

# Slate

## Rich Candidate Expected To Win Again

*Does the Supreme Court care more about free speech for the wealthy than about political corruption?*

By [Richard L. Hasen](#) Posted Friday, March 25, 2011, at 7:08 AM ET

Campaign finance is again before the Supreme Court bench. Imagine you want to run for office, say for a seat in the state legislature, and you are deciding whether to opt into a voluntary public financing system: accepting a pot of money from the government in exchange for giving up the right to raise funds from private individuals. If you opt in, you would be free from the burdens of fundraising, and the chances of corruption (or the appearance of corruption) would be minimized because you wouldn't be dependent on others to fund your campaign. But there's a danger: What if your opponent, or an outside group, is determined to spend lots of money against you? To deal with this problem, states like Arizona give you additional matching funds, to a point, to make it viable for publicly financed candidates like you to compete.

On Monday, the Supreme Court will hear oral arguments in [McComish v. Bennett](#), a case from Arizona in which those wealthy opponents and outside groups have complained that this additional spending violates *their* First Amendment rights. And once again, just a year after the court in [Citizens United](#) turned on the [corporate-money spigot](#) by allowing unlimited corporate spending in elections (and the FEC [allowed](#) corporations to hide much of their donations), the court appears poised to side with the wealthy in a campaign finance case.

At first glance, the First Amendment complaint of the wealthy candidates and outside groups would seem to be at odds with the "more speech is better" mantra of the court in [Citizens United](#). After all, Arizona imposes no limits on the spending of non-candidates or outside groups on election campaigns. What's the worst thing that can happen if a wealthy candidate spends gobs of cash running against a candidate who has opted into the public financing system? The publicly financed candidate gets more government dollars to campaign, and the voters hear *more* speech.

As conservative Ninth Circuit judge [Andrew Kleinfeld](#) wrote in his concurring opinion rejecting constitutional arguments against the Arizona system, "there is no First Amendment right to make one's opponent speak less, nor is there a First Amendment right to prohibit the government from subsidizing one's opponent, especially when the same subsidy is available to the challenger if the challenger accepts the same terms as his opponent." Similarly, Charles Fried, a solicitor general in the Reagan administration, argued in an [amicus brief](#) that it is the wealthy candidates and interest groups who "in reality are seeking to restrict speech."

So you'd think that the challengers to the Arizona law would have a hard time in front of a court that declared, in [Citizens United](#), that "it is our law and tradition that more speech, not less, is the governing rule." But it doesn't seem likely the court will see it that way. The court [showed its hand](#) back in June, when it took the unusual step of suspending the matching-funds portion of the Arizona law in the middle of the election, before it even agreed to hear the case, during a time when candidates (such as Gov. Jan Brewer) had already made the decision to opt in to the public financing system. A key factor that the court considers in deciding whether to grant such extraordinary relief is the likelihood that it is going to strike down the law at issue.

So what could be motivating the five conservative justices—John Roberts, Antonin Scalia, Clarence Thomas, Samuel Alito, and Anthony Kennedy—likely to be in the majority in an opinion striking down the Arizona scheme? The argument is that the matching scheme looks like an unconstitutional attempt on the part of Arizona to "level the electoral playing field." In the Supreme Court arena, so-called equality arguments in campaign-finance cases are the kiss of death. In 1976, in *Buckley v. Valeo* the court ruled that "the 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." It reached a similar conclusion in striking down the corporate spending limits in *Citizens United*. An earlier court case had upheld such limits based upon the "corrosive and distorting effect" of corporate spending on the political system. But in *Citizens United* the court overruled that case on grounds it relied upon an impermissible equality rationale.

Perhaps most on point is a 2008 case, *Davis v. Federal Election Commission*. In this 5-4 decision, the court declared unconstitutional a provision of the McCain-Feingold law that allowed congressional candidates running against self-financed wealthy opponents to collect campaign contributions larger than would be normally allowed. The court, in an opinion written by Alito, said this law was an impermissible attempt to level the playing field between wealthy and nonwealthy candidates. Challengers in the Arizona case are putting great weight on the *Davis* precedent, helped by the fact that Alito planted a little "time bomb" for future litigants in his *Davis* decision: an approving citation to an Eighth Circuit case striking down a public-financing matching scheme on similar equality grounds.

But *Davis* shouldn't carry the day here. Arizona did not enact its system to "level the playing field," and that is not its effect. Instead, Arizona adopted a public financing system to deal with well-publicized corruption scandal, *AzScam*, and it incorporated matching funds into the system because it is one of the only ways to create a *viable* campaign finance system. Rational politicians simply won't opt into public financing if they expect to be vastly outspent by their opponents.

If you are looking for a common thread between the "more speech is better" theory underlying *Citizens United* and an expected "more speech is unfair" ruling for the challengers in *McComish*, it is this: Five conservative justices on the Supreme Court appear to have no problem with the wealthy using their resources to win elections—even if doing so raises the danger of increased corruption of the political system.