartiality concerns raised by the personal solicitation of campaign funds are inherent in the state's decision to elect judges and cannot be used as a rationale to limit candidates' First Amendment rights.[59]

Post-*White*, two state courts have upheld solicitation clauses against constitutional challenge. *In re Dunleavy*[60] upheld Maine's solicitation clause against First Amendment challenge by potential contributors, but did not consider whether the provision violated judicial candidates' First Amendment rights. Additionally, *Dunleavy*'s holding was explicitly made contingent on the fact that judges in Maine were not elected.[61] The case is thus of limited applicability.

The Arkansas Supreme Court also recently upheld the state's solicitation clause in *Simes v. Arkansas Judicial Discipline and Disability Commission*,[62] partially on the grounds that "[a]ttorneys ought not feel pressured to support certain judicial candidates in order to represent their clients."[63] This reasoning is out of step with the *White* decision and its progeny, as it attempts to justify the solicitation clause not because of the effect such solicited contributions might have on candidates, but rather because of concern about the subjective feelings of those solicited. The state does have an interest in preventing corruption, and, therefore, could justifiably prohibit contributions that were solicited as part of a quid pro quo. Similarly, the state undoubtedly has an interest in preventing actual coercion of contributions by candidates. Whether protecting attorneys' subjective feelings of pressure is a compelling state interest sufficient to justify restricting political speech, however, is doubtful.[64]

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58. *See Weaver*, 309 F.3d at 1322-23 ("[E]ven if there is a risk that judges will be tempted to rule a particular way because of contributions or endorsements, this risk is not significantly reduced by allowing the candidate's agent to seek these contributions and endorsements on the candidate's behalf rather than the candidate seeking them himself. Successful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting of support."); *see also Carey v. Wolnitzek*, No. 3:06-36-KKC, slip op. at *18 (E.D. Ky. Oct. 10, 2006) ("Even with the prohibition against direct solicitations, however, judges are able to find out who contributed to their campaigns and the amounts they contributed. Thus, if a judge is predisposed to favoring those parties who agree to make contributions, the Solicitation Clause's prohibition against personal solicitation does not prevent such actual partiality.").

59. *See* Republican Party of Minn. v. White, 536 U.S. 765, 792 (2002) (O'Connor, J., concurring) ("If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."); *see also Weaver*, 309 F.3d at 1322 ("The impartiality concerns, if any, are created by the State's decision to elect judges publicly.").

60. 838 A.2d 338 (Me. 2003).

61. *Id.* at 349 ("The Committee correctly notes an important distinction between the restrictions at issue in *White* and *Weaver* and this case. Both of those cases concerned restrictions on candidates for judicial office in states where judges are elected.").

62. 247 S.W.3d 876 (Ark. 2007).

63. *Id.* at 882.

64. *Carey v. Wolnitzek*, No. 3:06-36-KKC, slip op. at *18 (E.D. Ky. Oct. 10, 2006) ("This Court finds no compelling state interest in prohibiting speech that makes it easier for potential donors to 'just say no.'").

It should be noted that feeling pressured to contribute is in no way confined to contributions solicited by judicial candidates. A person may "feel pressured" to support a candidate for legislative or executive office. In fact, the felt coercion could arguably be greater in the case of legislative or executive office candidates because it is generally unknown prior to an election whether a judge will ever sit on a case involving a potential contributor, whereas legislators and executive officers have the authority to influence the law on whatever matters they so choose. The state's assertion of this interest only in the context of judicial elections suggests that it is insincere, or, in constitutional terms, is fatally underinclusive.[65]

Challenges to state solicitation clauses are currently pending in five states.[66] When Wisconsin amended its judicial canons in 2004, two justices dissented from the amendments relating to the solicitation clause, arguing that the comprehensive ban on solicitation by judges and judicial candidates likely violated the First Amendment.[67] And in 2006, the Nevada Supreme Court rejected a request to add a ban on personal solicitation to its state judicial code, citing First Amendment concerns. Given the emerging legal landscape post-*White*, state bans on candidate solicitation of campaign contributions cannot be considered an appropriate or effective means of safeguarding the judiciary from the purportedly corrupting effect of contributions.

III. THE POSSIBILITY OF PUBLIC FUNDING

In the previous section, we considered two ways in which states have tried to limit any perceived negative effects of campaign contributions while keeping their system of privately funded judicial campaigns. In this section, we turn to a more radical solution to the problems of campaign contributions in judicial races: public funding of elections.[68]

Public funding would seem to address the worries about the effect of money in judicial races, while still allowing states to tap the accountability and legitimizing force that elections can bring. In 2002, the American Bar Association endorsed the concept of public funding and recommended that individual states adopt public funding schemes suited

65. *See* City of Ladue v. Gilleo, 512 U.S. 43, 52 (1994) (noting that underinclusiveness "diminish[es] the credibility of the government's rationale for restricting speech"); *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) ("As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.") (citations omitted).

66. *See Wolfson v. Brammer*, No. 08-CV-8064-FJM (D. Ariz. 2008); *Bauer v. Shepard*, No. 08-CV-196-TLS (N.D. Ind. 2008); *Wersal v. Sexton*, No. 08-CV-613-ADM-JSM (D. Minn. 2008); *Siefert v. Alexander*, No. 08-CV-126-BBC (W.D. Wis. 2008); *Yost v. Stout*, No. 06-CV-4122-JAR-KGS (D. Kan. 2006).

67. *In the Matter of the Amendment of Supreme Court Rules: SCR Chapter 60, Code of Judicial Conduct—Campaigns*, Elections, Political Activity, 2004 WI 134 (Wis. 2004)

68. *See generally* Deborah Goldberg, *Public Funding of Judicial Elections: The Roles of Judges and the Rules of Campaign Finance*, 64 OHIO ST. L.J. 95 (2003).

to their particular state circumstances.[69] According to the report, of the "many threats to judicial independence, one of the more pervasive problems is the nature and cost of running for the bench."[70] That same year, North Carolina became the first state in the nation to provide for full public funding for all state judicial offices.[71] Since then, only New Mexico has adopted public funding for judicial races.[72] Several other states, however, are currently considering public funding proposals, many of which are modeled off of the North Carolina scheme.[73]

Public funding of elections is not per se unconstitutional.[74] States generally have broader authority when it comes to the distribution of public funds than in the case of regulation, and so long as they do not engage in viewpoint discrimination, a state may choose to give money to candidates for particular public offices, at least when voluntarily contributed by taxpayers for this purpose.[75] Simply giving money to candidates, however, is unlikely to address the concerns raised about the current system of campaign financing. Without some limit on the ability of candidates to raise and spend private funds, candidates would be able to simply add what they receive in government funds to what they can raise privately, severely disadvantaging any candidate who relied exclusively on government funding to finance their campaigns.

To avoid this result, almost all public funding schemes make candidates agree to abide by certain expenditure and contribution limits as a

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69. *See* AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 38 (2002), *available at* http://www.abanet.org/judind/pdf/commissionreport4-03.pdf. The recommendations of the Commission report were approved by the ABA House of Delegates in February of 2002.

70. *Id.* at 61.

71. While Wisconsin has had public funding for state Supreme Court races since the 1970s, public funding even for those races has been limited. *See* WIS. STAT. § 11.50(3)(a)(2) (2007). The Wisconsin public funding scheme does not contain any provision for rescue funds based on opposing expenditures. For a description of how the Wisconsin scheme operates, see Charles Gardner Geyh, *Publicly Funded Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1476-77 (2001).

72. *See* N.M. STAT. ANN. § 1-19A-13(D)(2), (I) (West 2008); WIS. STAT. ANN. §§ 11.001-.70 (West 2007). Several states and localities have also adopted public funding schemes for certain elections. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 16-901.01, -940 to -961 (2008); CONN. GEN. STAT. §§ 9-600 to -674, 9-700 to -751 (2008); HAW. REV. STAT. § 11-217 to -225 (2008); ME. REV. STAT. ANN. tit. 21-A, §§ 1121-1128 (2008); N.J. STAT. ANN. § 19:44A-30 to -47 (West 2008). A proposal to adopt public funding for U.S. Senate races is currently before Congress. Fair Elections Now Act, S. 936, 110th Cong. (2007).

73. *See, e.g.*, H.B. 251, 57th Leg., 1st Reg. Sess. (Idaho 2003); H.B. 4610, 49th Gen. Assem., 2nd Reg. Sess. (Ill. 2006); S.B. 171, 98th Leg., 2007-2008 Reg. Sess. (Wis. 2007).

74. Buckley v. Valeo, 424 U.S. 1, 90-91 (1976) ("Congress has power to regulate Presidential elections and primaries, and public financing of Presidential elections as a means to reform the electoral process was clearly a choice within the granted power . . . . Whether the chosen means appear 'bad,' 'unwise,' or 'unworkable' to us is irrelevant.") (citation omitted); Davis v. Fed. Election Comm'n, 128 S. Ct., 2759, 2772 (2008).

75. *See, e.g.*, *Buckley*, 424 U.S. at 57 n.65 ("Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations.").

condition of receiving government funds.[76] The Supreme Court has held that this is constitutional so long as participation in the scheme remains voluntary.[77] To be voluntary, a public funding scheme must allow candidates the option of not participating in the system[78] and may not unconstitutionally burden the First Amendment rights of candidates who opt not to participate.[79]

A public funding scheme must also not burden the First Amendment rights of independent groups. States cannot constitutionally place limitations on the amount of independent expenditures made during a campaign.[80] Public funding schemes that do burden First Amendment rights are subject to strict scrutiny and will be deemed unconstitutional unless narrowly tailored to serve a compelling government interest.[81]

While crafting a public funding scheme that meets these requirements may seem like a simple task, in practice, constructing a public funding scheme that is both efficient and complies with the First Amendment is not easy. States generally provide funds at a level comparable to average spending in prior races. This amount, however, is often based on all races, not just competitive ones, and does not account for increased costs. This leaves the publicly funded candidate vulnerable to higher spending by privately funded candidates or independent spenders. This problem could be avoided if states were willing to provide publicly funded candidates with sufficient funds to run an effective campaign. However, few public funding schemes do this because one of the principal goals of public funding is to reduce the overall amount of campaign spending. For this reason, many schemes make additional distributions of public funds, called "rescue funds," to make up for the insufficiency of their original government allotment. The use of rescue funds, however, proves upon examination to pose insurmountable constitutional difficulties.

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76. National Conference of State Legislatures, Public Financing of Campaigns: An Overview (2008), http://www.ncsl.org/programs/legismgt/about/PubFinOverview.htm (last visited Oct. 19, 2008).

77. *Buckley*, 424 U.S. at 57 n.65 ("Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.").

78. *See* Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 38 (1st Cir. 1993) ("[V]oluntariness has proven to be an important factor in judicial ratification of government-sponsored campaign financing schemes." (citing *Buckley*, 424 U.S. at 95-96)).

79. *See* Shrink Mo. Gov't PAC v. Maupin, 71 F.3d 1422, 1425 (8th Cir. 1995) (holding that a ban on certain contributions to privately funded candidates was unconstitutional because it prevented privately funded candidates from gaining access to funding sources to which they would be entitled but for the choice to eschew public funding).

80. *See Buckley*, 424 U.S. at 46 ("[I]ndependent advocacy . . . does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."); *see also* Anderson v. Spear, 356 F.3d 651, 667 (6th Cir. 2004) ("*Buckley* drew a line in the sand, and prohibited the government from restricting a candidate's ability to make expenditures on his own behalf.").

81. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 657 (1990).

A. The Problem of Rescue Funds

In order to "level the playing field" between a publicly funded candidate and her privately funded opponent, most public funding schemes attempt to tie the level of government funding to the amount of money spent in opposition to that candidate's campaign. For example, under North Carolina's public funding scheme, once a candidate qualifies for public funding, she receives an initial distribution based on the office the candidate is seeking, whether or not she is opposed, and whether the funds are to be used in a primary or a general election campaign.[82] If the publicly funded candidate faces no serious opposition, no further government funds are provided.[83] However, additional government funds are available to the candidate if the combined sum of (a) contributions from a nonparticipating opponent, (b) independent expenditures[84] made in support of that opponent, and (c) independent expenditures in opposition to the publicly funded candidate exceeds a certain trigger amount.[85] These "rescue funds"[86] are made in an "amount equal to the reported excess."[87] That is, for every dollar spent by a privately funded candidate or independent group on behalf of a privately funded candidate or in opposition to a publicly funded candidate, the publicly funded candidate receives a dollar of government contributions.[88] Thus, under the rescue funds provision, expenditures by a candidate can result in additional government contributions to that candidate's opponent, and independent expenditures made in opposition to a candidate or in support of her opponent can, likewise, result in government contributions to the opposed candidate.

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82. N.C. GEN. STAT. ANN. § 163-278.65(a)-(b) (West 2007).

83. *Id.* § 163-278.65(b)

84. An independent expenditure is defined as "an expenditure to support or oppose the nomination or election of one or more clearly identified candidates that is made without consultation or coordination with a candidate or agent of a candidate whose nomination or election the expenditure supports or whose opponent's nomination or election the expenditure opposes." N.C. GEN. STAT. ANN. § 163-278.6(9a) (West 2007).

85. N.C. GEN. STAT. ANN. § 163-278.67(a) (West 2007). The trigger amount is determined by statute and, in the case of a general election, is equal to the amount of the initial distribution. N.C. GEN. STAT. ANN. § 163-278.62(18) (West 2007).

86. The name given to funds distributed in this way varies depending on the public funding scheme. In North Carolina they were originally called "rescue funds," but were re-labeled "matching funds" in 2007. *See id.* § 163-278.67. Other schemes refer to them by other names. *See* Fair Elections Now Act, S. 936, 110th Cong. § 511 (2007) (providing "fair fight" funds to publicly funded candidates based on opposition spending). None of these terms is entirely accurate. "Matching funds" is too broad, as a public funding scheme can choose to give matching funds based on something other than opposing expenditures. "Rescue funds" is not a completely neutral term, but at least better conveys the conditions in which funds are granted. For lack of a better term, this article will refer to government contributions to candidates based on opposing speech as rescue funds, and to the portions of a public funding scheme providing for these rescue funds as the rescue funds provision.

87. *Id.* § 163-278.67(a).

88. *Id.* Importantly, independent expenditures in support of a publicly funded candidate or in opposition to a nonparticipating candidate are not factored into calculating the trigger amount, and no rescue funds are issued to privately funded candidates nor deducted from a publicly funded candidate's government funding based upon independent expenditures so made. *See id.*

Until recently, courts have been divided over whether First Amendment rights are burdened by public funding schemes which provide rescue funds based on spending by privately funded candidates and independent groups. The First and Fourth Circuits have found that providing government funding to candidates based on opposition speech does not burden First Amendment rights and is, therefore, constitutional,[89] while the Eighth and arguably the Ninth Circuit have found them constitutionally suspect.[90] Treatment of the issue by other federal courts has often been analytically confused, leaving the validity of rescue funds provisions open to question. A brief summary of the relevant cases follows.

1. The Lower Courts

The first federal court case to address the rescue funds issue was *Day v. Holahan*.[91] *Day* involved Minnesota's public funding scheme, which distributed government funds to publicly funded candidates based on independent expenditures made in opposition to their campaign, over a trigger amount.[92] The Eighth Circuit struck down this provision because it penalized First Amendment rights.[93] The *Day* court reasoned that independent groups would be chilled from expending money opposing a candidate if they knew that doing so would result in government funds to that candidate's campaign.[94] Accordingly, the rescue funds provision turned independent expenditures over the trigger amount into de facto contributions to an opponent's campaign and was, therefore, an impermissible burden on First Amendment rights.[95]

In *Daggett v. Commission on Governmental Ethics and Election Practices*,[96] the First Circuit upheld the rescue funds provision of Maine's public funding scheme against a constitutional challenge.[97] Maine's scheme provided rescue funds to publicly funded candidates and reduced contribution limits for privately funded candidates to between $250 and $500, depending on the office sought.[98] The court was dismissive of any adverse effect on the complaining party, noting that the scheme "in no way limits the quantity of speech . . . nor . . . threaten[s]

89. Daggett v. Comm'n on Governmental Ethics and Election Practices, 205 F.3d 445, 472 (1st Cir. 2000); N.C. Right to Life Comm. Fund for Indep. Expenditures v. Leake, 524 F.3d 427, 437-38 (4th Cir. 2008).

90. Day v. Holahan, 34 F.3d 1356, 1360 (8th Cir. 1994); *see* Ass'n of Am. Physicians and Surgeons v. Brewer, 494 F.3d 1145, 1146 (9th Cir. 2007) (holding that the plaintiffs' complaint requesting injunction against the Arizona statute stated a cause of action).

91. 34 F.3d at 1358.

92. *See id.* at 1359.

93. *Id.* at 1361.

94. *Id.* at 1360 ("The knowledge that a candidate who one does not want to be elected will . . . receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech.").

95. *See id.* at 1360-61.

96. 205 F.3d 445 (1st Cir. 2000).

97. *Id.* at 472.

98. *Id.* at 451-52.

censure or penalty"[99] and, instead, focused on the voluntary nature of the scheme.[100]

Recently, the Fourth Circuit has followed *Daggett* and upheld the constitutionality of North Carolina's rescue funds for judicial elections.[101] *Duke* rejected *Day*'s conclusion that the rescue funds provision chilled speech, arguing instead that "North Carolina's provision of matching funds is likely to result in more, not less, speech."[102] The Fourth Circuit also held that North Carolina's public funding scheme was not coercive, in that a candidate might rationally choose not to participate in the scheme despite the advantages it provided.[103]

While *Day*, *Daggett*, and *Duke* offer conflicting analyses of the rescue funds provision, the holdings of these decisions are at least clear. The same cannot be said, unfortunately, for *Association of American Physicians and Surgeons v. Brewer*.[104] *Brewer* involved a coalition of candidates and independent organizations who brought suit challenging various aspects of Arizona's public funding scheme, including its provision for rescue funds.[105] The district court dismissed the suit, holding that the plaintiff's challenge to the rescue funds provision failed to state a claim because the provision was constitutional.[106]

On appeal, defendants argued that the case was moot, as the election at issue had long since passed.[107] The Ninth Circuit initially agreed and issued an opinion dismissing the appeal on mootness grounds.[108] Soon thereafter, however, the court withdrew its opinion when it was determined that the panel's original mootness holding was inconsistent with prior binding Ninth Circuit precedent.[109] The court then issued a third

99. *Id.* at 464.

100. *Id.* at 466-67.

101. N.C. Right to Life Comm. Fund for Indep. Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2008). At the district court level, the case was styled *Jackson v. Leake*. 476 F. Supp. 2d 515 (E.D. N.C. 2006). Plaintiff Jackson, however, was voluntarily dismissed from the case on appeal, and thus the case was restyled as *N.C. Right to Life Comm. Fund for Indep. Expenditures v. Leake* in the Fourth Circuit. This, however, has led to some confusion, as on the same day that it handed down its opinion, the Fourth Circuit also handed down its opinion in the separate case of N.C. Right to Life v. Leake, 525 F.3d 274 (4th Cir. 2008). On July 24, 2008, plaintiffs' filed a petition for a writ of certiorari with the United States Supreme Court, styled *Duke v. Leake*. 77 USLW 3074 (U.S. Jul 24, 2008) (NO. 08-120). For consistency, and in order to avoid confusion, for purposes of this article the Fourth Circuit's decision on the rescue funds provision shall be referred to as *Duke v. Leake*, or simply *Duke*.

102. *Duke*, 524 F.3d at 438.

103. *Id.* at 436 ("The plaintiffs do not make coercion a central aspect of their arguments, and, indeed, we conclude that North Carolina's public financing system is not unconstitutionally coercive. The incentives to choose public funding, while not insubstantial, are rather modest in comparison to those in similar systems that have been upheld against First Amendment challenges.").

104. 363 F. Supp. 2d 1197 (D. Ariz. 2005).

105. *Id.* at 1198-99.

106. *Id.* at 1202-03.

107. Assoc. of Am. Physicians & Surgeons v. Brewer, 486 F.3d 586, 588 (9th Cir. 2007), *reh'g granted*, 494 F.3d 1145 (9th Cir. 2007), *amended by* 497 F.3d 1056 (9th Cir. 2007).

108. *Id.* at 589.

109. *Brewer*, 494 F.3d at 1146.

opinion, clarifying that it had reversed the district court's dismissal, holding that plaintiffs had stated a cause of action in their challenges to the public funding scheme, and remanding the case back to the district court.[110] By finding that plaintiffs had stated a cause of action, the court appears to have sided with *Day* in finding the public funding scheme constitutionally problematic, though the Ninth Circuit's subsequent opinion contains virtually no substantive discussion of the merits of the rescue funds challenge.[111]

While these four cases are as yet the only decisions dealing explicitly with the constitutionality of the rescue funds, several other cases also warrant further mention. First, in *Rosentiel v. Rodriguez*,[112] publicly funded candidates in Minnesota were given an initial distribution of government funds in exchange for agreeing to spending caps.[113] The publicly funded candidates were released from these caps, however, if their non-publicly funded opponents spent more than a given amount.[114] The court upheld this provision on the basis that removing the publicly funded candidate's spending caps did not burden First Amendment rights.[115]

The Sixth Circuit has also dealt with the constitutionality of other aspects of public funding schemes in two cases. *Gable v. Patton*[116] involved a Kentucky scheme where publicly funded candidate slates were allowed to raise up to $600,000 in private contributions and were given two dollars in government funding for every privately raised dollar up to that amount. Further, if a slate of candidates were to face a privately funded slate that had raised more than $1.8 million, the publicly funded candidates were released from the otherwise applicable contribution limits and could continue to receive two dollars in government funding for every dollar raised privately. Despite these very generous benefits, *Gable* found that Kentucky's public funding scheme was not coercive and so was constitutional.[117]

Kentucky's public funding scheme also contained a provision, similar to the one at issue in *Rosentiel*, that removed the applicable expenditure limits for publicly funded candidates if an opposing slate of candidates spent more than the trigger amount. While *Gable* upheld this feature of the Kentucky scheme, in *Anderson v. Spear*,[118] the Sixth Circuit struck down the definition of "contribution" that applied to Kentucky's

110. *Brewer*, 497 F.3d at 1057.
111. *Id.*
112. 101 F.3d 1544 (8th Cir. 1996).
113. *Id.* at 1546.
114. *Id.* at 1547.
115. *Id.* at 1557.
116. 142 F.3d 940 (6th Cir. 1998).
117. *Id.* at 949.
118. 356 F.3d 651 (6th Cir. 2004).

matching funds provision on the grounds that it included contributions by a candidate to his own campaign.[119] The court held that including candidate contributions when calculating the trigger amount served to deter candidates from contributing funds to their own campaign, and "[t]hus, by failing to exempt candidate contributions to their own campaigns from the trigger provision, Kentucky applies an indirect regulation on *expenditures*."[120]

2. *Davis v. FEC*

The Supreme Court's recent decision in *Davis v. FEC*[121] provides important guidance as to how to resolve this conflict among the lower courts. *Davis* involved a challenge to the so-called "Millionaire's Amendment" to the Bipartisan Campaign Reform Act of 2002 (BCRA).[122] This provision tripled the contribution limit applicable to a candidate when that candidate's opponent had "self-financed" his campaign, that is, where he contributes more than $350,000 to his own campaign.[123] Contribution limits for the candidate who had self-financed, however, were not raised. Jack Davis, a self-financed congressional candidate in New York, challenged the provision, arguing that he was deterred from contributing personal funds to his campaign by the knowledge that if he did so he would trigger the deferential contribution limits.[124]

Davis held that by making the trigger for the asymmetrical contribution limits turn on the amount of personal spending by Davis on his own campaign, the Millionaire's Amendment chilled and penalized Davis's First Amendment rights.[125] Under this scheme, "a candidate who wishes to [make unlimited personal expenditures had] two choices: abide by a limit on personal expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits."[126] The Court endorsed the rationale of *Day* to support its conclusion that the Millionaire's Amendment burdened free speech:

> Many candidates who can afford to make large personal expenditures to support their campaigns may choose to do so despite § 319(a), but they must shoulder a special and potentially significant burden if they make that choice. *See Day v. Holahan*, 34 F.3d 1356, 1359-1360 (C.A.8 1994) (concluding that a Minnesota law that increased a candidate's expenditure limits

119. *Id.* at 667.
120. *Id.*
121. 128 S. Ct. 2759 (2008).
122. *Id.* at 2767.
123. 2 U.S.C.A. § 441a-1(a)(1)(A) (2002).
124. *Davis*, 128 S. Ct. at 2767, 2770.
125. *Id.* at 2771.
126. *Id.* at 2772.

and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures).[127]

Because the Millionaire's Amendment entailed that "the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics," the Court found that the provision burdened protected political speech.[128]

Having found that the Millionaire's Amendment burdened First Amendment rights, *Davis* went on to find the provision unconstitutional, as it was not narrowly tailored to a compelling government interest.[129] According to the Court, the Millionaire's Amendment was not justified by any anti-corruption interest, as "reliance on personal funds *reduces* the threat of corruption."[130] Furthermore, the *Davis* Court rejected the argument that the Millionaire's Amendment could be justified by a state interest in "fairness," "equality," or "leveling the playing field" with regard to elections.[131] Quoting a prior opinion by Justice Thomas, the Court noted that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."[132] Far from being compelling, the Court held that equality in campaign financing was not even a legitimate interest of the state.[133] A purported interest in equality justifies restricting speech that would have "ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office."[134] Finally, *Davis* held that the "resulting drag on First Amendment rights [caused by the Millionaire's Amendment] is not constitutional simply because it attaches as a

127. *Id.*

128. *Id.*

129. *Id.* (noting that the Millionaire's Amendment imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech and thus cannot stand unless it is "justified by a compelling state interest" (citing FEC v. Mass. Citizens for Life, 479 U.S. 238, 256 (1986))).

130. *Id.* at 2773.

131. *Id.*

132. *Id.* (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting)).

133. *Id.*; *see also* McConnell v. FEC, 540 U.S. 93, 227 (2003) (noting that "equal resources" or "equalizing" is "not . . . a legally cognizable right" (quoting FEC v. Mass. Citizens for Life, 479 U.S. 238, 257 (1986) and Buckley v. Valeo, 424 U.S. 1, 48 (1976) (per curiam)); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 705 (1990) (Kennedy, J., dissenting) (rejecting as "antithetical to the First Amendment" "the notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections"); *Buckley*, 424 U.S. at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.").

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

consequence of a statutorily imposed choice."[135] The provision was therefore unconstitutional.[136]

Davis sheds new light on the constitutionality of rescue funds in several important respects. First, the Supreme Court endorsed *Day*'s conclusion that rescue funds burden First Amendment rights of independent spenders.[137] This means that *Day* was right when it struck down a rescue funds provision that granted government contributions based on speech by independent groups.[138] Second, like *Anderson*, *Davis* involved contributions made by candidates from personal funds, not independent expenditures.[139] If the law struck down in *Davis* was analogous to a rescue funds provision in *Day*, then its holding must likewise apply to rescue funds issued based on the spending by a privately funded opponent.

It should also be noted that the constitutionality of the regulation at issue in *Davis* did not turn on any calculation of the overall benefits and burdens involved in the public funding scheme. A state cannot justify imposing burdens on the speech of non-publicly funded candidates on the grounds that publicly funded candidates have voluntarily adopted other burdens, such as voluntary expenditure limits; nor are these burdens justified as a means of encouraging participation in a public funding scheme.[140]

3. Can the Rescue Funds Provision Be Saved?

Viewed through the lens of *Davis*, it is clear that the rescue funds provision burdens First Amendment rights. As in *Davis*, the rescue funds provision presents candidates with a stark choice: "abide by a limit on personal expenditures or endure the burden that is placed on that right" by the provision of rescue funds.[141] Likewise, independent groups who want to advocate against publicly funded candidates or for their privately funded opponents must either limit their expenditures, or face the prospect that their speech will result in additional funding to the candidate whose election they oppose. This choice may chill some speech by privately funded candidates, and it may lead other candidates to face a "potentially significant burden" based on their speech.[142] As a result, rescue funds must pass strict scrutiny.

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135. *Id.* at 2764.
136. *Id.* at 2765.
137. *Id.* at 2772.
138. *See* Opinion of the N.J. State Legislature Office of Legislative Servs., 1, July 21, 2008 (concluding that a proposed New Jersey bill creating a public funding scheme with rescue funds would be unconstitutional under *Davis*).
139. *Davis*, 128 S. Ct. at 2763.
140. *Id.* at 2772 ("The resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice.").
141. *Id.*
142. *Id.* (citing Day v. Holahan, 34 F.3d 1356, 1359-60 (8th Cir. 1994)).

Rescue funds are sometimes justified as a means to "level the playing field" between publicly funded candidates and their privately funded opponents. After *Davis*, it is obvious that this is not a compelling government interest.[143] But rescue funds do not even have this effect, for several reasons. First, by providing rescue funds dollar for dollar over the government's original grant of funds, the publicly funded candidate will always have more money for campaign speech than her privately funded opponent. That is because neither the calculation of the trigger amount nor the calculation of the amount of rescue funds take into account the fundraising costs incurred by the privately funded candidate in raising private funds. This can readily account for a third to a half of the total funds raised.[144]

Second, in schemes like North Carolina's, if a group makes independent expenditures in support of a publicly funded candidate or opposing his privately funded opponent, this is not counted in the rescue funds calculation.[145] If, on the other hand, a group opposes the publicly funded candidate or supports his or her privately funded opponent, this triggers rescue funds.[146] Thus, the provision of rescue funds does not achieve equality even in the sense of dollars spent in support of each campaign.

Finally, rescue funds provisions do not serve an interest in "leveling the playing field" because they do not take into account the electoral advantages that come from being an incumbent. Were the rescue funds provision designed to further equality, it would take into account the advantages of holding office—an established staff, paid travel, franking privileges, media access—along with the benefits derived from having

143. *Id.* at 2773 ("The argument that a candidate's speech may be restricted in order to 'level electoral opportunities' has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office."); *see also* McConnell v. FEC, 540 U.S. 93, 227 (2003) (noting that "equal resources" or "equalizing" is "not . . . a legally cognizable right" (quoting FEC v. Mass. Citizens for Life, 479 U.S. 238, 257 (1986) and Buckley v. Valeo, 424 U.S. 1, 48 (1976) (per curiam))); *Buckley*, 424 U.S. at 49 (suggesting that a state cannot "abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society"); *Id.* at 54 ("[An] ancillary interest in equalizing the relative financial resources of candidates competing for elective office . . . . is clearly not sufficient to justify . . . infringement of fundamental First Amendment rights.").

144. There is not even a requirement that the expenditure triggering rescue funds be adverse to the interest of the publicly funded candidate who receives the rescue funds. For example, in a three person race, money spent by Candidate A attacking Candidate B (both privately funded candidates) would result in a government contribution to Candidate C (a publicly funded candidate) even though C has benefited from the original expenditure. Likewise, funds gained via expenditures by independent groups may be used against a candidate even though, by definition, such expenditures are outside the candidates control and may not even benefit his candidacy. *Buckley*, 424 U.S. at 47 ("[I]ndependent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."). By contrast, a privately funded candidate is never eligible for rescue funds, no matter how much money is spent in opposition to his candidacy or in support of his participating opponent by independent groups.

145. *See* N.C. GEN. STAT. § 163-278.67 (2008).

146. *Id.*

run for office before. These advantages are exacerbated under public funding schemes with rescue funds, which ensures that publicly funded incumbents can always maintain a funding advantage over a non-publicly funded challenger, removing the only advantage that challenger may have.[147] The result of all this is a significant advantage to publicly funded candidates, particularly incumbents.

This raises two constitutional concerns. First, it brings into question the sincerity of the claim that the rescue funds are needed to "level the playing field." Where considerable First Amendment freedoms are at stake, a state "must demonstrate its commitment to advancing [its] interest by applying its [requirements] evenhandedly."[148] Underinclusiveness with respect to a given state interest thus belies the claim that the regulation was actually designed to serve this interest. Furthermore, government contributions are given to a publicly funded candidate based on the viewpoint of that speech, which renders them unconstitutional.[149]

Since the rescue funds cannot be justified as a way of "leveling the playing field," they must be justified by the state's interest in preventing corruption or the appearance thereof.[150] The use of rescue funds, however, is not narrowly tailored to advance this interest for two reasons. First, the state's interest in preventing corruption does not justify burdens on independent expenditures,[151] since independent spending does not give rise to the threat of corruption.[152] Second, contributions made by a candidate to his own campaign, and spending money lawfully raised by a campaign does not implicate any corruption interest.[153] The rescue funds provision is therefore not narrowly tailored to any compelling anti-corruption interest.

Finally, the rescue funds provision cannot be justified as being a necessary component in a larger public funding scheme. As *Davis* noted, the "resulting drag on First Amendment rights [caused by an election

147. *McConnell*, 540 U.S. at 249 (Scalia, J., concurring in part and dissenting in part) (noting that "[A]s everyone knows, this is an area in which evenhandedness is not fairness. If *all* electioneering were evenhandedly prohibited, incumbents would have an enormous advantage. Likewise, if incumbents and challengers are limited to the same quantity of electioneering, incumbents are favored.").

148. Fla. Star v. B.J.F., 491 U.S. 524, 540 (1989).

149. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 378, 381 (1992).

150. Davis v. FEC, 128 S. Ct. 2759, 2773 (2008) (citing Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting) ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.")).

151. Buckley v. Valeo, 424 U.S. 1, 46, 53 (1976) (per curiam).

152. *Id.* at 46 ("[I]ndependent advocacy . . . does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.").

153. *Id.* at 53 ("[T]he prevention of actual and apparent corruption of the political process does not support the limitation on the candidate's expenditure of his own personal funds. . . . Indeed, the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed.").

regulation] is not constitutional simply because it attaches as a consequence of a statutorily imposed choice."[154] Public funding of elections may be viewed as desirable by a candidate for a whole host of reasons, but whatever advantages accrue from the scheme do not justify burdening core political speech.

If the rescue funds provision is so ill-fitted to a state's interests in equality or the avoidance of corruption, what interest does it actually serve? First, as indicated above, the provision serves as a form of incumbent protection. By accepting public funding, an incumbent can ensure that he will not be outspent by an opponent, thus protecting his incumbency advantage and removing one of the few serious threats to his re-election.

Second, the rescue funds provision serves the desire to reduce overall campaign spending by inducing candidates to accept public funds on more favorable terms than they could achieve through private means. Sometimes this goal is explicit. The North Carolina public funding scheme's stated purpose, for example, is "to protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections . . . ."[155] But even where this purpose is not made explicit, it is implicit in the way that rescue funds operate. If reducing the corrupting influence of contributions really were the goal behind public funding, a state could achieve this goal by awarding sufficient funds for a candidate to run an effective campaign[156] without the necessity of awarding rescue funds. This would induce virtually all candidates to sign up for the scheme. Doing this, however, would entail more total spending on campaigns, not less.

Through the use of a rescue funds provision, the state can keep public funding a viable option for candidates without abandoning the scheme's purpose in reducing total spending. In effect, then, rescue funds are an attempt to rescue publicly funded candidates not from their opponents, but from the scheme itself. Needless to say, the state does not have a compelling interest in reducing the total amount spent on a cam-

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

155. N.C. GEN. STAT. § 163-278.61 (2008).

156. In North Carolina, for example, "the base amount of funding for a contested state supreme court campaign was $216,650" in 2006. Duke v. Leake, 524 F.3d 427, 433 (4th Cir. 2008). By contrast, Roy Cooper, the winning candidate for Attorney General in 2004, raised $1,574,350 in campaign contributions. *See* National Institute on Money in State Politics, Candidate Profile for Roy Cooper, http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=67817 (last visited Oct. 19, 2008).

paign.[157] As such, the provision is unlikely to survive constitutional scrutiny.

B. The Problem of Disclosure

In order for a rescue funds provision to operate effectively, the state must have accurate and up-to-date information about expenditures made by privately funded candidates and independent groups opposing publicly funded candidates. Without this information, the state's promise to rescue publicly funded candidates from the inadequacy of their public funding is meaningless. And the only practicable way to get this information is through some form of expedited disclosure.

Since the provision of rescue funds to a candidate based on opposing speech violates the First Amendment, any disclosure scheme directly tied to a rescue funds provision will likewise be unconstitutional.[158] Even if this were not so, however, the methods of disclosure typically used in a rescue funds provision would be constitutionally problematic, as they involve significant burdens on protected political speech which fall more heavily on privately funded candidates than on publicly funded ones.

1. General Burdens Caused by Disclosure

While mandatory disclosure may at first blush seem innocuous, disclosure requirements have the potential to impose significant burdens on candidates and independent groups. Potential donors may face retaliation if the fact that they have contributed to a particular candidate or group becomes public knowledge. Retaliation may come in the form of social ostracism,[159] economic sanctions,[160] harassment by vengeful politicians,[161] or even violence.[162] A soldier who donates to pro-gay causes

157. *See Buckley*, 424 U.S. at 9 (holding that expenditure limits were unconstitutional because they "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached").

158. *See, e.g.*, *Davis*, 128 S. Ct. at 2775 ("The § 319(b) disclosure requirements were designed to implement the asymmetrical contribution limits provided for in § 319(a), and as discussed above, § 319(a) violates the First Amendment. In light of that holding, the burden imposed by the § 319(b) requirements cannot be justified, and it follows that they too are unconstitutional.").

159. Bradley A. Smith, *A Moderate, Modern Campaign Reform Agenda*, 12 NEXUS 3, 15 (2007) (noting that some people "would not want their contributions to the Log Cabin Republicans, an organization of gay Republicans, to be disclosed publicly").

160. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-42 (1995) (noting that the desire to contribute anonymously to a political organization or campaign "may be motivated by fear of economic or official retaliation").

161. Smith, *supra* note 164, at 15 (noting that some contributors "will prefer to give anonymously in order to avoid retaliations by vengeful politicians"); *see also* Ben Smith, *Obama lawyer warns of 'reckoning' for Clinton 527 donors and staff*, POLITICO, Feb. 21, 2008, http://www.politico.com/blogs/bensmith/0208/Obama_lawyer_warns_of_reckoning_for_Clinton_527_donors_and_staff.html; Michael Luo, *Group Plans Campaign Against G.O.P. Donors*, N.Y. TIMES, Aug. 8, 2008, *available at* http://www.nytimes.com/2008/08/08/us/politics/08donate.html (detailing letter sent by group Accountable America warning donors to conservative 527 groups of exposure).

162. NAACP v. Alabama, 357 U.S. 449, 462 (1958).

may risk being discharged under the military's "Don't Ask, Don't Tell" policy.[163] A union member or corporate employee may risk ostracism or be denied advancement if he or she contributes to candidates or causes not in line with those of management.[164] Businessmen and other professionals may not want to alienate potential customers,[165] and those whose careers depend on reputation and avoiding controversy, such as doctors, ministers, or journalists, may not wish to have their political views publicly advertised.[166] The risk of retaliation is particularly acute for individuals who contribute to "unpopular or unconventional" causes and candidates.[167] And recent advances in computer technology and the availability of readily-searchable, digitized information on the Internet only exacerbate this problem.[168]

Even apart from any risk of retaliation, compelled disclosure of contributor information raises serious privacy concerns. In *Buckley*, the Supreme Court recognized that "compelled disclosure, *in itself*, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."[169] Legal protections for privacy have multiplied in recent years, forbidding the disclosure of personal information in a wide variety of areas. Likewise, courts have long recognized the importance of protecting privacy in the political arena and have repeatedly invalidated restrictions on anonymous political speech.[170]

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163. *See* McVeigh v. Cohen, 983 F. Supp. 215, 216-18 (D.D.C. 1998) (considering a sailor discharged for discussing his sexual orientation in an anonymous online profile).

164. Buckley v. Valeo, 424 U.S.1, 237 (1976) (per curiam) (Burger, C.J., concurring in part and dissenting in part) ("Rank-and-file union members or rising junior executives may . . . think twice before making even modest contributions to a candidate who is disfavored by the union or management hierarchy. Similarly, potential contributors may well decline to take the obvious risks entailed in making a reportable contribution to the opponent of a well-entrenched incumbent.").

165. *See* Leigh Jones, *Boycott Threatened Over Meeting Site of Association of American Law Schools*, NAT'L L.J., Aug. 5, 2008, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202423529779.

166. William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 17 (2003) ("Those who rely on trust and identification with others to do their work–such as ministers, psychotherapists, or schoolteachers–may find their roles undermined if congregants, patients, or parents know and judge their personal political activity.").

167. *Id.* at 22.

168. *Id.* at 11-12 ("In the last five years, campaign contribution disclosure suddenly joined the trend of online compilation and availability. This change in technology qualitatively transformed the nature of disclosure laws. No longer can a contributor assume that disclosed information is unlikely to be seen by anyone. The law remains the same, but its effect is entirely different." (footnotes omitted)).

169. Buckley v. Valeo, 424 U.S.1, 64 (1976) (emphasis added).

170. *See* Watchtower Bible and Tract Soc'y v. Vill. of Stratton, 536 U.S. 150, 153, 159-60, 169 (2002) (striking down ban on anonymous solicitation); Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 204 (1999) (finding that a person gathering petition signatures retains an anonymity interest); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (holding unconstitutional an Ohio law mandating disclosure for low level, individual expenditures regarding a ballot initiative); Talley v. California, 362 U.S. 60, 63-66 (1960) (striking down a California law prohibiting anonymous leafleting regarding a commercial dispute); NAACP v. Alabama, 357 U.S. 449, 466 (1958) (striking down a state law mandating disclosure of members).

Fear of retaliation and concern over privacy undoubtedly deters some potential donors from making contributions to candidates and independent groups where they know disclosure will be required. This chilling effect may be significant. In a 2007 survey, fifty-six percent of respondents objected to having their name and address posted on the Internet as a contributor, and seventy-one percent objected to having their employer's name listed.[171] Sixty percent said they would think twice about contributing if their name and address would be disclosed, and forty-nine percent said the same if their employer were reported.[172] Among the reasons listed for this reluctance were: "I would never want my employer to know who I give money to," and fear "that [disclosure] would jeopardize my job."[173] Courts have also taken judicial notice of the deterrent effect compelled disclosure can have.[174]

Compelled disclosure can also impose significant burdens on candidates and groups in terms of the time and effort needed to comply with the specified disclosure requirements. For example, *Citizens for Responsible Government State Political Action Committee v. Davidson*[175] involved a challenge to the disclosure requirements of the Colorado Fair Campaign Practices Act.[176] Under the Colorado law, independent expenditures exceeding $1,000 had to be reported to all candidates and to the Secretary of State. This notice had to be in writing and had to include: "(1) the amount of the expenditure, (2) a 'detailed description' of the use of the expenditure, and (3) the name of the candidate whom the expenditure is intended to support or oppose."[177] Violations were punishable by a "'penalty of ten dollars per day for each day that a statement or other information required to be filed . . . is not filed by the close of business on the day due.'"[178] As the *Davidson* court recognized, "[t]o require such immediate notice severely burdens First Amendment rights."[179]

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171. *See* DICK M. CARPENTER II, INST. FOR JUSTICE, DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE REFORM 7 (2007), *available at* http://www.ij.org/images/pdf_folder/other_pubs/DisclosureCosts.pdf.

172. *Id.*

173. *Id.* at 9.

174. Buckley v. Valeo, 424 U.S. 1, 68 (1976) (per curiam); *see also* McConnell v. FEC, 251 F. Supp. 2d 176, 227-29 (D.D.C. 2003) (noting evidence of retaliation and deterred contributions ranging from: large numbers of contributions at just below the disclosure trigger amount; to vandalism after disclosure; to non-contribution because of concerns about a group's ability to retain confidentiality; to concerns about employers, neighbors, other business entities, and others knowing of support for causes that are not popular everywhere and the results of such disclosure); AFL-CIO v. FEC, 333 F.3d 168, 176 (D.C. Cir. 2003) (noting statements by labor organizations "that releasing the names of hundreds of volunteers, members, and employees will make it more difficult for the organization to recruit future personnel").

175. 236 F.3d 1174 (10th Cir. 2000).

176. *Id.* at 1181, 1197.

177. *Id.* at 1196 (quoting COLO. REV. STAT. § 1-45-113(4) (2000)).

178. *Id.* (quoting COLO. REV. STAT. § 1-45-113(4) (2000) (alteration in original)).

179. *Id.* at 1197.

Individuals or groups who fail to meet these requirements can face serious penalties based on what amount to technical violations of the law. In 1996, for example, California imposed an $808,000 fine (the largest ever) on Russell Howard and Steve Cicero (president and treasurer) of Californians Against Corruption (CAC), a small grassroots organization that only spent $103,091 in an unsuccessful effort to oust by recall a powerful state senator whom they considered to be corrupt.[180] In the flurry of activity and with few resources, CAC had trouble keeping up with the reporting of the name, address, occupation, and employer of anyone contributing over $100.[181] The information was always requested, but contributors did not always follow up with the needed information.[182] California's Fair Political Practices Commission (FPPC) levied the maximum $2,000 per violation for each failure to provide a piece of the required information, even though the total was about eight times the total amount spent, and most of the contributors' addresses were provided on copies of the checks given to the FPPC.[183]

2. Specific Burdens Caused by Disclosure under Rescue Funds Provisions

Aside from the sorts of burdens mentioned above—which apply to most election-related disclosure—the disclosure requirements commonly imposed by a rescue funds provision also impose additional burdens. Specifically, compelled disclosure under a rescue funds provision requires the disclosure of campaign spending which exposes the privately funded candidate's campaign strategy, thus undermining her ability to engage in "*effective* advocacy" and to wage an effective campaign.[184] This is especially true where, as with most rescue funds provisions, disclosure requirements are asymmetrical, placing more stringent reporting burdens on privately funded candidates.

Under the disclosure requirements of North Carolina's scheme, for example, privately funded candidates with publicly funded opponents are required to "report total income, expenses, and obligations to the Board by facsimile machine or electronically within 24 hours after the total amount of campaign expenditures or obligations made, or funds raised or borrowed, exceeds eighty percent (80%) of the trigger for rescue funds,"

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180. Brian Doherty, *Disclosure Flaw*, REASON, Mar. 1996, *available at* http://www.reason.com/news/printer/29856.html.

181. *Id.*

182. *Id.*

183. *Id.* During the proceedings, "the FPPC explicitly stated as an aggravating factor that Howard told a newspaper reporter that 'the little guy can't participate [in politics] without running afoul of technical violations.'" Brian Doherty, *How Campaign Finance Law Hurts Participation in Politics*, REASON, Apr. 2001, *available at* http://www.reason.com/news/printer/32341.html.

184. Buckley v. Valeo, 424 U.S. 1, 21 (1976) (per curiam) (emphasis added). *Cf.* AFL-CIO v. FEC, 333 F.3d 168, 177-78 (D.C. Cir. 2003) (noting compelled disclosure of "confidential internal materials" violates privacy right and "seriously interferes with internal group operations and effectiveness").

and must file periodic reports thereafter according to an expedited reporting schedule set by the North Carolina Board of Elections.[185] Likewise, "any entity making independent expenditures in support of or opposition to a [publicly funded] candidate or in support of a candidate opposing a [publicly funded] candidate" is required to "report the total funds received, spent, or obligated for those expenditures . . . to the Board by facsimile machine or electronically within 24 hours after the total amount of expenditures or obligations made, or funds raised or borrowed, for the purpose of making the independent expenditures . . . exceeds five thousand dollars ($5,000)."[186] Subsequently, such groups must follow the same expedited reporting schedule as privately funded candidates. Disclosure is not required, however, for independent expenditures made in opposition to a publicly funded candidate.[187]

Electoral politics is a zero-sum game, and any benefit conferred on one candidate is by its very nature a disadvantage to his opponents. Required reporting, both as to actual and planned expenditures (obligations), can provide valuable information to an opposing candidate as to when major media buys and other readily-identifiable, big-ticket expenses are in the works, all long before they would be known under the regular reporting required of all candidates. Information on spending is strategic information that a candidate would ordinarily keep private until all candidates are equally required to disclose their activities. These ongoing, unilateral disclosures of strategic information impose a clear handicap, and also disincentives, on speech by privately funded candidates.

3. How to Deal with Disclosure

The fact that compelled disclosure imposes burdens on First Amendment rights does not mean that all disclosure requirements are unconstitutional. It does mean, however, that the "significant encroachments" on privacy and speech caused by mandatory disclosure "cannot be justified by a mere showing of some legitimate governmental interest."[188] In *Buckley*, the Supreme Court set forth a two-part test to determine the constitutionality of disclosure requirements. First, as a threshold requirement, the affected speech or activity be unambiguously campaign related.[189] Second, if the law passes this threshold requirement, a disclosure requirement "must survive exacting scrutiny."[190]

185. N.C. GEN. STAT. § 163-278.66(a), (b) (2008).
186. *Id.* § 163-278.66(a).
187. *See id.* § 163-278.66(b).
188. Davis v. FEC, 128 S. Ct. 2759, 2775 (2008) (quoting *Buckley*, 424 U.S. at 64).
189. *See* N. C. Right to Life v. Leake, 525 F.3d 274, 281 (2008) ("[A]fter *Buckley*, campaign finance laws may constitutionally regulate only those actions that are 'unambiguously related to the campaign of a particular . . . candidate.' " (quoting *Buckley*, 424 U.S. at 80) (alterations in the original)).
190. *Buckley*, 424 U.S. at 64.

a. The Unambiguously Campaign Related Threshold Requirement

Buckley held that disbursements for political speech may not be subjected to compelled disclosure, unless they are for communications "unambiguously related to the campaign of a particular federal candidate," to assure that "the relation of the information sought to the purposes of the Act [was not] too remote,"[191] and to ensure that the provision only "shed[s] the light of publicity on spending that is unambiguously campaign related."[192]

Buckley applied this unambiguously-campaign-related requirement to: (1) expenditure limitations,[193] (2) Political Action Committee (PAC) status and disclosure,[194] (3) non-PAC *disclosure* of contributions and independent expenditures,[195] and (4) contributions.[196] Because *Buckley* expressly applied this unambiguously-campaign-related requirement to the *disclosure of expenditures*,[197] it has direct application to the disclosures required to provide rescue funds.

Buckley employed two tests to implement this unambiguously-campaign-related requirement. First, for determining PAC status, *Buckley* endorsed the major-purpose test for "political committees."[198] "Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, *campaign related*."[199] Second, to limit the speech subject to FECA to only campaign-related speech, the Court created the express-advocacy test, i.e., whether a communication contains explicit words expressly advocating the election or defeat of a clearly identified candidate.[200] This test assures that expenditures are "unambiguously related to the campaign of a particular federal candidate."[201]

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191. *Id.* at 80.
192. *Id.* at 81.
193. *Id.* at 42-44.
194. *Id.* at 79.
195. *Id.* at 79-81. "Independent expenditure" is a term of art referring to an express-advocacy communication that is not coordinated with a candidate. *See* 2 U.S.C. § 431(17) (2006).
196. *Id.* at 23 n.24, 78 ("So defined, 'contributions' have a sufficiently close relationship to the goals of the Act, [i.e., regulating elections,] for they are connected with a candidate or his campaign.").
197. *Id.* at 80.
198. *Id.* at 79 ("To fulfill the purposes of the Act, [i.e., regulating elections,] they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."); FEC v. Mass. Citizens for Life, Inc. (*MCFL*), 479 U.S. 238, 252 n.6 (1986) (reaffirming major purpose test).
199. *Buckley*, 424 U.S. at 79 (emphasis added).
200. *Id.* at 44, 80; *MCFL*, 479 U.S. at 262 (holding that the major purpose of an organization was determined by express-advocacy "independent spending").
201. *Buckley*, 424 U.S. at 80.

The Court in *FEC v. Wisconsin Right to Life* (*WRTL II*)[202] also limited the BCRA's new "electioneering communication"[203] corporate prohibition[204] to only "*campaign* speech,"[205] when it stated its test for the extent of the prohibition: an ad may be prohibited "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[206] So *WRTL II*'s appeal-to-vote test was the application of the unambiguously-campaign-related requirement to electioneering communications, just as the express-advocacy test was the *Buckley* Court's application of the requirement to reporting independent expenditures and the major-purpose test was its application of the requirement to determination of PAC status.

The purpose of the unambiguously-campaign-related requirement—and the appeal-to-vote test applying it—is twofold. Negatively, it confines government within the pale of its constitutional authority to regulate elections.[207] Positively, it protects what *WRTL II* called "political speech,"[208] a term it equated with "genuine issue ads,"[209] or "issue advocacy,"[210] as distinguished from "campaign speech" or "express advocacy."[211] *WRTL II* explained that "[i]ssue advocacy conveys information and educates,"[212] and reaffirmed *Buckley*'s statement that, because issue advocacy and candidate advocacy often look alike, bright-line tests are required to protect political speech, or issue advocacy, from being chilled.[213] And to remove any doubt as to the necessity of speech-protective lines, *WRTL II* reiterated that "the benefit of any doubt [goes] to protecting rather than stifling speech."[214]

As explained, the disclosure requirements tied to rescue funds are often triggered by spending by the privately funded opponent or by independent expenditures of third party groups. Since such speech is cam-

202. 127 S. Ct. 2652 (2007).

203. Under BCRA, "electioneering communication" was defined as "any broadcast, cable, or satellite communication which- (I) refers to a clearly identified candidate for Federal office; (II) is made within- (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate." 2 U.S.C. § 434(f)(3)(A) (2006).

204. 2 U.S.C. § 441b(a) (2000 ed., Supp. IV).

205. *WRTL II*, 127 S. Ct. at 2672 (emphasis added).

206. *Id.* at 2667.

207. Buckley v. Valeo, 424 U.S. 1, 13 (1976) (per curiam) ("The constitutional power of Congress to *regulate federal elections* is well established and is not questioned by any of the parties in this case." (footnote omitted and emphasis added)).

208. *WRTL II*, 127 S. Ct. at 2659.

209. *Id.* at 2659 (quoting McConnell v. FEC, 540 U.S. 93, 206 n.88 (2003)).

210. *Id.* at 2667.

211. *Id.* at 2659 (quoting *McConnell*, 540 U.S. at 205-206).

212. *Id.* at 2667.

213. *Id.* at 2669.

214. *Id.* at 2667; *see also id.* at 2669 n.7, 2674.

paign speech,[215] then the disclosure requirements would be unambiguously campaign related. Whether disclosure was constitutional, therefore, would depend on whether the disclosure provision passed strict scrutiny.

b. Strict Scrutiny

Since *Buckley*, the Supreme Court has been clear that election-related disclosure requirements are subject to "exacting scrutiny."[216] It has been less clear, however, in defining exactly what sort of scrutiny this "exacting scrutiny" requires. Some courts have held that exacting scrutiny is simply a synonym for strict scrutiny and that compelled disclosure based on core political speech must be narrowly tailored to a compelling government interest to be constitutional, regardless of the level of burden that disclosure placed on the exercise of First Amendment rights.[217] Other courts have applied a lesser standard of scrutiny when evaluating the constitutionality of mandatory disclosure provisions.[218]

Evidence that "exacting scrutiny" means strict scrutiny can be found in the *Buckley* decision itself. In its discussion of the disclosure requirements, for example, the *Buckley* Court expressly described "exacting scrutiny" as "[t]he strict test," and included a discussion of "least restrictive means" in its analysis,[219] a hallmark of strict scrutiny.[220] When *Buckley* turned next to consider compelled disclosure for persons making independent expenditures and certain contributions, it said that it "must apply the *same strict standard of scrutiny*" as it had just applied to the previous disclosure provision to protect the "right of associational privacy."[221] More tellingly, *Buckley* also used "exacting scrutiny" to describe the level of scrutiny given to the expenditure limits at issue in the case.[222] The Supreme Court has also explicitly linked "exacting scrutiny" with strict scrutiny in other contexts in *Buckley v. American Consti-*

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215. If, however, the disclosure requirements on independent spending went beyond express advocacy communications to require the disclosure of issue advocacy, the disclosure requirements would be unconstitutional as not being campaign related.

216. Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam).

217. *See* Alaska Right to Life Comm. v. Miles, 441 F.3d 773, 787 (9th Cir. 2006) (noting that the "'exacting scrutiny' standard in *Buckley* was later characterized by the Court as requiring that a restriction on corporate political expenditures be 'narrowly tailored to serve a compelling state interest.'" (*quoting* Austin v. Mich. Chamber of Comm., 494 U.S. 652, 657 (1990))); AFL-CIO v. FEC, 333 F.3d 168, 176 (2003) (stating that *Buckley* "conclud[ed] that the disclosure requirements . . . survived strict scrutiny"); Cal. Pro-Life Council v. Getman, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) ("[W]e subject California's disclosure requirements to strict scrutiny."); R.I. ACLU v. Begin, 431 F. Supp. 2d 227, 235 (D.R.I. 2006) (stating that disclosure requirements "are subject to 'strict' or 'exacting' scrutiny").

218. Duke v. Leake, 524 F.3d 427, 439 (4th Cir. 2008); C & C Plywood Corp. v. Hanson, 583 F.2d 421, 425 (9th Cir.1978) (holding that disclosure regulations for express ballot measure advocacy may be enacted "without a showing of a compelling state interest").

219. *Buckley*, 424 U.S. at 68.

220. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 488 (1960).

221. *Buckley*, 424 U.S. at 75 (emphasis added).

222. *Id.* at 44.

tutional Law Foundation (Buckley II),[223] *McIntyre v. Ohio Elections Commission*,[224] and *First National Bank of Boston v. Bellotti*.[225]

To date, one of the best attempts to synthesize these seemingly inconsistent lines of cases is Justice Thomas's concurrence in *Buckley II*.[226] Justice Thomas begins his analysis by addressing a puzzling feature of constitutional jurisprudence, namely that political speech concerning elections is often subject to greater regulation than is non-election related speech. The answer to this puzzle lies in the state's authority to regulate elections.[227] States must hold elections, and this necessity requires regulations of the various aspects of the election process.[228] To require that every election regulation pass strict scrutiny "would tie the hands of States seeking to assure that elections are operated equitably and efficiently."[229] Since it would not be appropriate or practicable to subject every election-related law to strict scrutiny, courts have developed a special framework for addressing the constitutionality of some sorts of election-related regulations. Under this framework, while regulations that impose significant burdens on freedom of speech and association remain subject to strict scrutiny, regulations imposing light burdens are subject to a lesser standard of review.[230] However, when an election-regulated regulation burdens core political speech, the Supreme Court has "ordinarily applied strict scrutiny without first determining that the State's law severely burdens speech"[231] because "restrictions on core political speech

223. 525 U.S. 182, 192 n.12 (1999) ("Our decision is entirely in keeping with the 'now-settled approach' that state regulations 'impos[ing] 'severe burdens' on speech . . . [must] be narrowly tailored to serve a compelling state interest." (citation omitted)). Although the Court used strict scrutiny language, it concluded that the challenged provisions were "no more than tenuously related to the substantial interests disclosure serves," so that they "'fail exacting scrutiny.'" *Id.* at 204. (citing Am. Constitutional Law Found. v. Meyer, 120 F.3d 1092, 1105 (10th Cir. 1997)).

224. 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."); *see also id.* at 348 (referring to exacting scrutiny as "the strictest standard of review").

225. 435 U.S. 765, 786 (1978) ("[When] exacting scrutiny [is] necessitated . . . 'the State may prevail only upon showing a subordinating interest which is compelling,' 'and the burden is on the government to show the existence of such an interest.'" (citations omitted)); *but see* McConnell v. FEC, 540 U.S. 93, 196 (2003) (holding that disclosure provisions of the Bipartisan Campaign Finance Reform Act were constitutional because they served "important state interests").

226. *Buckley II*, 525 U.S. at 206 (Thomas, J., concurring).

227. *See, e.g., id.* (citing Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (citing U.S. CONST. art. I, § 4)).

228. *Buckley II*, 525 U.S. at 206. (Thomas, J., concurring).

229. Burdick v. Takushi, 504 U.S. 428, 433 (1992).

230. *Buckley II*, 525 U.S. at 206 (Thomas, J., concurring) ("When a State's rule imposes severe burdens on speech or association, it must be narrowly tailored to serve a compelling interest; lesser burdens trigger less exacting review, and a State's important regulatory interests are typically enough to justify reasonable restrictions.").

231. *Id.* at 207.

so plainly impose a 'severe burden.'"[232] This analysis appears to have been adopted by the Court in *Davis*.[233]

The provision of rescue funds and the accompanying disclosure, however, are not necessary to conduct elections in the way that, say, regulations concerning voting, ballots, and candidate eligibility are. The justification for lower scrutiny of some election-related regulations—that such regulations are necessary to effectuate the state's obligation to hold fair elections—would therefore not apply to compelled disclosure under the rescue funds provisions.[234]

A word should also be said here about the use of synonyms in Supreme Court opinions, which can cause confusion or be used in an attempt to evade the required strict scrutiny. Writing is often enhanced by the use of synonyms to avoid repetition of the same term, so it is common to find synonyms in legal opinions as a stylistic device. But where, as in Supreme Court legal opinions, advocates may attempt to place heavy reliance on any variant reading, precision is preferred. Confusing synonyms are often used without any intent to change the analysis, and analytical language often changes over time.

For example, *McIntyre* used "overriding," not "compelling," to describe the required strict-scrutiny standard.[235] In *Bellotti*, the Court spoke of "exacting scrutiny" as requiring the State to "show[] a subordinating interest which is compelling," and "means 'closely drawn to avoid unnecessary abridgment . . . .'"[236] *Bellotti* also referred to "exacting scrutiny" as "critical scrutiny,"[237] and after further analysis held that "[a]ssuming, *arguendo*, that protection of shareholders is a 'compelling' interest . . . we find 'no substantially relevant correlation between the governmental interest asserted and the State's effort' to prohibit appellants from speaking."[238] While *Bellotti* employed standard strict-scrutiny language by speaking of a "compelling interest," the "narrow tailoring" requirement was described with synonyms that might lead one to mistakenly believe that some intermediate standard applied—or even that the Court was speaking of the relevant-and-substantial-relation requirement that it had stated in *Buckley* in the disclosure context. From these examples, it is apparent that the use of synonyms does not alter the required level of scrutiny.

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232. *Id.* at 208 (citation omitted).

233. Davis v. FEC, 128 S. Ct. 2759, 2775 (2008) ("[T]he strength of the governmental interest [justifying disclosure] must reflect the seriousness of the actual burden on First Amendment rights.").

234. *See Burdick*, 504 U.S. at 433.

235. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).

236. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam) (outlining *Buckley*'s contribution-limit analysis using intermediate scrutiny)).

237. *See id.* at 786-87.

238. *Id.* at 795 (citation omitted).

4. Are There Compelling Reasons for Compelled Disclosure?

In *Buckley*, the Supreme Court found that there were three government interests sufficiently compelling to justify some form of disclosure: (1) an informational interest in allowing voters to know who was financially supporting a given candidate's campaign; (2) an anti-corruption interest in deterring both actual corruption and its appearance; and (3) an enforcement interest allowing a state to more easily detect violations of its contribution limits.[239] The third interest obviously has no application to disclosure under the rescue funds provision, as the disclosure requirements apply to independent expenditures and the campaign spending of opposing candidates, for which contribution limits do not apply.[240] The first two interests, however, warrant further comment.

a. Informational Interest

The first interest cited by *Buckley* as potentially justifying compelled disclosure was informational. Disclosure "provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office."[241] Done appropriately, disclosure "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches," and can "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office."[242]

Disclosure requirements associated with rescue funds provisions will generally not be narrowly tailored to this interest. As discussed above, under the disclosure requirements of North Carolina's scheme privately funded candidates with publicly funded opponents are required to "report total income, expenses, and obligations to the Board by facsimile machine or electronically within twenty-four hours after the total amount of campaign expenditures or obligations made, or funds raised or borrowed, exceeds eighty percent (80%) of the trigger for rescue funds," and must file periodic reports thereafter according to an expedited reporting schedule set by the North Carolina Board of Elections.[243] Likewise, "[a]ny entity making independent expenditures in support of or opposition to a [publicly funded] candidate or in support of a candidate oppos-

239. *Buckley*, 424 U.S. at 66-68.

240. In *McConnell*, the Supreme Court expanded the understanding of data-gathering as a compelling interest in holding that the important state interest of "gathering the data necessary to enforce more substantive electioneering restrictions" applies to "the entire range of *electioneering communications*." McConnell v. FEC, 540 U.S. 93, 196 (emphasis added). Even as broadened by *McConnell*, however, the state's interest in data-gathering has no relevance to the rescue funds provision.

241. *Buckley*, 424 U.S. at 66-67.

242. *Id.* at 67.

243. N.C. GEN. STAT. § 163-278.66(a) (2008).

ing a [publicly funded] candidate" is required to report the total funds received, spent, or obligated for those expenditures or payments to the Board by facsimile machine or electronically within 24 hours after the total amount of expenditures or obligations made, or funds raised or borrowed, for the purpose of making the independent expenditures or electioneering communications exceeds five thousand dollars ($5,000).[244]

Again, such groups must follow the same expedited reporting schedule as privately funded candidates. The disclosure requirements imposed by the rescue funds provision are also far more burdensome than would be necessary for the state to achieve legitimate informational interests.[245] Under the disclosure requirements, candidates and independent groups must report contributions, obligations, and expenditures within 24 hours. The State's interest in disclosure is served so long as disclosure is made before the election and with enough time for voters to make informed voting decisions.

The disclosure burden required by a rescue funds provision is also often unilateral. Publicly funded candidates are only required to file a few reports during the election campaign, and these reports need not be made on any sort of expedited basis.[246] Similarly, the disclosure requirements for independent expenditures differ greatly according to whether the expenditures involve a publicly funded or privately funded candidate. In North Carolina, for example, disclosure is not required under the rescue funds provision for independent expenditures made in opposition to a candidate opposing a publicly funded candidate, i.e. to independent expenditures opposing a privately funded candidate.[247] Where considerable First Amendment freedoms are at stake, a state must "demonstrate its commitment to advancing [its] interest by applying its [requirements] evenhandedly."[248] The rescue funds provision's disclosure requirements, however, do not do this.

In any event, the public will receive full information about campaign contributions and receipts in the less-restrictive quarterly and pre-election reports that both candidates must file, and in the normal independent expenditure reports that groups must file, so the special, unilateral disclosure requirements are redundant as to any public informational interest. Any asserted informational interest would be "insubstantial

244. *Id.*

245. *See* Citizens for Responsible Gov't State PAC v. Davidson, 236 F.3d 1174, 1197 (2001) ("None of the State's compelling interests in informing the electorate, preventing corruption and the appearance of corruption, or gathering data would be at all compromised by a more workable deadline.").

246. *See, e.g.*, § 163-278.66(a), (b).

247. § 163-278.66(b).

248. Fla. Star v. B.J.F., 491 U.S. 524, 540 (1989).

because voters may identify [the relevant information] under [other] provisions."[249]

b. Anti-Corruption Interest

Compelled disclosure has also been justified as a means of deterring actual and apparent corruption.[250] Disclosure can act as a safeguard against corruption in two ways. First, the exposure that comes from disclosure "may discourage those who would use money for improper purposes either before or after the election."[251] In addition, a "public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return."[252]

The disclosure requirements provided for under typical rescue funds provisions, however, are not narrowly tailored to the state's interest in preventing actual or apparent corruption. First, the rescue funds provisions' disclosure requirements apply to independent and candidate expenditures. These expenditures pose no threat of corruption.[253] In addition to requiring disclosure based on expenditures, compelled disclosure under a rescue funds provision also typically applies once a candidate has received contributions over some set amount (usually a percentage of the trigger amount). In North Carolina, for example, disclosure is required once the total contributions by a privately funded candidate combined with the total of independent expenditures made in support of that privately funded candidate and in opposition to his publicly funded opponent reach 80% of the trigger amount.[254] Yet, if anything, the corrupting influence a contribution has is likely to decrease the more total funds a candidate has raised, as each individual contribution will make up a smaller percentage of the total. A contribution is no less likely to have a corrupting influence on candidates who do not end up raising 80% of the trigger amount than on candidates who do. Despite this fact, reporting is required for the latter, but not the former. Likewise, whether a contribution is corrupting does not depend on whether a candidate's opponent is publicly funded or privately funded. Yet disclosure is only required for privately funded candidates who face publicly funded opponents. Thus, compelled disclosure required by the rescue funds provision does not serve an anti-corruption interest.

249. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 298-99 (1981) ("It is clear, therefore, that [the challenged disclosure provision] does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights.").

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

251. *Id.*

252. *Id.*

253. Randall v. Sorrell, 548 U.S. 230, 244 (2006) (reaffirming *Buckley*'s holding regarding the unconstitutionality of expenditure limits); *Buckley*, 424 U.S. at 47 (suggesting that independent expenditures do not pose threat of corruption).

254. N.C. GEN. STAT. § 163-278.66(a) (2008).

IV. CONCLUSION

Concern about corruption, in the judiciary as much as in other branches of government, is a matter of great importance. One should not make the mistake, however, of equating increases in the amount of money spent on judicial campaigns with an increase in corruption. Furthermore, if states are going to adopt measures designed to combat corruption, they must take care that the proposed antidotes do not impose unconstitutional burdens on the First Amendment rights of judicial candidates or independent groups. If a state does attempt to restrict protected speech via election regulations, whether through bans on personal solicitation, rescue funds based on opposing speech, or burdensome and asymmetrical disclosure, this will only serve to deform, rather than reform, the judicial election process.