that right.[74] These laws should receive heightened scrutiny because of their role in establishing lockups.[75]

In policing election law, the courts have a duty not only to protect the rights of incumbent party leaders, but also to promote a competitive election market. Political primaries can play an enormous role in determining whether an election is truly competitive, as the Court has previously recognized.[76] Permitting the party organization to present as the chosen candidate of the party one whose political success has only been gaining the support of that organization, rather than that of the party electorate as a whole, undercuts both the First Amendment rights of the electorate and the state's interest in maintaining fair and competitive elections. Courts should strive to look past the formal divide between the public and private spheres that was maintained in *López Torres* and recognize the functionally public nature of party primaries.

E. Freedom of Speech and Expression

1. Campaign Finance Regulation. — The Supreme Court's newest member, Justice Alito, joined the Court after promising to practice judicial restraint by deciding cases narrowly and avoiding broad and hasty doctrinal changes.[1] Campaign finance doctrine is one area of law in which he has delivered on that promise.[2] Last Term, in *Davis v. FEC*,[3] the Supreme Court held that the "Millionaire's Amendment" provision of the Bipartisan Campaign Reform Act (BCRA) unconstitutionally burdened speech through its asymmetrical expenditure limits. In a carefully written opinion, Justice Alito reasoned that the asymmetrical restriction scheme constituted a penalty unsupported by a compelling state interest. Despite Justice Alito's narrow opinion, some commentators have suggested that the logic of

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[74] *See* David Schleicher, *"Politics As Markets" Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections*, 14 SUP. CT. ECON. REV. 163, 214–15 (2006).

[75] Issacharoff & Pildes, *supra* note 71, at 670.

[76] *See* United States v. Classic, 313 U.S. 299, 320 (1941).

[1] *See, e.g.*, *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 343 (2006) [hereinafter *Alito Confirmation Hearing*] (statement of then-Judge Samuel A. Alito, Jr.).

[2] Although this is the first Supreme Court opinion Justice Alito has written on campaign finance, Justice Alito joined the Chief Justice in trimming back *McConnell v. FEC*, 540 U.S. 93 (2003), through a narrow as-applied challenge to the Bipartisan Campaign Reform Act in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007). Along with the Chief Justice, Justice Alito also provided Justice Breyer with a plurality for his opinion in *Randall v. Sorrell*, 126 S. Ct. 2479 (2006), which employed narrow reasoning in striking down Vermont's extremely low cap on campaign expenditures.

[3] 128 S. Ct. 2759 (2008).

Davis calls into question many states' public financing schemes. Although this reading of *Davis* is plausible, it oversimplifies the Court's reasoning and ignores the long-recognized constitutional distinction between speech restrictions and speech subsidies.

The BCRA restricts the size of donations candidates may receive from individuals and the amount parties can spend on coordinated campaign expenditures that support specific candidates.[4] Although these restrictions typically apply equally to all candidates, the restrictions are loosened when a candidate's opponent spends above a certain amount of his own money.[5] The expenditure exceptions of the so-called Millionaire's Amendment kick in when the "opposition personal funds amount" (OPFA) of a candidate's opponent exceeds $350,000.[6] The OPFA "is a statistic that compares the expenditure of personal funds by competing candidates and also takes into account to some degree certain other fundraising."[7] Once a candidate becomes "self-financing" by exceeding the $350,000 OPFA limit, the Millionaire's Amendment authorizes his opponent to receive three times the amount he could normally receive from individuals under the BCRA, including from individuals who have otherwise maxed out their authorized contributions, and allows him to receive unlimited coordinated funds from his party.[8] But "[o]nce the non-self-financing candidate's receipts exceed the OPFA, the prior limits are revived."[9] The Millionaire's Amendment also requires self-financing candidates to announce their intent to self-finance within fifteen days of entering a race, then to announce they have crossed the OPFA threshold within twenty-four hours of doing so, and again to announce within twenty-four hours any expenditure of an additional $10,000 or more of personal funds.[10]

Jack Davis ran for Congress in 2004 and 2006.[11] In both races, he ran as the Democratic candidate for New York's 26th congressional district, and in both races he lost to the incumbent Republican Tom Reynolds.[12] Davis funded both campaigns primarily from his own pocket, spending $1.2 million in 2004 and $2.3 million in 2006.[13] In the 2006 race, the race at issue in *Davis*, Congressman Reynolds spent

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[4] *Id.* at 2765–66 (citing 2 U.S.C. § 441a (2006)).
[5] *See id.* at 2766.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 2766–67.
[11] *Id.* at 2767.
[12] Brief for Appellant at 4, *Davis*, 128 S. Ct. 2759 (2008) (No. 07-320), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-320_Appellant.pdf.
[13] *Davis*, 128 S. Ct. at 2767.

no personal funds on his campaign.[14] When Davis decided to run in 2006, he declared his intent to exceed the OPFA threshold, and he subsequently sued the Federal Election Commission (FEC), asserting that the Millionaire's Amendment was unconstitutional and asking the District Court for the District of Columbia to enjoin the FEC from enforcing it.[15] On summary judgment, a three-judge panel of the district court ruled against Davis on his constitutional claim.[16] Davis invoked the BCRA's direct Supreme Court review provision.[17]

The Supreme Court reversed.[18] In an opinion by Justice Alito,[19] the Court held that Davis had standing[20] and that the Millionaire's Amendment violated the First Amendment.[21] Addressing the standing issue first, the Court determined that Davis faced a sufficiently "real, immediate, and direct" prospective injury[22] because he was likely to trigger the Millionaire's Amendment at the time he filed suit.[23] The Court also determined that Davis's suit was not moot because, as in *FEC v. Wisconsin Right to Life*,[24] his case "fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review."[25]

Then the Court turned to Davis's First Amendment arguments and determined that the Millionaire's Amendment's asymmetrical contribution limits[26] and disclosure requirements[27] unconstitutionally burdened candidates' speech. The asymmetrical limits, the Court reasoned, effectively "impose[d] an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right,"[28] con-

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[14] *Id.*
[15] *Id.*
[16] *Id.* at 2768.
[17] *Id.*
[18] *Id.*
[19] Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas joined Justice Alito.
[20] *Davis*, 128 S. Ct. at 2768.
[21] *Id.* at 2775.
[22] *Id.* at 2769 (citing Los Angeles v. Lyons, 461 U.S. 95, 102 (1983); Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979)).
[23] *See Davis*, 128 S. Ct. at 2769.
[24] 127 S. Ct. 2652 (2007).
[25] *Davis*, 128 S. Ct. at 2769 (quoting *Wis. Right to Life*, 127 S. Ct. at 2662) (internal quotation marks omitted). According to *Wisconsin Right to Life*, "[t]he exception applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" 127 S. Ct. at 2662 (quoting Spencer v. Kemna, 523 U.S. 1, 17 (1998)). In addition, Davis requested that his suit be expedited to conclude before the 2006 election, but the district court denied his request following the FEC's assertion that the case would require extensive discovery. *See Davis*, 128 S. Ct. at 2768.
[26] *See Davis*, 128 S. Ct. at 2773.
[27] *See id.* at 2774–75.
[28] *Id.* at 2771.

trary to *Buckley v. Valeo*'s[29] "emphasis on the fundamental nature of the right to spend personal funds for campaign speech."[30] This burden could only be "justified by a compelling state interest,"[31] and the FEC's asserted interest — "level[ing] electoral opportunities for candidates of different personal wealth" — was not sufficiently compelling.[32] Nor did the Millionaire's Amendment further the previously recognized compelling state interest "in eliminating corruption or the perception of corruption."[33]

Having concluded that the asymmetrical contribution limits were unconstitutional, the Court examined the accompanying disclosure requirements. For disclosure requirements to satisfy the First Amendment, "there must be 'a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed,' and the government interest 'must survive exacting scrutiny.'"[34] Therefore, because the Court found the asymmetrical limit scheme unconstitutional, the Millionaire Amendment's disclosure requirements could not survive either.

Justice Stevens filed a dissent in which he expressed his fundamental disagreement with *Buckley*'s prohibition against expenditure limits and his belief that the Millionaire's Amendment satisfied *Buckley*.[35] He opened the dissent by wholeheartedly agreeing with the district court that "the Millionaire's Amendment does not impose any burden whatsoever on the self-funding candidate's freedom to speak,"[36] nor did it violate the "equal protection component of the Fifth Amend-

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[29] 424 U.S. 1 (1976) (per curiam).

[30] *Davis*, 128 S. Ct. at 2771; *see also id.* at 2772 ("Under § 319(a), 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.").

[31] *Id.* at 2772 (quoting FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 256 (1986)) (internal quotation marks omitted).

[32] *Id.* at 2773–74 ("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. . . . [I]t is a dangerous business for Congress to use the election laws to influence the voters' choices."); *id.* at 2774 ("The '[g]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves.'" (alteration in original) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791 n.31 (1978))). The FEC also asserted an interest in "ameliorat[ing] the deleterious effects that result from the tight limits that federal election law places on individual campaign contributions and coordinated party expenditures." *Id.* at 2774. The Court rejected this argument as inconsistent with *Buckley*'s distinction between expenditures and contributions. *Id.*

[33] *Id.* at 2773.

[34] *Id.* at 2775 (quoting *Buckley*, 424 U.S. at 64 (footnotes omitted)).

[35] *See id.* at 2777–78 (Stevens, J., concurring in part and dissenting in part). Justices Souter, Ginsburg, and Breyer joined Part II of Justice Stevens's opinion, which argued that the Millionaire's Amendment satisfied *Buckley*.

[36] *Id.* at 2778.

ment."[37] Next, he expressed his agreement with Justice White's position in *Buckley* that expenditure limits amount to time, place, and manner restrictions that should be upheld "so long as the purposes they serve are legitimate and sufficiently substantial."[38] Accordingly, Justice Stevens presented what he considered to be two legitimate and substantial purposes that justify limiting campaign expenditures: freeing candidates from the burden of fundraising and improving the exchange of ideas.[39] Based on this logic, Justice Stevens concluded that because he saw no constitutional problem with expenditure limits, "it follows *a fortiori* that the [Millionaire's Amendment] survives constitutional scrutiny."[40] Next, Justice Stevens argued that the Millionaire's Amendment "quiets no speech at all,"[41] but instead only "[e]nhanc[es] the speech of the millionaire's opponent."[42] Even assuming that the Millionaire's Amendment burdened speech, Justice Stevens maintained that the anti-corruption interest identified in *Buckley* was not the only government interest compelling enough to justify contribution limits.[43] He would have accepted the FEC's proffered interests in leveling the spending of candidates and in preventing the appearance that public office can be bought.[44]

Justice Ginsburg also filed a dissent in which she distanced herself from some portions of Justice Stevens's opinion.[45] In particular, she declined to join Justice Stevens "to the extent that [he] address[ed] *Buckley*'s distinction between expenditure and contribution limits and, correspondingly, *Buckley*'s holding that expenditure limits impose 'direct quantity restrictions on political communication.'"[46] Because the parties had not briefed those issues, she would have "[left] reconsideration of *Buckley* for a later day and case."[47]

When he was nominated to the Court, Justice Alito promised he would practice a form of judicial restraint by deciding narrowly only

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[37] *Id.*

[38] *Id.* (quoting *Buckley*, 424 U.S. at 264 (White, J., concurring in part and dissenting in part)) (internal quotation marks omitted).

[39] *See id.* at 2779.

[40] *Id.*

[41] *Id.* at 2780.

[42] *Id.* ("If only one candidate can make himself heard, the voter's ability to make an informed choice is impaired. And the self-funding candidate's ability to engage meaningfully in the political process is in no way undermined by this provision." (citations omitted)).

[43] *See id.* at 2780–81.

[44] *See id.* at 2781 ("Indeed, we have long recognized the strength of an independent governmental interest in reducing both the influence of wealth on the outcomes of elections, and the appearance that wealth alone dictates those results.").

[45] *See id.* at 2782 (Ginsburg, J., concurring in part and dissenting in part). Justice Breyer joined Justice Ginsburg.

[46] *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 18 (1976) (per curiam)).

[47] *Id.* at 2783.

those issues presented in each case.[48] In his three Terms, he has held true to that promise.[49] In controversial cases, he has stayed much of the controversy by handling the cases carefully, reasoning only so far as to resolve the issues presented to the Court.[50] As a result, Justice Alito has set the Court on a more steady and modest path while it slowly re-centers constitutional doctrine. The opinion in *Davis v. FEC* is one more example of his careful approach to the law, in its sober treatment of the law and facts of the case. Yet some have suggested that *Davis*'s reasoning carries broader implications that draw into question the public financing laws of many states. According to these commentators, the Court's characterization of the BCRA's asymmetrical restriction scheme as an unconstitutional burden on self-financing candidates' speech implies that asymmetrical public financing schemes must also unconstitutionally burden speech. This reading of *Davis* is

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[48] *See, e.g.*, *Alito Confirmation Hearing*, *supra* note 1, at 343 (statement of then-Judge Samuel A. Alito, Jr.) ("I think that . . . my philosophy of the way I approach issues is to try to make sure that I get right what I decide, and that counsels in favor of not trying to do too much, not trying to decide questions that are too broad, not trying to decide questions that don't have to be decided, and not going to broader grounds for a decision when a narrower ground is available."); *cf. id.* at 56 ("Good judges are always open to the possibility of changing their minds based on the next brief that they read or the next argument that is made by an attorney who is appearing before them or a comment that is made by a colleague during the conference on the case, when the judges privately discuss the case."). As his former colleagues attested, this has been Justice Alito's philosophy since he sat on the Third Circuit. *See, e.g.*, *id.* at 657 (statement of Chief Judge Anthony J. Scirica) ("Judge Alito approaches each case with an open mind and determines the proper application of the relevant law to the facts at hand. He has a deep respect for precedent. His reasoning is scrupulous and meticulous. He does not reach out to decide issues that are not presented in the case.").

[49] *See, e.g.*, Snyder v. Louisiana, 128 S. Ct. 1203, 1212 (2008) (Alito, J.) ("We have not previously applied [a burden-shifting rule] in a *Batson* case, and we need not decide here whether that standard governs in this context."); *see infra* pp. 346–55 (describing the narrowness of Justice Alito's majority opinion in *Snyder*). *But cf.* Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1543 (2008) (arguing that "[Chief Justice] Roberts and [Justice] Alito seem to . . . be[] driven by nothing more than their own desire to reach results they personally prefer: they do not like abortion, they don't like speech that mocks Jesus, they don't like laws that regulate corporate speech, they don't like affirmative action, and they do like faith-based initiatives," and therefore "[i]f ever such phrases as 'result-oriented' and 'ideologically driven' ring true, it is in the conduct of [Chief Justice] Roberts and [Justice] Alito during the 2006 Term"); Seth Rosenthal, *Fair to Meddling: The Myth of the Hands-Off Conservative Jurist*, SLATE, June 27, 2006, http://www.slate.com/id/2144202/ (characterizing Justice Alito's jurisprudence as more activist than restrained).

[50] In fact, his minimalist judicial style has often drawn fire from other members of the Court who would prefer to sweep more broadly in establishing doctrine. *See, e.g.*, Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2582 (2007) (Scalia, J., concurring in the judgment) ("Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future. The rule of law is ill served by forcing lawyers and judges to make arguments that deaden the soul of the law, which is logic and reason. Either *Flast* was correct, and must be accorded the wide application that it logically dictates, or it was not, and must be abandoned in its entirety.").

understandable, but ultimately incorrect. It oversimplifies and overbroadens the Court's reasoning, and it ignores the critical constitutional distinction between government restrictions on speech and government subsidies of speech. While the Court may well set its sights on asymmetrical public funding, *Davis* is hardly the warning shot these commentators think it is.

Many state public financing schemes employ an asymmetrical funding schedule similar to the asymmetrical contribution restriction schedule in *Davis*. In general, these asymmetrical public financing schemes provide additional public funds to candidates whose opponents spend over a certain amount. For example, Maine's Clean Elections Act provides additional public funding to a participating candidate when his opponent exceeds the participating candidate's public funding revenue and independent expenditures.[51] Similar schemes exist in other states.[52]

Until *Davis*, these schemes were generally considered constitutionally permissible. Asymmetrical public financing schemes are generally premised on the same rationale as the Millionaire's Amendment: to level the financial disparity between political candidates. Nebraska's public financing law, for example, provides a participating candidate with funds that equal "the difference between the spending limitation and the highest estimated maximum expenditures filed by any of the candidate's opponents . . . ."[53] When defending its scheme against a First Amendment challenge, North Carolina argued that without its asymmetrical funding scheme, "the risk of being drowned out by a [self-funding] opponent would render participation implausible."[54] Despite these similar purposes, most courts that have considered the asymmetrical public financing schemes have held them constitutional.[55]

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[51] ME. REV. STAT. ANN. tit. 21-A § 1125(9) (2008).

[52] For a list and summary of state public financing laws, see Common Cause, Public Financing in the States, http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=507399 (last visited Oct. 5, 2008).

[53] NEB. REV. STAT. ANN. § 32-1606(1) (LexisNexis Supp. 2007).

[54] Appellees' Answering Brief at 37, N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2008) (No. 07–1454), *available at* http://brennan.3cdn.net/ee364fb3207e174ce9_j2m6bpspk.pdf.

[55] Three circuits have squarely upheld asymmetrical public funding schemes. In *Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000), the First Circuit rejected a First Amendment challenge to an asymmetrical public financing scheme, characterizing the challenge as "boil[ing] down to a claim of a First Amendment right to outraise and outspend an opponent." *Id.* at 464. In *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998), the Sixth Circuit upheld an even more questionable public funding scheme that provided two-for-one matching funds to participating candidates and continued to do so even when it lifted the expenditure limit on participating candidates whose opponents exceeded a certain amount. *See id.* at 947–49. And, shortly before the Court decided *Davis*, the Fourth Circuit upheld a public financing scheme that provided matching funds to participating candidates whose opponents exceeded a

In the wake of *Davis*, however, some commentators have read the Court's broad language to suggest that asymmetrical public funding schemes are unconstitutional. For example, Professor Rick Hasen of the Election Law Blog argued that *Davis* "calls all [asymmetrical] provisions in public financing systems into question."[56] Similarly, Professor Rick Esenberg at the Shark and Shepherd blog argued that *Davis* was the day's most important opinion — even more important than the Second Amendment ruling in *District of Columbia v. Heller*[57] — precisely because it potentially signaled that asymmetrical public funding schemes are unconstitutional.[58] Professor Esenberg suggested that "if asymmetrical campaign contribution limits . . . burden a candidate's constitutional right to spend his own money, then asymmetrical public financing . . . [might] burden the constitutional right of persons to communicate on issues of public importance during an election."[59] There have also been warnings in the popular press that *Davis* calls asymmetrical financing schemes into question.[60]

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certain limit. *See N.C. Right to Life*, 524 F.3d at 438 ("To the extent that the plaintiffs (or those similarly situated) are in fact deterred by [the asymmetrical public funding scheme] from spending in excess of the trigger amounts, the deterrence results from a strategic, political choice, not from a threat of government censure or prosecution.").

Only the Eighth Circuit, in *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), has struck down an asymmetrical financing law as unconstitutional. The Minnesota campaign finance law in *Day* relaxed expenditure limits and provided public funding to a candidate once his opponent spent over a certain amount. *See id.* at 1359; *see also* MINN. STAT. § 10A.25 subd. 13 (Supp. 1993). The precise terms of the scheme provided:

> The *expenditure limits in this section are increased by the sum of independent expenditures* made in opposition to a candidate plus independent expenditures made on behalf of the candidate's major political party opponents . . . . Within three days after providing this notice, the board shall pay each candidate against whom the independent expenditures have been made, if the candidate is eligible to receive a public subsidy and has raised twice the minimum match required, *an additional public subsidy equal to one-half the independent expenditures*.

Id. (emphases added). Without distinguishing between the expenditure restriction provision and the public financing provision, the Eighth Circuit held that the law infringed on the plaintiffs' First Amendment rights, *Day*, 34 F.3d at 1360, was content-based, *id.* at 1361, and failed strict scrutiny, *id.* at 1361–62. Yet the Eighth Circuit later declined to extend *Day*'s rationale to cover a public financing scheme that required participating candidates to agree to a cap on expenditures but relaxed that cap if a candidate's opponent exceeded a certain expenditure limit. *See* Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996).

[56] Posting of Rick Hasen to Election Law Blog, http://electionlawblog.org/archives/011095.html (June 26, 2008, 07:55).

[57] 128 S. Ct. 2783 (2008).

[58] Posting of Rick Esenberg to Shark and Shepherd, http://sharkandshepherd.blogspot.com/2008/06/davis-v-fec-days-most-important.html (June 26, 2008, 13:22) ("*Heller* is a huge case, but, in terms of affecting policies that might actually be enacted, it may not be as important as today's decision in *Davis v. Federal Election Commission*.").

[59] *Id.*

[60] *See, e.g.*, Adam Bonin, Opinion, *Average Joes Struggle To Be Heard as Campaign System Favors the Rich*, PHILA. INQUIRER, Aug. 7, 2008, at A15 ("Because [asymmetrical funding] re-

Although this reading of *Davis* is plausible, it oversimplifies the Court's reasoning and ignores a crucial First Amendment distinction between government promotion of speech and government restriction of speech. As a result, it overly broadens Justice Alito's narrow reasoning to sweep well beyond the circumstances presented in *Davis*. Justice Alito did characterize asymmetrical contribution limits as a "burden" on speech.[61] But he was careful not to say that any policy measure that arguably gives one candidate more speech power is an unconstitutional burden. Instead, he merely reasoned that *restricting* a candidate's speech based on his decision to exercise his speech rights is an unconstitutional burden.[62] *Promoting* a candidate's speech based on an opponent's exercise of his speech rights is a different matter. While both kinds of regulation might seek to level the field between candidates, only one does so by affirmatively limiting a candidate's First Amendment right to speak.

The Court has long recognized the distinction between government restrictions on speech and government promotion of speech.[63] Although the Court's public subsidies jurisprudence has been far from clear,[64] one principle is evident: the government can discriminate more when subsidizing speech than when restricting speech.[65] Simply stated, because the government is not required to fund all constitutional activities, it can choose to fund certain constitutionally protected speech but not other constitutionally protected speech.[66] As the Court said in *Regan v. Taxation with Representation of Washington*,[67] "[The Supreme] Court has never held that Congress must grant a benefit . . . to a person who wishes to exercise a constitutional right."[68] Be-

forms call for government spending to boost the speech of some candidates and not others, however, the Supreme Court decision now calls them into constitutional doubt.").

[61] *See, e.g.*, *Davis*, 128 S. Ct. at 2771 ("[W]e agree with Davis that this scheme impermissibly burdens his First Amendment right to spend his own money for campaign speech."); *id.* at 2772 (characterizing the asymmetrical scheme as "a special and potentially significant burden"); *id.* (calling the asymmetrical scheme a "substantial burden"). At times, the Court even went so far as to call the scheme an "unprecedented penalty." *Id.* at 2771.

[62] *See id.* at 2771 (explaining that the Court has "never upheld the constitutionality of a law that imposes different contribution *limits* for candidates who are competing against each other" (emphasis added)).

[63] *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 326–29 (3d ed. 2007) (discussing the Court's distinction between "penalties" and "non-subsidies").

[64] *See id.* at 326.

[65] *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (holding that the government can consider "general standards of decency" when selecting how to award funds); Rust v. Sullivan, 500 U.S. 173 (1991) (holding that government can condition funding on recipients' agreement not to encourage, advocate, or promote abortion).

[66] *See* Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983) (upholding law forbidding nonprofits that engage in lobbying from receiving tax-deductible contributions).

[67] 461 U.S. 540.

[68] *Id.* at 545.

cause this distinction is so firmly established, it is unlikely that a careful jurist like Justice Alito would *sub silentio* wipe out subsidies as well as burdens on campaign speech without even a mention of the distinction.

The distinction draws a clear doctrinal line between the asymmetrical restriction scheme in *Davis* and the asymmetrical funding schemes in many states. Public funding is clearly a government subsidy,[69] whereas contribution limits are clearly government restrictions.[70] By providing additional funding to non-self-financing candidates, non-coercive asymmetrical funding schemes *only* promote speech; in no way do they directly restrict the self-funding candidate's speech. As a constitutional matter, asymmetrical public campaign funding is little different from denial of tax-deductible status to nonprofits that lobby[71] or from government refusal to subsidize certain types of art,[72] both of which the Supreme Court has upheld. And asymmetrical funding schemes are certainly less constitutionally suspect than the content-based restrictions on the use of public funding by organizations that advocate abortion that the Court upheld in *Rust v. Sullivan*.[73] In contrast, asymmetrical contribution limits directly penalize the self-funding candidate's speech by subjecting him to lower contribution limits than his opponent as a result of his exercise of his speech rights. Recognizing this crucial distinction between penalties and subsidies, circuit courts have refused to apply expenditure limit cases when assessing the constitutionality of asymmetrical public funding schemes.[74] There is no reason to think that Justice Alito would obliterate this distinction — especially because *Buckley* approved of similar public funding schemes.[75]

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[69] *Cf. id.* at 544 ("[T]ax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."). Like tax exemptions and deductibility, public campaign funding has "the same effect as a cash grant," since it allows a candidate to spend more on expressing and disseminating his campaign message than he otherwise would have been able to spend.

[70] *See* Buckley v. Valeo, 424 U.S. 1, 18 (1976) (per curiam) ("[T]he present Act's contribution and expenditure limitations impose direct quantity restrictions on political communication and association . . . .").

[71] *See Taxation with Representation*, 461 U.S. 540.

[72] *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

[73] 500 U.S. 173 (1991).

[74] *See, e.g.*, Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445, 464 (1st Cir. 2000) (refusing to apply expenditure limit cases to asymmetrical public financing scheme "because they involve direct monetary restrictions on independent expenditures, which inherently burden such speech, while the [asymmetrical public funding] statute creates no direct restriction.").

[75] *See Buckley*, 424 U.S. at 93 ("Thus, [the public funding scheme] furthers, not abridges, pertinent First Amendment values.").

Campaign finance is a hotly contested area of constitutional law — many of the Supreme Court's cases on the topic have split along the Court's alleged political lines.[76] While some strongly view campaign expenditures as speech, others see them as simple financial transactions. And while some view government regulation of campaigns as fundamentally antithetical to democracy, others view it as the only way to achieve true democracy. Precisely because of this strong split in opinion, it is especially important for the Supreme Court to address campaign finance cases with care and modesty. Justice Alito's opinion in *Davis* meets this need through its narrow focus on asymmetrical expenditure limits. It says nothing of asymmetrical funding schemes and therefore says nothing about their constitutionality. While some might wish to stretch Justice Alito's reasoning to serve an anti–public finance agenda, or to sound an alarmist warning to rally public finance law supporters, there is nothing to stretch. This opinion does no more than it purports, and such restraint is a welcome development in Supreme Court jurisprudence.

2. Overbreadth Doctrine. — The Supreme Court has long recognized that the existence of laws threatening protected speech can have a chilling effect that unacceptably burdens free expression.[1] The overbreadth doctrine responds to that concern by allowing any individual to argue that a statute unconstitutionally restricts others' speech.[2] Although overbreadth claims are nominally available to both civil litigants and criminal defendants on equal terms, they have been almost invariably rejected by the Supreme Court when brought as defenses to prosecution over the last twenty-five years.[3] Last Term, in *United States v. Williams*,[4] this pattern continued, as the Court avoided a finding of overbreadth that would have stricken Congress's latest effort to deal with online child pornography and instead upheld a conviction for possessing and pandering sexually explicit pictures of children as young as five.[5] In doing so, the Court repeatedly chose to follow its less speech-protective overbreadth precedents, even expanding one of the categorical exclusions to the First Amendment. *Williams* thus reveals a possibly self-defeating flaw in the overbreadth doctrine: when criminal defendants champion speech interests, courts

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[76] *See, e.g.*, FEC v. Wis. Right to Life, 127 S. Ct. 2652 (2007); Randall v. Sorrell, 126 S. Ct. 2479 (2006); McConnell v. FEC, 540 U.S. 93 (2003).

[1] *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 611–12 (1972); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

[2] *See Dombrowski*, 380 U.S. at 486. *See generally* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1.

[3] *See infra* pp. 390–91.

[4] 128 S. Ct. 1830 (2008).

[5] *See id.* at 1836–38.