Don't Feed the Alligators: Government Funding of Political Speech and the Unyielding Vigilance of the First Amendment

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''Every dollar I spend over the threshold starts feeding the alligator trying to eat me.''

That was the description of Arizona's system for public financing of political campaigns from the perspective of a candidate who financed his campaign privately without government funds. What he meant was that once his campaign funding exceeded the amount that the government established as sufficient for that election, every time he raised or spent a dollar more, the government would give one dollar to his publicly funded opponent. If he had two such opponents, they *each* received a dollar to match his spending and counterattack his speech, multiplying the government resources available against him and his speech. Hence his rather graphic lament about alligators.[1]

A generation earlier, a slightly more elegantly expressed objection to government funding of politics came from Eugene McCarthy, the great liberal senator from Minnesota whose 1968 primary challenge to President Lyndon B. Johnson over the Vietnam War helped end the Johnson presidency. One of the two marquee plaintiffs in the 1976 landmark case of *Buckley v. Valeo*,[2] McCarthy was vehemently

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[1] The quote from the unidentified candidate appears in Michael Miller, Gaming Arizona: Public Money and Shifting Candidate Strategies, 41 PS: Pol. Sci. & Pol. 527–32 (2008).

[2] Buckley v. Valeo, 424 U.S. 1 (1976). The lead plaintiff was then-Senator James L. Buckley, Conservative from New York.

opposed to all aspects of the Federal Election Campaign Act challenged in that case, particularly the brand-new government financing of presidential campaigns. In his typically wry way, McCarthy suggested that government financing of presidential campaigns was like the colonists in 1776 asking King George III to finance the American Revolution. Since politics was all about challenging and changing the government, it was ludicrous, he thought, for the government to be funding politics.[3] So he and other plaintiffs challenged *any* provision that involved government financing of politics, complaining further that it would discriminate against insurgents, third parties, and new points of view.[4]

The effort to turn Senator McCarthy's perception into constitutional doctrine proved unsuccessful in *Buckley*. The Court, with only two dissenters, held that the Constitution did not forbid the federal government from funding presidential political campaigns. The contention that government funding of politics was a constitutionally inappropriate task fell on deaf ears.

While the Court has decided around 20 campaign finance cases since then, not until this year did the Court revisit the constitutional validity of public funding of political campaigns. This time, although the Court did not embrace Senator McCarthy's insistence on complete separation of government funding and politics, it did reject a

[3] Here's how his former aide described McCarthy's view:

> During the American Revolution, [McCarthy] said, ''One of the complaints was that the Crown was controlling politics in this country and controlling government. We now say that the government can control politics and through politics it can control the government, which really closes the whole circle as I see it.'' McCarthy asked people to imagine King George III saying to the colonists, '''Why don't you raise a few thousand pounds? We will provide matching funds, and you can run a pure revolution with matching funds from the Crown. We will have a few things to say about how you run the revolution and where it goes. . . .'''

Mary Meehan, The Federal Election Commission, Cato Policy Analysis No. C at 8, Nov. 1, 1980.

[4] McCarthy and Buckley were well positioned to challenge another feature of the new law, strict contribution limits, since each man had run a successful outsider campaign with help from a small number of large contributions, McCarthy's successful campaign against a sitting president had famously been underwritten by a handful of wealthy liberals, prominent among them General Motors heir Stewart Mott, whose large contributions would have been illegal under the new law.

scheme that used the levers of public funding to bring about results inconsistent with First Amendment safeguards of political speech. And the Court also expressed the kind of skepticism about government funding of politics that recalls Senator McCarthy's observations about asking King George to fund the American Revolution.

In its 5-4 ruling in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,[5] the Court invalidated a key feature of Arizona's self-proclaimed ''Clean Election'' scheme for funding state politics.[6] As Chief Justice John Roberts's opinion for the Court explained, under the Arizona Citizens Clean Elections Act, passed by voter initiative in 1998, candidates for statewide and legislative office who raise a specified amount of small private contributions can have their primary and general election campaigns funded by the government, rather than relying on their own and contributed funds. But if they choose that option, they cannot raise or spend a penny more than the government-determined amount they are given.

But the Arizona scheme went considerably further than the presidential general election flat-grant scheme upheld in *Buckley*. It also contained a trigger provision, giving additional ''matching'' funds to participating candidates whenever nonparticipating candidates, or independent groups supporting them, spent more than the allotment given to the participating candidate. In other words, the government decided how much would be an appropriate amount to spend on a political campaign for, say, the state senate, and gave that amount to a participating candidate. Any participating candidate then receives more money if the total amount spent by a privately funded rival, *plus* independent groups supporting that rival—or opposing the participating candidate—exceeded the designated amount. The more money spent against a government-funded candidate, the more money the government would give that candidate

[5] 131 S. Ct. 2806 (2011). The act is set forth at Ariz. Rev. Stat. Ann. §§ 16-940-961. The trigger matching provisions are contained in § 16-952(A)-(C).

[6] Of course, the official characterization of those who accept public financing as ''clean'' politicians suggests that those who eschew the ''Clean Elections'' program are somehow dirty or unclean, a powerful psychological inducement for candidates to go the public-funding route in the first place and for voters to incline toward those who do. Indeed in a ''clean election'' scheme in Maine, there was a proposal with the potential to have the official Election Day ballot identify those candidates who were ''clean.'' See Daggett v. Comm. on Gov't Ethics & Election Practices, 205 F.3d 445, 467 (1st Cir. 2000).

to counter the spending, up to a ceiling of three times the original government-set spending limits. Beyond that level, no additional government funds would be made available to the publicly financed candidate.[7]

The pivotal issue for the Court was whether this ''trigger'' device would advance or hinder the First Amendment goal of facilitating ''more speech.'' Supporters of the law claimed that since government funding would subsidize more speech by the participating candidate, it was almost by definition a ''more speech'' system. Challengers claimed that the availability of so-called matching funds would deter and discourage speech by outside candidates and independent groups who would be, in effect, ''drowned out'' by government-funded counterattacks. The more they spoke, the more the government would fund ''counter-speech'' against them. This prospect, in turn, would deter the outside candidates and independent groups from spending and drive the candidates into the public-financing system with its strict limits on how much speech they could have. The result would ultimately be less speech, not more, which opponents claimed to be the real purpose of the scheme.

The Court viewed the trigger provision as aimed at the heart of the First Amendment's concerns: to keep government from suppressing electoral speech. As the Court saw it, the purpose and effect of the triggered matching-funds structure were to deter and discourage campaign speech by imposing a substantial burden and penalty on the speech of privately funded candidates and independent groups, thereby undercutting the very purpose of the First Amendment to

[7] The lawyer who won *Arizona Free Enterprise*, rebutting claims that the system was a valid populist measure to expand political opportunity, has pointed out that, perversely, it has had the opposite effect:

> Because trigger matching funds were capped at two times the initial grant, the very wealthy could spend beyond the cap and not have the government level their speech after that. Instead, the burden in the case fell most heavily on those political speakers with little money, who were either too small or not rich enough to spend beyond the cap, such as my clients. So, the law mostly ''leveled'' the speech of middle-class candidates and small independent groups, while leaving the speech of wealthy and large groups like the NRA, the Sierra Club, or the SEIU far less affected.

Bill Maurer, Email to Election Law Listserv, Election Law Listserv Website/Law-Election Archives (Jun. 27, 2011, 11:26 a.m.), http://department-lists.uci.edu/pipermail/law-election/2011-June/000494.html (last visited Aug. 8, 2011).

ensure the most robust and vigorous debate about government and politics. The ultimate result would be less speech, not more.

Thus, the Court applied strict First Amendment scrutiny, requiring the state to prove a compelling interest for the suppression of political speech. Prevention of corruption was not being furthered because none of the private political funding being burdened and deterred—by self-financed candidates, severely limited campaign contributions, or totally independent groups—could be called corrupt under the Court's precedents. To the extent that corruption might be prevented by inducing more candidates to accept public financing, this was too attenuated and indirect a justification for burdens on speech. Therefore, the clean election plan would not directly combat corruption.

As to the goal of ''leveling the playing field,'' that had been condemned ever since *Buckley* as wholly inconsistent with the central point of the First Amendment: keeping government from controlling the quality and quantity of political speech. Accordingly, the Court properly recognized that the Arizona ''trigger'' mechanism was an unconstitutional state-financed counterattack that undercut the First Amendment. The government would not be allowed to do indirectly something it could not do directly: limit and level political speech. That kind of public financing of political campaigns is not constitutionally acceptable.

The four dissenters, in a spirited opinion by Justice Elena Kagan, saw the situation quite differently. To them, *Buckley* had put beyond doubt the constitutional validity of public funding of political campaigns, and the new feature of triggered matching funds was a clever way to ensure that as many candidates as possible would opt in to the public-funding system and therefore avoid the inherent corruption of wide-scale private financing of politics. Since ''clean'' government-funded elections would provide less opportunity for political corruption, and since the trigger mechanism would help encourage candidates to foreswear private financing and its inherent corruption, the trigger mechanism served the interests of preventing corruption, albeit in a roundabout way.

The disagreement in *Arizona Free Enterprise* over the validity of triggered matching funding is, of course, emblematic of the larger battles that have raged over campaign finance regulation for 40 years now, ever since the passage of the Federal Election Campaign Act

of 1971. The battles focused on the meaning of the First Amendment and the best way to ensure a robust and well-functioning democracy, with minimum corruption and maximum participation.

On one side are justices who feel that First Amendment values have to be balanced against electoral fairness and opportunity—that is, that individual or group liberty must be tempered by constitutional concerns regarding equality and political corruption. Those justices would permit government to limit *all* political funding in the service of ''leveling the playing field'' and combating corruption, which they feel is endemic to private financing. Accordingly, such financing must be driven out of the system. The four *Arizona Free Enterprise* dissenters are largely in that camp.

Other justices take a more libertarian position of minimum regulation of political funding in order to protect the speech and association that it embodies and implements. They would resolve the clash between liberty and equality by hewing to the liberty side of the ledger. Indeed, they see political liberty as the source of equal political opportunity for all different points of view.

Finally, there have been justices, largely in the middle, who have straddled these issues—as did the *Buckley* decision—with a nod to liberty and a nod to equality, while trying to avoid ''undue influence.''

There is another way, one which insists that the clash between liberty and equality in the campaign finance area is a false one; that limits on liberty do not achieve equality but disable those without power from challenging and changing the status quo. This view also assumes that expanding political opportunity and participation are valid goals of government. For quite some time, the ACLU advocated a position that came close to achieving this synthesis. The ACLU's mantra was: (1) no limits on contributions or expenditures, so that free speech will remain unfettered by government; (2) full disclosure of large contributions to major party candidates, so that the people, not the government, can decide who has too much access or influence; and (3) public funding to all legally qualified candidates, but *without* limits and conditions—so-called floors without ceilings—to enhance and expand political speech without limiting it.[8] With public

[8] Regrettably, the ACLU has recently changed its policy and now supports both ''reasonable'' limits on contributions and conditioned limits on candidates who accept public funding. See Floyd Abrams, Ira Glasser & Joel Gora, Editorial, The ACLU Approves Limits on Speech, Wall St. J., Apr. 30, 2010, available at http://online.wsj.com/article/SB10001424052748704423504575212152820875486.html (last visited Aug. 2, 2011).

funding as a welcome part of the mix, such a policy might have been less palatable to Senator McCarthy, and certainly to the Cato Institute, but it entailed less government control than the policy approved by the Court majority in *Buckley* or the dissenters in *Arizona Free Enterprise*.

I. The *Buckley* Baseline

Almost all questions of the constitutional validity of campaign finance rules trace back to the fountainhead of *Buckley v. Valeo*. *Buckley* involved an across-the-board challenge to the sweeping changes in federal campaign finance law wrought by the Federal Election Campaign Act of 1971 and its post-Watergate amendments in 1974.

The initial FECA was a surprising mix of speech protection and regulation. First, it limited the use of media for political advertising to address skyrocketing increases in TV campaign ads during the 1960s. Some of the restrictions applied to both the media and independent groups, but they were held to violate the First Amendment—an early indication that efforts to control independent political speech would be an Achilles' heel of campaign finance regulations, as later reflected in *Arizona Free Enterprise*.[9] Second, having dealt with what appeared to be the major campaign finance problem of the time—excessive media advertising by campaigns—FECA also eliminated limits on contributions by individuals to candidates, a deregulatory surprise that would be short-lived. Third, and alternatively, FECA severely tightened porous federal disclosure requirements to deal with allegedly undue influence by large contributors. Finally, the separate Revenue Act of 1971 authorized the use of the ''taxpayer checkoff,'' which allowed people to designate one dollar of their tax returns for a presidential public-financing fund, an important first step toward presidential election public funding.

But the original FECA did not survive a single election cycle. Instead, Congress enacted the major 1974 amendments to FECA, driven by the campaign finance excesses associated with Watergate and embodying a sweeping overhaul of federal campaign finance

[9] ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court), vacated sub nom. Staats v. ACLU, 422 U.S. 1030 (1975).

law. The new law contained severe limitations on campaign expenditures by candidates and independent groups, and similarly austere limits on contributions to candidates and political committees. The amendments carried-forward strong and intrusive disclosure provisions from the 1971 act, created a new Federal Election Commission whose members would be under the thumb of the House and Senate leadership, and, for the first time, provided for public funding of presidential elections—at least for those candidates and parties who could qualify.[10]

The law was challenged by a diverse coalition of political dissenters and outsiders, led by Senators Buckley and McCarthy, who came together over the firm conviction that the law, cheered as necessary reforms and antidotes to Watergate, was, in reality, a flawed incumbents' protection act that would entrench the political status quo, freeze out the voices of change, and systematically violate the First Amendment's commands in the process.[11] They saw the law as a seamless web of anti-democratic and anti-change devices, a systematic assault on freedoms of speech and association in the area where they had their most urgent application—elections for public office—and a regime to be enforced by the very officials whom elections are designed to challenge.

The Supreme Court only partially agreed, in a landmark decision that seemed to split as many differences as possible.[12]

On the key question of campaign funding, the Court ruled expenditures could not be restrained, since limits on political spending were direct limits on political speech. But large contributions to candidates and committees could be sharply limited because they were less directly exercises of First Amendment rights and could pose dangers of corruption and its appearance. Thus, rather than recognize that giving and spending political funds were two sides

[10] One early version of the Senate bill even included public funding of House and Senate campaigns as well, a far-reaching provision that was omitted during the later stages of the legislative process. See S. Rep. No. 93-689 (1974).

[11] In the interests of full disclosure, I should note that I was one of the lawyers for the *Buckley* challengers.

[12] I have been a staunch defender of *Buckley*; or at least the parts of it that vindicated First Amendment rights. See generally Joel M. Gora, *Buckley v. Valeo*: A Landmark of Political Freedom, 33 Akron L. Rev. 7 (1999). But it certainly fell short of the ideal protection of such rights against campaign finance restraints.

of the same First Amendment coin, the Court freed one but allowed government to control the other, without acknowledging the distortions and disparities that would result. This maneuver was especially questionable, considering that a candidate's contributions to his own campaign were properly held to be protected expenditures and not limitable contributions.

On disclosure, the Court upheld reporting of contributions to candidates of as little as $101, but tempered the privacy-invading speech- and association-chilling effects of that ruling by noting that controversial minor parties might escape disclosure and, where independent expenditures were concerned, ruling that only those expressly advocating the election or defeat of specified candidates could be subject to reporting and disclosure. ''Issue advocacy'' that criticized the stances of politicians on issues was thus declared off-limits from any form of federal regulation, a welcome safe haven that would remain for the next 25 years.

On the composition of the Federal Election Commission, the Court unanimously determined that giving a majority of its powers to officials appointed by Congress was a clear violation of the Constitution's Appointments Clause, which vests the president, not Congress, with the power to appoint such important officers. (After the ruling, Congress quickly reformed the selection method, but stipulated that no more than three of the six members could come from any one party. Only Democratic and Republican representatives have ever been appointed.)

On the public-funding aspect of *Buckley*, the Court approved. The 1974 FECA amendments had launched the first federal campaign financing in our history by providing public funds for presidential campaigns.[13] It had three components: (1) primary election matching

[13] At around the same time, the federal government also provided for a different kind of ''public financing'' of politics by allowing taxpayers to claim a modest tax credit or deduction for any political donation to a candidate or party, federal, state or local. See Buckley, 424 U.S. at 108, n.146. Some believe that encouraging citizen participation in funding politics in this fashion is the best kind of ''public financing'': private choices, publicly incentivized. Interestingly, when President Barack Obama was criticized for rejecting public financing and raising all his money privately, his excuse was that he was raising money from ''the public.'' (Of course, to equate tax credits with public ''subsidies'' is to endorse the ''tax expenditure'' logic that the Court rejected this past term in *Ariz. Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011), whereby the government owns all income and allows taxpayers to retain some of it.)

funds for those seeking the presidential nomination of a major party—those parties whose presidential candidates had gotten more than 25 percent of the popular vote in the prior election; (2) a direct grant of funds for the nominating conventions of a major party; and (3) a lump-sum payment for the general election presidential campaign of a major party candidate. Notice that all three of these components heavily favor the two established parties: the Democrats and Republicans. Of course, there being no free lunch, these various benefits came with lots of terms, conditions, and strings attached.

The matching-funds program for primary elections provided that a major party candidate who had raised at least $5,000 in 20 or more states, counting only donations of $250 or less, was eligible for matching funds. These funds matched the first $250 of any such donation up to a total of 50 percent of the spending limits to which the candidate had to agree—$10 million overall nationwide, *plus* state-by-state spending limits determined by an incredibly complex formula. The arrangement was structured to discourage regional candidacies of the kind represented by Alabama Governor George Wallace in 1968, or ideological candidacies like those of Senator Eugene McCarthy. Thus, from the very outset, public funding was abused to manipulate political outcomes.

The party convention funding, initially set at $2 million, came with one major string: the party could spend no more than that amount on its convention, and the same amount was made available to any party that qualified as a major party—again, Democrats and Republicans.[14]

The general election public funding was a flat grant of $20 million.[15] But the candidate receiving the grant could not raise or spend a

[14] These limits have not prevented lavish corporate and interest-group funding of convention-related activities in recent years through payments for ''host city'' events. Astoundingly, in 2008, while the two parties were each allotted $16.8 million of public funds for their conventions, interest-group and wealthy-donor spending on these host activities totaled over $124 million. See 35 F.E.C.R. 7, at 8 (July 2009).

[15] All three amounts were adjustable for inflation, so that the spending limits over the decades have been automatically raised. But they clearly have not kept pace with the costs of campaigning. In 2008, the basic primary limit was $42 million, the convention funding was $16.3 million, and the basic general election limit was $84 million. John McCain took the money and that was all he could spend. Barack Obama turned it down and spent almost 10 times that much: $746 million. By comparison, contribution limits were not adjusted for inflation until 2003, so that the effect of those limits each year from 1976 forward was a gradual de facto *decrease* in the contribution limits and a concomitant increase in the difficulty of fundraising for

dollar more than that for his campaign. In other words, expenditure limits were an integral feature of the presidential public funding for both the primaries and general elections. This was not a program of ''floors without ceilings''; this was a program of ''floors are ceilings.''

The *Buckley* challengers made two basic arguments against the presidential campaign finance scheme. First, they claimed government had no business funding the political process, which was designed to be a check on government. By analogy to separation of church and state, there needed to be a separation of government and the funding of politics to avoid the dangerous ''entanglement'' that would result. A related submission was that funding political campaigns was not a proper exercise of Congress's spending power. The other key contention was that the funding arrangements fatally discriminated against new parties and outsider candidates and would starve them of any sustenance before they could gain a foothold in politics, in violation of both First Amendment requirements and equal protection safeguards.

The Court, by a 6-2 vote, dispatched these arguments and legitimized the constitutionality of public financing of political campaigns. Indeed, the Court warmly embraced what it considered to be the positive features of the funding program: ''In this case, Congress was legislating for the 'general welfare'—to reduce the deleterious influence of large contributors on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraisers.''[16]

First, the Court would not second-guess the congressional determination that presidential public funding would further the general welfare, a traditional form of judicial deference to congressional spending choices.[17] Second, the ''entanglement'' contention was rejected on the ground that the statute was a congressional effort ''not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus

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those without personal wealth or connections to well-heeled interest groups and supporters. The result was more pressure to take the government money and the spending limits.

[16] 424 U.S. at 91 (citing S. Rep. No. 93-689, at 1–10 (1974)).

[17] *Id*. at 90–92.

[the statute] furthers, not abridges, pertinent First Amendment values.''[18] This language was cited repeatedly by the defenders of the Arizona scheme. Finally, the Court rejected the discrimination claims: that the system entrenched the two major parties at the expense of third parties and independent candidates and new voices generally.[19]

Absent from the majority's justification was an answer to this question: How could spending limits that had just been declared unconstitutional earlier in the opinion be imposed as a condition on the receipt of public funding? Indeed, the Court had no sooner finished a stirring affirmation of the limited role of government and the maximum role of political freedom in our constitutional system,[20] when it abruptly reversed course with the attached footnote:

> For the reasons discussed in Part III, *infra*, 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. 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.[21]

The problem was that Part III explains why Congress may engage in public financing of campaigns, but it nowhere explains why the receipt of a government financial benefit (campaign subsidies) can be conditioned on the imposition of an otherwise unconstitutional condition (spending limits). That invitation to mischief has been accepted by a number of the campaign public-funding programs enacted in *Buckley*'s wake.

There were two dissenters on public financing in the *Buckley* era. Chief Justice Warren Burger, essentially channeling McCarthy's King

[18] *Id*. at 92–93.

[19] *Id*. at 93–108. Minor parties were three-time losers in *Buckley*, unfortunately. Contribution limits denied them the help of the occasional financial angel, public funding froze them out, and disclosure laws still applied to them.

[20] *Id*. at 57 (''In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.'').

[21] *Id*. at 57 n.65.

George III theme, would have struck down the entire statute: expenditure limitations, contribution limitations, intrusive and overbroad disclosure requirements—the works.[22] He was similarly unimpressed with the constitutional justifications for public financing. Indeed, in his view, ''the use of funds from the public treasury to subsidize political activity of private individuals would produce substantial and profound questions about the nature of our democratic society.''[23] Quoting former Senator Howard Baker—''I think there is something incestuous about the Government financing and, I believe, inevitably then regulating, the day-to-day procedures by which the Government is selected''—Chief Justice Burger concluded that ''the inappropriateness of subsidizing, from general revenues, the actual political dialogue of the people—the process which begets the Government itself—is as basic to our national tradition as the separation of church and state . . . or the separation of civilian and military authority.''[24] He also viewed the program as an open invitation to government scrutiny and control of the inner workings of our campaigns and parties.

Then-Justice William Rehnquist also would have invalidated the public funding, on First Amendment grounds, because ''Congress . . . has enshrined the Republican and Democratic Parties in a permanently preferred position'' at the constitutional expense of minor party and independent candidates.[25]

For the next 35 years, the Court would remain virtually silent on the subject, having decreed that public financing of campaigns is constitutional and otherwise unconstitutional limitations can be imposed as a condition of accepting the public largesse.[26]

[22] *Id*. at 236–46 (Burger, C.J., dissenting in part).

[23] *Id*. at 247.

[24] *Id*. at 248–49.

[25] *Id*. at 293 (Rehnquist, J., dissenting in part).

[26] There was one effort, in the aftermath of *Buckley*, to challenge the limits imposed on those accepting public funds. Based on the experience of the 1976 presidential campaigns, when the major party candidates took the public funds and were barred from raising and spending a penny more, the Republican National Committee filed suit contending that presidential candidates were compelled to take the public funding because private fundraising with sharp contribution restrictions was unavailing, that the campaigns required additional assistance to be anything more than television campaigns, that any grassroots participation could no longer be financed by the parties—which had a crippling effect on robust campaigns—and that imposing the spending limits on the receipt of the public funds constituted a classic unconstitutional

II. Public Financing Since *Buckley*

Following the Court's somewhat uncritical acceptance of the constitutionality of public financing of political campaigns, a number of significant developments have occurred.[27]

A. Presidential Public Funding

In recent years, we have witnessed the dismal failure of the system of public funding of presidential elections. The Court approved public funding on two grounds: First, it served the valid purpose of substituting for private funding and thus reducing whatever improper potential private funding might have; and second, it was designed to enhance and not restrain political communication. Neither of those objectives has been achieved.

Presidential public funding seemed to proceed uneventfully and perhaps usefully in the first two or three elections where it was available, at least from the vantage point of the two major parties. But starting in the 1980s and reaching a crescendo in the 1990s, it became clear that the expenditure limits mandated by the law were inadequate to run an effective presidential campaign. Enter ''soft money.''

Soft money took many forms, but one notorious instance happened in 1996, when President Bill Clinton basically auctioned off overnights in the Lincoln Bedroom in exchange for large five- or six-figure contributions to the Democratic National Committee for use in his re-election campaign. This and less scandalous soft-money stories ultimately led to the ban in the McCain-Feingold bill on such soft-money raising and spending by national political parties, upheld in *McConnell v. FEC*.[28] But until then, the major parties raised major

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condition on the presidential candidates, attempting to accomplish indirectly what could not be commanded directly. These claims were rejected in a decision summarily affirmed by the Supreme Court. See Republican Nat'l Comm. v. FEC, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), aff'd, 445 U.S. 955 (1980). *Buckley* and the summary affirmance in the *RNC* case were invoked in the *Arizona* dissent.

[27] For a general discussion of public financing, see Public Financing in American Elections (Costas Panagopolous ed., 2011), Welfare for Politicians? Taxpayer Financing of Campaigns (John Samples ed., 2005), Peter J. Wallison & Joel M. Gora, Better Parties, Better Government: A Realistic Program for Campaign Finance Reform 62–79 (2009).

[28] McConnell v. FEC, 540 U.S. 93 (2003).

amounts of money outside the FECA limits on contributions and publicly funded campaigns. Whether or not one thinks of this as corruption, it certainly undercuts the premise that public funding served the purpose of relieving candidates from the burdens and obligations that may accompany private contributions.

Second, the idea that public funding would provide ample subsidies for ''more speech'' was called into question as campaign costs increased and government allotments of public funds could not keep pace. Even though they were adjusted for inflation, the limits on the amount of money that could be spent for either primary or general election campaigns were entirely too low. The original $20 million lump-sum grant for the general election might have seemed adequate in 1976 (even though it was quite a bit lower than President Nixon's 1972 re-election campaign cost), but by 2000 it was clearly not. Major party candidates—Bush and Kerry in 2004, Clinton and Obama in 2008—therefore began abandoning public financing in the primaries so they could raise and spend well beyond the spending ceilings. But what really drove a stake through the heart of presidential public financing was then-Senator Obama's decision to reject public financing in the *general election* as well, the first significant major party candidate to ever do so. That was quite stunning for someone who had long championed campaign finance reform. But Obama and his advisors determined that they could raise much more than they would be allowed to spend under public financing and, wow, were they right! Obama raised and spent approximately $750 million—that's right three quarters of a *billion* dollars—the most expensive political campaign in American history, and a privatizer's delight since not a penny of that money was publicly provided and much of it came from well-heeled individuals and groups. So the public-funding system has certainly not reduced the effect of private funding on presidential politics.

Finally, to the extent that public financing may involve an important kind of democratic legitimacy and participation, the presidential public financing scheme has been a dismal failure as well. As staggering as the amount of money that candidate Obama raised and spent in his 2008 campaign is the unwavering decline in support for the program, as measured by citizen participation through the check-off feature on Form 1040 tax returns. Although this procedure is nowhere near as democratic as a system that would let each taxpayer

direct, say, $100 of his tax liability to the political party or candidate of his choice, it is nonetheless a rough barometer of public support for the program. The participation rate has declined relentlessly from around 30 percent following *Buckley* to well below 10 percent today, hardly a democratic vote of confidence. Indeed, the declining levels of participation caused Congress to raise the check-off amount from one to three dollars in 1993 to avoid a potential shortfall in funds.[29]

B. Congressional Public Funding

Public funding of congressional campaigns has not been much more promising. In the 35 years since *Buckley*, no such provision has been enacted, despite bills having been introduced almost every session. Some have passed the House. Some have passed the Senate. One passed both but was vetoed by President George H. W. Bush in 1992 because he did not approve of the mandated spending limits that would protect incumbents. That is one of the reasons incumbents like to vote for public funding: Even though they would be authorizing funds for their opponents, they can impose spending limits that almost inevitably benefit themselves. All things being equal—the playing field being ''leveled''—incumbents have enormous institutional and inherent advantages. (Reformers like public funding because they believe that almost all private funding is inherently corrupt.)

Until 2008, many of the proposals for public financing of congressional campaigns, like the perennial Fair Elections Now Act, also had trigger provisions that allowed for increased fundraising and spending to counter well-financed, privately funded opposition campaigns—as insurance against the occasional well-heeled or well-supported challenger or opposing group. Following the decision

[29] Most state and local public-funding schemes do not even have the fig leaf of direct public support like a tax check-off mechanism. Instead, the legislators simply enact public financing to finance their own campaigns. That practice has been the experience in New York City, with its lavish matching-funds program. The New York city council simply raises the match whenever it sees fit and provides more public monies for its reelection campaigns. The basic match is now 6 to 1: six dollars of public funding for every dollar of private contributions (up to $175 per contributor). Many have claimed the New York City program can be a model for the post-*Arizona Free Enterprise* future. We will see, Part V, *infra*, if that is the case.

in *Davis v. FEC*,[30] the versions of FENA no longer contained such mechanisms—the sponsors correctly having seen the *Davis* handwriting on the wall, as discussed further in Part III below.

C. State and Local Public Funding

At the state and local level, the results have been mixed. The Congressional Research Service has estimated that public funding of political campaigns exists in one form or another in 16 states, either in statewide elections or at the local level only, like New York.

The programs take a variety of forms. Some follow the presidential primary model and offer matching funds to enhance the effect of private contributions, usually up to a certain level. Some follow the presidential general election approach and give one lump-sum payment for the whole campaign. Both systems almost always impose spending limits on those who receive the matching funds or lump-sum subsidies and may impose other conditions and restrictions as well, such as a limitation on the use of the candidate's personal funds, a restriction on the source of contributions that will be matched, or required participation in televised debates.[31] These programs seem anchored in the *Buckley* approach where candidates choose for themselves between public funding accompanied by spending limits or private financing without such limits. But, unlike in *Arizona Free Enterprise*, the actions of one candidate or group have no direct effect on the fundraising prospects of any other candidate.

The most ambitious schemes are the ''clean election'' systems, of the kind at issue in *Arizona Free Enterprise*. Advancing the twin goals of imposing limits on campaign spending and driving private funding out of campaigns, these ''clean'' public-financing systems have often been enacted by popular referendum, supported by well-funded liberal advocacy groups and well-financed publicity campaigns claiming that the program will level the playing field and

[30] Davis v. FEC, 554 U.S. 724 (2008) (striking down a trigger provision raising contribution limits for certain federal candidates but not their opponents).

[31] This was not always the case. When public funding of campaigns first got started, there were a few jurisdictions that did enact the ''floors without ceilings'' approach, but they were quickly abandoned, especially after *Buckley* said that imposing spending limits on public funding of campaigns was acceptable. In recent years, some mainstream political figures have suggested that we should consider taking the same floors-without-ceilings approach to presidential funding, since the limits have become so counterproductive to participation.

cure the evils of corruption, ''pay to play'' politics, and special-interest dominance of our political agendas. The elixir has proved alluring to some. Under these schemes, the candidate is typically required to raise a respectable amount of money, but in very small amounts—such as five dollars—in order to qualify for full public funding of primary and general election campaigns. From that point forward, no private money is allowed.

Two devices are used to pressure candidates into these public-funding systems and the spending limits that come with them. First, the public-funding option is usually coupled with very low private contribution limits, thus making it extremely hard for candidates who are not either personally wealthy or well-connected (usually incumbents) to raise money. If that scheme seems coercive, its defenders claim that the candidate made a ''voluntary'' choice to accept the limits that go with the subsidies, relying on footnote 65 in the *Buckley* decision.[32]

The other device is the trigger mechanism embedded in many ''clean election'' schemes, like Arizona's. This mechanism is a way to help induce candidates, especially incumbents, into public funding by giving them some insurance against being outspent. The one thing that might keep incumbents from giving up their normal fundraising advantage—even though they would retain all the other playing-field-tilting perquisites of incumbency—is the fear that the low spending limits on a publicly funded campaign would render them vulnerable to a high-spending campaign by a well-heeled challenger or independent group. The trigger addresses that problem by enhancing the funding of the participating candidate in response to speech by either the nonparticipating opponent or independent groups. The enhancement can take the form of raising the spending limit, raising the contribution limit, or providing additional government funds to counter the speech of the adversaries of the favored, government-funded candidate. Some have objected that the purpose and effect of these triggers are to deter the privately funded candidate in the first place—in order to achieve the impermissible goal of limiting and leveling campaign speech. The defenders of such

[32] See *supra* note 21 and accompanying text. In *Randall v. Sorrell*, 548 U.S. 230 (2006), the Court reviewed Vermont's financing scheme for statewide elections of governor and lieutenant governor. The Court held that the contribution limits were so low as to render competitive campaigns extremely unlikely and were thus unconstitutional.

schemes have responded, almost smugly, that these ''trigger'' funds or ''fair fight'' funds or ''rescue'' funds are simply an example of providing ''more speech,'' a First Amendment touchstone, and therefore could not possibly violate the First Amendment.

This argument persuaded some pre-*Davis* courts, but only one post-*Davis* court—the Ninth Circuit in *Arizona Free Enterprise*.[33] The whole purpose and effect of these schemes are to reduce political electoral speech and the reliance on private financing of that speech. And, as the prevailing attorney in the Supreme Court pointed out, the effect of the law is almost pernicious in restraining the speech of middle-class candidates.[34]

The effect of these various state and local public-funding schemes in terms of the claimed benefits of increasing electoral competition and reducing official corruption is questionable. Government and academic studies have not shown any significant evidence of positive accomplishments in these regards.[35] Where First Amendment rights are burdened, equivocal results fall well short of what the Court's demanding scrutiny requires.

In summary, public funding has been provided, but in ways designed to coerce candidates into accepting it and the other limitations that go with it. The schemes seek to achieve indirectly—through ''voluntary'' participation and acceptance—what the First Amendment overwhelmingly denies government the power to achieve directly: expenditure limits. Normally, such circumvention of constitutional rights is condemned by the unconstitutional conditions doctrine. But, as we saw, *Buckley* blew right past that barrier and, until recently, lower courts have followed suit.

Expenditure limits are critical to public-funding schemes. Incumbent legislators will not consider any ''floors without ceilings''

[33] It is telling, however, that the primary congressional election public-financing bill, FENA, eliminated the trigger mechanism in versions proposed after *Davis* was decided.

[34] See *supra* note 7.

[35] See Brief for Center for Competitive Politics as Amicus Curiae in Support of the Petitioners at 5–9, Arizona Free Enterprise, 131 S. Ct. 2806 (Nos. 10-238 & 10-239) (summarizing studies). See also, Wallison & Gora, *supra* note 27, at 63 (discussing whether New York City public-financing program has promoted competition or countered corruption).

approach because they will not provide a free lunch to their challenger opponents without knowing that it will not be very nourishing. And ceilings effected by popular referendum are vulnerable to the claim that they ''level the playing field.''

Still, the current Court has shown increasing skepticism for campaign finance schemes that seem to be end runs around core First Amendment principles. These schemes have been shown to exploit campaign finance rules and regulations to manipulate the ways candidates and groups speak out on electoral matters, or force them to do so in the way that the incumbents want. In *Arizona Free Enterprise*, the Court once again rejected such manipulative and intrusive restrictions on how we choose to organize our political and electoral speech (see Part IV below). By calling into question many key features of the system for public financing of elections, *Arizona Free Enterprise* will significantly effect future campaigns (see Part V below). As the Court continues to see these restrictions not as combating corruption but as suppressing speech, the programs will continue to be in constitutional jeopardy.

III. Constitutional Doctrine Since *Buckley*

For 25 years, the Court's handling of campaign finance issues was relatively consistent, with no clear patterns discernable.[36] The Court accepted the *Buckley* baselines and then determined on which side of them a particular case fell. Some decisions gave aid and comfort to the pro-regulatory camps, while others cheered the deregulatory forces. If cases involved restrictions on independent expenditures, the Court tended to wheel out its heavy First Amendment fire power. Such speech and its funding were at the very core of the First Amendment protections, implicated the essence of citizen criticism of government, and posed little or no danger of corruption because, by definition, they could not be in concert with candidates and might often be unwelcome by the very candidates they seemed to support. For these reasons also, deference to the legislative branch that fashioned the restraints was minimal and First Amendment scrutiny of asserted ends and means was at its maximum. The incumbents

[36] See generally Lillian BeVier, Campaign Finance and Free Speech: First Amendment Basics Redux: *Buckley v. Valeo* to *FEC v. Wisconsin Right To Life*, 2006–2007 Cato Sup. Ct. Rev. 77 (2007).

imposing those restraints were dimly viewed as protecting their own turf rather than benignly viewed as protecting the public weal. In such situations, the Court struck down limitations on corporate expenditures in referendum campaigns, on political action committee spending (whether for or against publicly financed presidential candidates), on candidate criticism by non-profit corporations, and on independent spending by political parties that would benefit their own candidates.[37]

On the other hand, in cases involving contributions, especially made to candidates or for the benefit of candidates, the Court hewed to the *Buckley* divide and tended to uphold such restrictions, without offering much pushback against justifications based on countering corruption or the appearance of corruption.[38] Finally, in two significant cases involving disclosure, the Court saw the situations as far removed from the core of corruption reflected by large contributions to mainstream candidates and used strong political privacy and association-protecting language and analysis to strike down the disclosure or registration requirements.[39]

These various cases were not all decided by ideologically partisan 5-4 majorities. The pendulum swung back and forth from case to case. In 2000, however, the Court decided the first of four cases where the pendulum swung only one way: in the direction of greater judicial deference to campaign finance controls.

The first case rejected an effort to revisit *Buckley*'s upholding of contribution limits.[40] The case involved a Missouri statute containing

[37] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986); and Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996); but see Austin v. Mich. State Chamber of Commerce, 494 U.S. 692 (1990), overruled by Citizens United v. FEC, 130 S. Ct. 876 (2010).

[38] Calif. Med. Asso. v. FEC, 453 U.S 182 (1981); and FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982); but see Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) (contribution limits to a referendum campaign struck down as far removed from the potential for *candidate* corruption).

[39] Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982) (delivering on *Buckley*'s promise of disclosure protection for controversial minor parties); McIntyre v. Ohio Elections Comm. 514 U.S. 334 (1995) (citing the anonymously written Federalist Papers in protecting citizen's right to circulate anti-tax flyer without putting her name on it).

[40] Nixon v. Shrink Missouri Gov't Now PAC, 528 U.S. 377 (2000).

basically the same $1,000 ceiling that *Buckley* had sustained for federal elections. Time and inflation had, in effect, lowered that amount to around $300, and the challengers argued that such a low contribution limit disadvantaged candidates who were not able to self-finance. The Court rejected these arguments in a way that expressed a sharp distrust of private financing of campaigns and a deference to the legislature's efforts to police the potential for corruption, undue influence, and improper access, which the Court believed were handmaidens of such private financing.

One year later, the Court declined to expand an earlier ruling that allowed parties to make independent expenditures in support of their own candidates but not party expenditures coordinated with those same candidates.[41] Since all the funding would be limited as to source and amount and fully disclosed—so-called hard money—the plaintiffs argued that no corruption potential was present. The Court held, however, that prophylactic rules were appropriate. There was the risk that such newfound freedom might be used *indirectly* by unscrupulous donors who would give large contributions to parties to circumvent the more restrictive limits on contributions directly to candidates.

In early 2003, the Court again rejected efforts to loosen the reins of campaign-finance controls. The Court had held previously that nonprofit advocacy corporations, like a Right to Life group, could make independent expenditures supporting or opposing particular candidates, even though the group was a corporation.[42] Building on that premise, such a group sought permission to make contributions directly to candidates, once again, limited in amount and fully disclosed. Again, the Court said no, citing the concerns with corruption and corporate dominance of our politics, even though these were nonprofit corporations who wanted to make limited-in-amount contributions.[43]

Most sweepingly, at the end of 2003, the Court decided the broad challenge to the McCain-Feingold bill, the Bipartisan Campaign Reform Act of 2002.[44] In an unusual opinion jointly authored by

[41] FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001).

[42] FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986).

[43] FEC v. Beaumont, 539 U.S. 146 (2003).

[44] McConnell v. FEC, 540 U.S. 93 (2003).

Justices John Paul Stevens and Sandra Day O'Connor, the Court upheld the law, building on the themes of its recent cases: the dangers of corporate and union dominance of our politics, the need for prophylactic rules to prevent circumvention of limits on contributions by corporations and unions, the willingness to allow limits on independent expenditures by unions and corporations (including nonprofits), and, underlying all these new or revised restrictions, a broad deference to the judgment of Congress about the need to impose these controls to prevent undue access and influence as a fair tradeoff against First Amendment values.

To opponents of campaign finance limitations, the 5-4 ruling was the nadir of the Court's campaign finance jurisprudence. In both its ruling and its approach, the *McConnell* majority displayed the kind of deference to legislative choices rarely seen in a First Amendment case, and especially one involving such sweeping restraints on political speech. The great divide between the five justices in the majority who upheld all the key features of McCain-Feingold and the four dissenters who strenuously rejected those restraints was that, where the proper functioning of democracy was concerned, the majority viewed more political speech as the problem, while the dissenters saw more political speech as the solution.[45]

As is well known, the membership of the Supreme Court was constant from 1994 until 2005, the longest such period in its history. Then, in short order, Justice Sandra Day O'Connor, a ''swing'' vote and co-author of *McConnell*, retired to care for her ailing husband and was eventually replaced by Justice Samuel Alito. Chief Justice William Rehnquist took ill and died, and was replaced by Chief Justice John Roberts. That change in the Court would help set in motion the dramatic pendulum swing in the opposite direction that we have witnessed for the last five years in five cases, culminating in *Arizona Free Enterprise*.

At first, the movement seemed small. In a 2006 case, the Court for the first time struck down a state's extremely low contribution limits on the ground that such restraints improperly stifled political competition and entrenched the status quo. The Court also invalidated spending limits as flat violations of *Buckley*.[46] An interesting

[45] For further development of these themes, see Joel M. Gora, The First Amendment . . . United, 27 Ga. St. U.L. Rev. 935 (2011).

[46] Randall, 548 U.S. at 236.

harbinger of the new Chief Justice Roberts's views came during oral argument when he sharply challenged the Vermont attorney general's claim that the low limits were necessary to combat ''corruption,'' pressing the lawyer to demonstrate in detail why and how Vermont was ''corrupt'' and required a potentially unconstitutional measure to combat the problem. It seemed clear that the chief justice was not about to accept the talismanic incantation of ''corruption'' as a carte blanche immunity for any campaign finance restriction or regulation that came down the pike.

The pendulum gathered momentum the next year in a case that was a partial do-over of the 2003 *McConnell* ruling, which upheld federal bans on corporate, union, and nonprofit broadcast ads that simply mentioned federal candidates, even without electoral advocacy.[47] The *McConnell* Court had surprisingly upheld that ban on the ground that so many of the independent ads criticizing or attacking politicians were ''sham issue ads'' and the functional equivalent of ''express advocacy,'' which such entities were already banned from promoting. This ruling caused a great deal of consternation among groups like the ACLU whose election season commentary on elected officials was now banned by the law upheld in *McConnell*.

This ruling was now challenged by a Right to Life group that wanted to run ads critical of Wisconsin's two senators, one of whom, Senator Russell Feingold, ironically, was up for re-election. His law, McCain-Feingold, made it illegal for that group to criticize him during the election season. The Court held, 5-4, that the law could not constitutionally be applied to such ads. In a powerful use of the *McConnell* precedent, Chief Justice Roberts neatly unpacked the government's arguments as follows: if ads can be restrained only because many of them are ''the functional equivalent of express advocacy,'' then ads that are *not* the functional equivalent of express advocacy should not be banned. Otherwise, the law would be allowing the invasion of protected ''issue advocacy.'' That doctrinal maneuver effectively gutted the statutory section that, on its face and as upheld in *McConnell*, prohibited all ads that even mentioned a politician.

[47] FEC v. Wisconsin Right To Life (WRTL), 551 U.S. 449 (2007); see generally, BeVier, *supra* note 36.

More broadly, Chief Justice Roberts insisted that every case raising the issue of where to draw the ''functional equivalent of express advocacy'' line was a First Amendment case, and all procedures and standards for making that determination have to be First-Amendment friendly, including high barriers against chilling political speech. For example, we must ''give the benefit of any doubt to protecting rather than stifling speech.'' ''When it comes time to defining what speech [qualifies for protection] we give the benefit of the doubt to speech, not censorship.'' ''Where the First Amendment is implicated, the tie goes to the speaker, not the censor.''[48] From these premises, the opinion easily concluded that the issue advocacy of the group posed no threat of ''corruption'' that would justify a restraint of speech. And his opinion ends by quoting the words of the Free Speech Clause of the First Amendment, a signature textualism that would have made the ''absolutist'' Justice Hugo Black proud.

These two cases evidence a distrust for easy assertions that campaign finance restrictions are necessary to prevent corruption and a strong First Amendment thumb on the scale for resolving the clash of campaign finance rules and free speech rights. The third case in our pendulum's swing is the so-called Millionaire's Amendment case, *Davis v. FEC*, improperly named since the amount that could trigger penalties was well beneath that amount, and not much more than a second mortgage on a New York City co-op. Under the provision, if a candidate spent more than a certain amount of personal funds, the contribution limits of his opponent were raised three-fold. It was sold to Congress as a way for the members to protect themselves against a high spending, self-financed opponent, one of the two risks that incumbents try to minimize (criticism by independent groups is the other). And, as is true of most campaign finance restrictions, while neutrally applicable to incumbents and challengers alike, the real world effect is to tilt the playing field in favor of incumbents, not just to level it. Indeed, the Millionaire's Amendment has almost never been invoked *against* an incumbent because they invariably do not have to rely on their own funds to campaign for re-election; they are easily able to raise money from

[48] WRTL, 551 U.S. at 474.

individual and group supporters. The amendment is overwhelmingly used against challengers.

The Court saw right through the corruption argument, pointing out that the law itself cynically undercut that rationale by *raising* contribution limits. If it was necessary to have limits to guard against corruption in the first place, how could you justify raising them three-fold when an opponent self-finances his own campaign? Moreover, if large contributions are more likely to cause corruption, why exacerbate that problem—particularly in response to the one campaign that is *least* likely to be corrupt: the self-financed candidate beholden to no one. The Court rejected this charade as a cover for the law's obvious purpose and effect: to discourage candidates—again mostly challengers—from self-financing their campaigns (and thereby threatening incumbents). Such manipulation of campaign finance rules—burdening speech by enabling the opponent to raise more funds to counter that speech—was a net loss, not gain, for the volume of political expression. The trigger was constitutionally defective. The Court saw the statute as a cynical attempt to use campaign finance restrictions to control political speech, manipulate electoral outcomes, and penalize those who would use their own personal funds to support their own campaign speech. Gone was any effort at placating Congress, in either outcome or attitude. Evident instead was the new majority's deep skepticism of the motives and methods of campaign finance controls.[49]

That brings me to the final piece put into place: It would almost dictate the outcome in *Arizona Free Enterprise*. I refer, of course, to the well-known, and in so many quarters reviled and condemned, decision in the *Citizens United* case.[50] The Court's holding—that the

[49] Davis v. FEC, 554 U.S. 724 (2008). Frankly, the only disappointment of this case was that the four liberal dissenters in *Wisconsin Right to Life* would continue to embrace sloganeering support for frankly unsupportable efforts by Congress either to flout *Buckley*'s principles or to exploit them cynically.

[50] Citizens United v. FEC, 130 S. Ct. 876 (2010). For my own view that the decision was an historic reaffirmation of classic First Amendment principles, see Gora, The First Amendment . . . United, *supra* note 45. For other takes on the case, see Ilya Shapiro & Nicholas M. Mosvick, *Stare Decisis* after *Citizens United*: When Should Courts Overturn Precedent, 16 Nexus J. L. & Pub. Pol'y 121 (2011); James Bopp, Jr. & Richard E. Coleson, A Big Year for the First Amendment: Citizens United v. Federal Election Commission: ''Precisely what *WRTL* Sought to Avoid,'' 2009–2010 Cato Sup. Ct. Rev. 29 (2010).

First Amendment prevents the use of campaign finance restrictions to prohibit independent political speech of entities like corporations, unions, or nonprofit organizations—and the principles applied have telling implications for *Arizona Free Enterprise*:

- Government may not limit or burden political speech, especially independent speech, which is inherently not corrupting or problematic;
- Government may not determine how much political speech there should be or that speech from certain sources will ''distort'' or ''imbalance'' the debate or prevent ''a level playing field'';
- Government may not circumvent these principles by forcing political speech into burdensome channels like requiring that all organizations speak through political action committees;
- Government may not manipulate and design campaign finance rules to favor or advantage certain kinds of speakers and disfavor or disadvantage others;
- Government may not impose burdensome requirements or vague rules and regulations that have the effect of requiring people and organizations to get the government's permission before engaging in political speech or that may chill and deter political speech in the first place;
- Government may not simply cry ''corruption'' to deflect deep judicial distrust and strict scrutiny of campaign finance regulations; and
- Government may define ''corruption'' only in terms of quid pro quo arrangements, and may not invoke broader notions that contributions or independent expenditures can be restrained because they might allow ''undue influence'' on or ''improper access'' to political officials.

The *Citizens United* Court demonstrated a deep skepticism of the fairness and neutrality of permitting government to enforce campaign finance rules. The pendulum of judicial review had clearly swung from *McConnell*'s broad deference to the embodiment of strict scrutiny. *Citizens United* was a game changer for First Amendment review of campaign finance restrictions. While not quite the equivalent of the exceptionally potent doctrine against prior restraints, one could say, to adopt the language of the Pentagon Papers case, that

any system of campaign finance limitations ''comes to this Court bearing a heavy presumption against its constitutional validity.''[51]

Davis invalidated the use of trigger mechanisms to manipulate the level of campaign funding and deter and penalize those who finance their own campaigns. *Citizens United* reaffirmed the *Buckley* principle that the people, not the government, get to determine how much political speech is appropriate or necessary or enough. Yet in *Arizona Free Enterprise*, the law empowered the *government* to set the level that it thought was enough to run a viable political campaign and then gave the government the further power to manipulate that level to favor those who participated in the program and to penalize those who used or benefited from private funding—all in a manner that favored some forms and choices of campaign financing and disfavored others. These precedents would seem to cover and condemn the Arizona program and, perhaps ultimately, call into question the *Buckley* opinion that upheld public funding more generally.

IV. Rounding Up the Alligators: The Court's *Arizona* Decision

These cases were pretty much all the Court needed to condemn Arizona's scheme. The Court's holding was clear: ''Arizona's matching funds scheme substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment.''[52] *Arizona Free Enterprise* divided along the same 5-4 conservative/liberal lines as did the three previous campaign finance decisions. Chief Justice Roberts wrote for the majority with Justices Sonia Sotomayor and Elena Kagan comfortably stepping into the roles of their predecessors, Justices David Souter and John Paul Stevens, respectively. The majority opinion was straightforward in its framing and resolution of the issues, use of precedent, and invocation of broader principles. The ultimate issue was whether the triggering scheme was about encouraging more electoral speech or suppressing it.

A. The Nature of the Scheme

Candidates for state office could seek public financing for their campaigns by raising a significant number of small donations and

[51] N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

[52] Arizona Free Enterprise, 131 S. Ct. at 2813.

then agree to raise or spend no more than the primary or general election government allotment for the particular election. The distinctive feature of the plan was the ''matching'' funds provision. It gave the participating candidates additional state monies for their campaigns if opposing privately financed candidates raised or spent more than the state-determined limit or if independent groups spent funds in support of the privately financed candidate or in opposition to the publicly funded candidate in excess of those limits. All such spending against a participating candidate was aggregated to trigger the flow of state monetary support. Where *two* publicly financed candidates faced one privately financed candidate, any funds the latter spent beyond the government-decreed limits were matched by the state, which then gave those amounts to *each* of the publicly financed candidates. The same was true of any outside group spending: if it benefited an ''outside'' candidate, *both* inside candidates received the same amount of money from the government. These triggers and possible multiple matches continued to operate so long as outside speech opposed the inside candidates, up to three times the amount of the initial grant. Beyond that level, there was no more matching. Outside candidates could spend as much as they had or could raise, but under the very low contribution limits of $840 for statewide offices or $410 for legislative offices. Independent spending was subject to no direct limitation.

The Court detailed the scheme's disparities and anomalies—ones that tended to tilt the playing field toward the ''clean'' publicly financed candidates:

- If the privately funded candidate spent $1,000 of his own money for a direct mailing, the government would give *each* of his publicly financed opponents $940 (an unrealistically low 6 percent discount for fundraising costs avoided);
- If the privately funded candidate held a fundraiser that generated $1000 in contributions, each of his publicly funded opponents would receive $940 from the government;[53]

[53] A perfect example of this: When Arizona Democrat Janet Napolitano, now secretary of homeland security, was running for governor, she joked that President George W. Bush, in effect, held a fundraiser for her when he spoke at a dinner to raise money for her privately funded opponent. The government gave her $750,000 in matching tax dollars.

- If an independent group spent $1,000 on a brochure expressing its support for the privately funded candidate—wholly without that candidate's authorization or approval—each publicly funded candidate would receive $940 from the government;
- If an independent group spent $1,000 on a brochure opposing one publicly financed candidate, but saying nothing about the privately financed candidate, the publicly funded candidate would receive $940 directly from the government to counter that speech;
- If an independent group spent $1,000 on a brochure supporting one of the publicly financed candidates, the other publicly financed candidate would receive $940 from the government, but the privately financed candidate would receive nothing.
- If an independent group spent $1,000 on a brochure opposing the privately financed candidate, the government would not give him anything to help him respond.[54]

Privately funded candidates and independent groups who claimed they were burdened and disadvantaged by these campaign finance disparities sued to declare the triggers unconstitutional. The triggers penalized their speech by using it as the predicate for funding their opponents. In effect, the government was ''drowning out'' their speech through a state-financed counterattack on it.[55] A district court declared the matching-funds trigger unconstitutional, largely on the basis of *Davis* and enjoined its enforcement.[56] A panel of the Ninth Circuit subsequently reversed the district court, held the matching-funds trigger scheme constitutional and vacated the injunction against its enforcement.[57] That court concluded that the system did not impose a significant burden or direct restraint on speech and was justified by the government's interest in combating quid pro quo political corruption inherent in private financing of campaigns. Shortly thereafter, the Supreme Court reinstated the district court's injunction so that the triggers would not operate

[54] Arizona Free Enterprise, 131 S. Ct. at 2815.

[55] They did not challenge the basic constitutionality of public financing of political campaigns or the specific mechanism for presidential public financing upheld in the *Buckley* case. See *id*. at 2833.

[56] McComish v. Brewer, 2010 U.S. Dist. LEXIS 4932 (D. Ariz. 2010).

[57] McComish v. Bennett, 611 F.3d 510 (9th Cir. 2010).

during the fall 2010 state and local elections in Arizona.[58] The Court's action reinforced the expectation that *Davis* and *Citizens United* had put the *Arizona Free Enterprise* scheme on borrowed time. That expectation, of course, became reality.

In order to decide the case, the Court had to resolve two basic issues: First, did the matching-funds trigger scheme substantially burden the First Amendment rights of the privately financed candidates and independent speakers or groups whose speech was being countered by the provision of government funds? Second, if so, was such a burden justified as advancing a compelling government interest? The Court answered the first question yes and the second question no: ''Laws like Arizona's matching fund provision that inhibit robust and wide-open political debate without sufficient justification cannot stand.''[59]

B. The Speech Burdens Created

The *Davis* case made the Court's task so much easier because the burdens on speech in *Arizona Free Enterprise* were so similar to the Millionaire's Amendment harms. Indeed, *Arizona Free Enterprise* was even worse. In *Davis*, the disadvantaged, self-financing candidate suffered the harm of having his own campaign funding trigger the *opportunity* for his opponents to raise money more easily by lifting the contribution ceilings on donations to their campaigns. In *Arizona Free Enterprise*, the Court observed, the effect was even more severe because the government gave the outside candidate's opponent funds *directly*, without even the need to raise the money. Moreover, in elections where there were multiple inside candidates, the match was multiple as well, so that one dollar of speech made by an outside candidate would trigger two dollars or perhaps three dollars of government-funded speech against that candidate. Third, the outside candidate had absolutely no control over money given to inside candidates triggered by the speech of independent groups or individuals. Furthermore, that independent speech might have been unwelcome and counterproductive to the outside candidate (for example, ''Nazis for the outside candidate'').

[58] McComish v. Bennett, 130 S. Ct. 3408 (2010).

[59] Arizona Free Enterprise, 131 S. Ct. at 2829.

Moreover, the Arizona scheme had an additional, novel set of burdens, completely different from both *Buckley* and *Davis*: the government-funded counterattack against *independent* speech. The triggered match was not just for spending by the outside candidate, but for speech by independent groups. That was a new feature of the second generation of public-funding laws, designed to give the inside candidates an insurance policy against high-spending outside groups and induce incumbents to participate in the public-funding system. The Court pointedly noted that the triggered match imposed an even more severe burden on independent groups; unlike candidates, they were obviously not eligible to seek public funds for their speech in the first place. There was then not even the fiction of a ''voluntary'' choice between public funding and private financing of political speech. For these groups, the only way they could avoid the government's triggered financing of counter-speech against their message would either be to change their message or not speak at all. For government to impose such a ''choice'' on the speaker's decision whether to speak or what to say cuts against the core First Amendment protection of speaker autonomy heralded by both *Buckley* and *Citizens United* and applied to the trigger scheme in *Davis*.

Responding to the dissenters' complaint that a scheme like this could not be a burden because it provided for ''more speech,'' the Court said that any added speech was one-sided, only aiding the speech of the publicly funded candidate and burdening (thus reducing) the speech of the privately funded candidate. Such a consequence is a defining characteristic of expenditure limits—namely, they burden and limit the speech of some ''to enhance the speech of others,'' a leveling-down concept ''wholly foreign to the First Amendment.''[60]

The Court also found strong support in two cases outside the campaign finance area that held that government regulations requiring speakers to provide a forum for those they oppose was a violation of the First Amendment. *Miami Herald v. Tornillo* struck down a

[60] *Id*. at 2811 (quoting Buckley, 424 U.S. at 48–49). The whole *Buckley* passage, usually omitted by critics of the ruling, is as follows: ''But 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, which was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'''

''right of reply'' statute that required newspapers to give editorial space to those politicians they criticized.[61] *Pacific Gas & Electric v. Public Utilities Commission of California*, invalidated a requirement that utility companies allow their public policy opponents to include opposing messages in monthly bill mailings.[62] In both cases, the Court ruled that such requirements not only improperly expropriated the speaker's property and gave it to his ideological opponents, but the very prospect of having to do so deterred the speaker's own speech: He would be inclined to tailor his remarks rather than giving a speech benefit to his ideological opponents.

The fact that the speaker was not compelled to express a message with which he disagreed was beside the point; the gravamen of the harm was that the state provided a monetary subsidy to the speaker's political rival—triggered by the speaker's own speech. *That* was the burden on speech—that it would force the speaker to think twice before engaging in speech that the government would use to provide a direct, tangible benefit to the speaker's adversary. ''The Arizona law imposes a similar penalty: The State grants funds to publicly financed candidates as a direct result of the speech of privately financed candidates and independent expenditure groups. The argument that this sort of burden promotes free and robust discussion is no more persuasive here than it was in *Tornillo*.''[63] By similar reasoning, the challengers' concession that Arizona could have provided a three-times larger grant in the first place without triggers did not lessen the particular harm of the trigger mechanism, which directly penalized one candidate's or group's speech by giving government funds to the other candidates in response to that speech.[64]

[61] 418 U.S. 241 (1974).

[62] 475 U.S. 1 (1986).

[63] Arizona Free Enterprise, 131 S. Ct. at 2821.

[64] The Court also rejected the dissent's suggestion that the Arizona scheme was acceptable under cases permitting government broad leeway in subsidizing speech so long as the scheme did not amount to a penalty. See, e.g., Rust v. Sullivan, 500 U.S. 173 (1991); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998); Regan v. Taxation With Representation, 461 U.S. 540 (1983). In this case, the Court noted, ''The direct result of the speech of privately financed candidates and independent expenditure committees is a state-provided monetary subsidy to a political rival.'' Arizona Free Enterprise, 131 S. Ct. at 2821. The Court likewise rejected the analogy to the lower standard of review that *Citizens United* applied to disclosure and disclaimer requirements in the campaign finance area, observing that disclosure does not result in a cash windfall to one's political opponents because of one's own speech.

Finally, contradicting the dissent, the Court noted significant evidence of the actual chilling effect the triggers had on outside candidates and independent groups. But the real problem was not how many outside candidates had refrained from speaking, but that every outside candidate and group had to confront the question of whether to speak and, by so doing, provide a direct financial benefit to their opponents. As in *Davis*, the harm was the very existence of the trigger mechanism and the inherent effect it had on the speech choices of outside candidates: ''It is clear not only to us but to every other court to have considered the question after *Davis* that a candidate or independent group might not spend money if the direct result of that spending is additional funding to political adversaries.''[65] Accordingly, the Court concluded, ''Because the Arizona matching fund provision imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups, ''that provision cannot stand unless it is 'justified by a compelling state interest.'''[66]

C. The Justifications Found Wanting

That brought the Court to the second critical branch of the inquiry: Did the trigger mechanism's substantial burden on speech serve a compelling governmental interest? Two interests were considered: one that the state disclaimed and one that it advanced.

The compelling interest treated like the plague was the one that, in the Court's opinion, was the real motivating force behind the Arizona scheme: ''to level the playing field.'' Few phrases are more poll-tested to produce good feelings than that one. It has been a key mantra of the campaign finance control movement: In order to improve our political and electoral speech and competition, we need to find ways to reduce the financial disparities among candidates—to level the playing field. That was the avowed purpose of the *Buckley* statute: trying to ensure that no one person could spend more than a nominal amount on politics and no one candidate could spend more than any other. And it is one of the two motivating forces behind the ''clean elections'' movement, to drive more and

[65] Arizona Free Enterprise, 131 S. Ct. at 2823.

[66] *Id*. at 2824 (citations and internal quotation marks omitted).

more candidates into the publicly funded system where all candidates get the same amount to spend, and even more if outside candidates or groups speak.

The problem is, ''if there is any fixed star in our constitutional constellation,'' it is that campaign finance laws cannot attempt to level the playing field and equalize political speech.[67] *Buckley* condemned that rationale in no uncertain terms, branding it ''wholly foreign to the First Amendment.'' Liberals and campaign finance control groups have bitterly attacked that part of *Buckley* for a generation and came close to putting a major doctrinal dent in that theme in *Austin* and *McConnell*, which limited campaign funding to counter the influence of ''immense aggregations of wealth'' that might, one could say, tilt the playing field. But after *Citizens United* reaffirmed the *Buckley* ban on equalizing campaign speech, ''level the playing field,'' as good as it sounded to proponents of more regulation, was constitutional anathema.[68]

For these reasons, Arizona understandably disclaimed an interest in ''leveling the playing field.'' Conjuring up the old Groucho Marx line, ''Who are you going to believe, me or your lying eyes?'' the Court pointed to a number of factors to show the illicit purpose. These factors included the rhetoric used to support the ''clean election'' law when it was enacted by referendum, the text used in the law (''equal funding of candidates,'' ''equalizing funds''), and the structures and mechanisms of the law designed to induce participation by providing trigger funds to help, though not guarantee, a level playing field. Accordingly, the Court concluded that one of the goals was to equalize campaign funding and therefore campaign speech, a clearly illicit, let alone not a compelling, interest.[69] '''Leveling the playing field' can sound like a good thing. But in a democracy,

[67] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[68] In addition, leveling the political playing field simply will not work. To the extent leveling limits are effective, they simply freeze the political status quo and magnify the enormous advantages of incumbency. In addition, to the extent they do not cover all political speech—because of things like the statutory media exemption and the constitutional protection for issue advocacy—they are anything but fair and equal. Rather they simply privilege the individuals and groups whose speech is not subject to the controls. Wholly apart from the First Amendment, leveling the playing field simply makes no democratic sense.

[69] The state's disclaimer of this purpose was not aided by the fact, noted at oral argument, that the website of the Clean Election Commission, the agency responsible

campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a nation that, when it comes to such speech, the guiding principle is freedom—the 'unfettered exchange of ideas'—not whatever the state may view as fair.''[70]

Preventing corruption, of course, is the only compelling interest the Court recognizes now and, courtesy of *Citizens United*'s reaffirmation of *Buckley*'s formulation, an interest concerned only with quid pro quo dangers, not the more gossamer claims of undue access or influence. Drawing carefully on settled doctrine in the area, Chief Justice Roberts showed why the Arizona scheme, and the burdens and penalties it visited on private and independent speech, could not be justified on the ground of preventing corruption. First, none of the speech that Arizona countered, deterred, and penalized was the product of any campaign finance practice that the Court had deemed corrupting. The state matched a candidate's own spending, but ever since *Buckley*, reaffirmed by *Davis*, the Court has said that self-financing was the most protected and least corrupting form of campaign finance—on the self-evident basis that a candidate cannot corrupt himself. Second, Arizona could not be seeking to prevent corruption in the form of large donations to candidates that might influence their official behavior because, quite simply, Arizona allowed no such donations. On the contrary, the state's contribution limits were extremely low—indeed, ''ascetic''—and subject to rigorous and timely reporting and disclosure.[71] Properly, the Court concluded that low contribution limits and full-disclosure requirements were more than ample antidotes to cognizable quid pro quo corruption. Finally, Arizona's scheme could not be seeking to prevent corruption by countering independent expenditures: The Court,

for administering the law, contained the following statement: ''The Citizens Clean Elections Act was passed by the people of Arizona in 1998 to level the playing field when it comes to running for office.'' After oral argument, the website was changed—scrubbed?—to state that the purpose of the law was ''to restore citizen participation and confidence in our political system.'' Arizona Free Enterprise, 131 S. Ct. at 2825 n.10.

[70] *Id*. at 2826 (citing Buckley, 424 U.S. at 14).

[71] *Id*. at 2827. Indeed, they were so low that they came perilously close to violating the *Randall* ban on low contribution levels that suppressed electoral competition. Of course, that is part of the ''clean election'' strategy: setting contribution limits so low that all but the well-heeled or well-connected candidates are coerced into the public-funding system with its severe expenditure limits.

from *Buckley* through *Citizens United*, had consistently said that such expenditures, at the core of the First Amendment, could not be corrupting because, by definition, they are not coordinated in any way with candidates.[72]

Accordingly, none of the campaign financing that Arizona claimed it had a compelling interest in countering posed any risk or danger of corruption, and the triggered funding system was not directly serving the anti-corruption interest.

In a nutshell, the trigger provisions *could not* constitutionally serve a leveling purpose and *did not* directly serve a corruption-preventing function. But could they be justified in any other way? The state's answer was that the triggers prevented corruption by herding candidates into the public-financing system in the first place. ''They contend that the provision indirectly serves the anticorruption interest, by insuring that enough candidates participate in the State's public funding system, which in turn helps combat corruption.''[73] Though noting *Buckley*'s approval of public financing as a means of eliminating the influence of large private contributions, the Court was unwilling to extend that general principle to validate the matching-funds provision at issue in *Arizona Free Enterprise*. None of the deterred campaign financing was corruption-threatening. Moreover, the Court observed:

> How the State chooses to encourage participation in its public funding system matters, and we have never held that a State may burden political speech—to the extent the matching funds provision does—to ensure adequate participation in a public funding system. Here the State's chosen method is unduly burdensome and not sufficiently justified to survive First Amendment scrutiny.[74]

In effect, the Court refused to circumvent First Amendment rights for the indirect accomplishment of a purportedly compelling objective: ''Laws like Arizona's matching fund provision that inhibit

[72] The Court suggested otherwise in both *Austin* and *McConnell* but those cases were ultimately overruled in *Citizens United*. See *supra* note 37 and accompanying text.

[73] Arizona Free Enterprise, 131 S. Ct. at 2827.

[74] *Id*. at 2828.

robust and wide-open political debate without sufficient justification cannot stand.''[75]

D. The Dissenters' Different Perspective

The Court let pass the real full-throated justification for the law—namely, as the title of the statute implies, only public money supports ''clean elections''; private money is unclean or dirty or inherently corrupting. Thus, by pressuring candidates into taking public funding, the trigger serves the goal of preventing corruption; the ''clean'' public-funding system, unlike its private counterpart, cannot by definition be corrupt.

That is really what clean election laws have always been about: *any* private financing of political campaigns is corrupting. If it is the candidate's own money, it violates democratic equality of one person, one vote and allows the wealthy to ''buy elections.'' Likewise, private contributions larger than specified ''qualifying'' amounts are corrupting because of quid pro quo and undue influence by ''special interests.'' That is not quite what Arizona and its supporters argued, but its basic defense of the trigger mechanism was that it was necessary to induce candidates to become ''clean''—almost like a reformed drug user—and participate in the public-funding system. The more candidates who participated, the less corruption there would be; therefore, Arizona had a compelling interest in the triggers as a way to get more candidates to give up private funding and go into the system. Sadly, the dissenters bought this theory hook, line, and sinker.

Justice Kagan's dissent contained two parts. First, she maintained, triggers did not significantly burden or penalize speech, were not condemned by *Davis*—which was about disparities—and were justified by cases giving government greater leeway when it was subsidizing speech, not directly restricting it.

But the heart of the dissent was a sweeping condemnation of the American campaign-financing system's heavy reliance on private funding. Here are ways that the dissent characterized the nature and dangers of privately financed election campaigns:

- ''Candidates accept large contributions in exchange for the promise that, after assuming office, they will rank the donors'

[75] *Id*. at 2829.

interests ahead of all others. As a result of these bargains, politicians ignore the public interest, sound public policy languishes, and the citizens lose their confidence in government.''

- There is ''a cancerous effect of this corruption.''
- ''[T]he greatest hope of eliminating corruption lies in creating an effective public financing system, which will break candidates' dependence [there's that drug user theme again] on large donors and bundlers.''
- Public financing like Arizona's ''produces honest government, working on behalf of all the people'' and can ''break the stranglehold of special interests on elected officials.''
- ''Campaign finance reform has focused for a century on one key question: how to prevent massive pools of private money from corrupting our political system.''
- ''By supplanting private cash in elections, public financing eliminates the source of political corruption.''
- The Court ''wrongly prevents Arizona from protecting the strength and integrity of its democracy.''
- ''When private contributions fuel the political system, candidates will make corrupt bargains to gain the money needed to win election. And voters, seeing the dependence of candidates on large contributors (or on bundlers of smaller contributions), may lose faith that their representatives will serve the public interest.''[76]

[76] *Id*. at 2829–30, 2841–42 (Kagan, J., dissenting). Some wags might point out that these claimed corruptions might have been at work recently when a major state enacted a controversial bill that the governor endorsed the very day he received a $60,000 contribution from a powerful special-interest lobby that supported the bill; or when various state legislators received five-figure campaign contributions from lobby groups and obscenely rich donors who also supported the bill. (Notably, millions were spent on expensive media campaigns urging politicians to vote for the bill or face defeat at the polls in the next election.) The bill at issue was New York's legalization of same-sex marriage, passed, ironically, within days of the Supreme Court's *Arizona Free Enterprise* decision. See Gay Rights Groups Gave Cuomo $60,000 as He Pushed Marriage Bill, Records Show, N.Y. Times, July 15, 2011 at A17. The *Wall Street Journal* enjoyed editorially tweaking its cross-town rival, the *New York Times*, for the powerful role of *private* campaign financing in bringing about a cherished liberal objective. See Editorial, Campaign Speech and Gay Marriage, Wall St. J., June 29, 2011, at A16. The *Times*, though lauding the marriage equality legislation, made no editorial mention of its support by wealthy special interests, many of whom would benefit economically from the legislation. No ''pay-to-play'' problems there, apparently, or at least none the *Times* thought worth mentioning. I wonder if Justice Kagan thinks the new legislation in her home state was the result of ''corruption.''

These buzzwords and phrases sound like they came out of a Common Cause press release. Such a jaundiced view of our system of private funding of political campaigns is certainly in vogue in such quarters. Some academics and editorialists support those views, and a majority of Americans—after a generation of brainwashing by the mainstream media—may even feel the same way. It is a stunning and alarming thought that the Supreme Court would be only one justice away from allowing every state and locality, not to mention Congress, to impose a ''clean election'' system on American politics, despite the injunctions of the First Amendment.

The gap between the majority and the dissent almost seems unbridgeable. One prominent election law scholar, reacting contemporaneously to the ruling, said the Court was in a ''[d]octrinal death match.''[77] One view holds that government can and really should be the primary or even exclusive source of campaign funding and that the First Amendment should welcome this development or, at least, get out of the way unless the funding entails overt viewpoint discrimination. The other view holds that the First Amendment bars the government from managing or funding the political process. The dissenters think more private funding of political speech is the problem for democracy, while the majority think it is the solution. The different perspectives sometimes seem as powerfully divisive as the schism over abortion, affirmative action, and other hot button issues, where people see fundamental things totally differently and the notion of bridging the gap seems quixotic.

But, finally, at least the *Arizona Free Enterprise* case has put to rest the vexing question: ''Is money speech?'' All nine justices now seem to agree that it is: The Court majority thinks it should come from the people; the dissenters are content to let it be supplied by the government. Indeed, Justice Kagan praised the Arizona scheme for generating the ''just right'' level of political speech, and then using monetary incentives to encourage candidates to stick to that level.[78] Clearly, Justice Kagan sees the relationship between money and speech, even though the Framers no doubt would have rejected her

[77] See Heather Gerken, Campaign Finance and the Doctrinal Death Match, Balkinization Blog, June 27, 2011, http://balkin.blogspot.com/2011/06/campaign-finance-and-doctrinal-death.html (last visited Aug. 2, 2011).

[78] Arizona Free Enterprise, 131 S. Ct. at 2832.

preference for government's deciding how much political speech is ''just right'' and penalizing people who speak ''too much'' by giving money to their political opponents.

V. The Future for Public Financing of Election Campaigns

What does *Arizona Free Enterprise* augur for the future of public financing of political campaigns? Doctrinally, the Court reaffirmed, in word and deed, that strict scrutiny means strict scrutiny. Even in the context of public funding, campaign finance regulations that directly or indirectly restrain the amount of speech and undermine the autonomy of political speakers must be justified in the most careful way. In terms of precedent, most ''triggers'' are now presumptively unconstitutional, whether they result in more public funding or higher private-funding limits for favored candidates.

More intriguing is the question of whether *any* otherwise First Amendment-unfriendly limits can continue to be imposed on the recipients of public funding as a condition of getting those benefits. In other words, is the basic *Buckley* bargain—public funding in exchange for expenditure limits and no private funding—now called into question? Supporters of public funding were quick to claim that *Arizona Free Enterprise* left this aspect of *Buckley* unscathed. But that is yet to be determined.

Finally, what are the political ramifications of the decision? The now-defunct triggers were designed to enforce the expenditure limits supposedly integral to public funding. With that hammer gone, those limits may have outlived their usefulness. Some form of floors without ceilings may make sense after all, politically, whether or not constitutionally.

A. Doctrinal Possibilities

First, will the strict scrutiny applied in *Arizona Free Enterprise* spill over into other challenged areas of campaign finance law, such as the continued ban on contributions by certain entities? Or indeed will the Court revisit the very propriety of limits on contributions that have been consistently upheld? One scholar suggests there is no such danger since the Court pointed to various restraints on contributions as not meriting strict scrutiny because they were considered less onerous.[79] Remember, however, that *Arizona Free Enterprise*'s broader themes included the need to preserve speaker autonomy regarding funding, the application of strict scrutiny to restraints

[79] Rick Hasen, The Arizona Campaign Finance Case: The Surprisingly Good News in the Supreme Court's Decision, The New Republic, June 27, 2011, available at

that had a chilling effect, and the refusal to find that the corruption interest—concededly compelling—was being directly protected. At the very least, the Court will take a closer look at these traditionally accepted campaign finance limitations.

Second, all forms of triggered public financing to counteract privately funded campaign speech are almost per se unconstitutional. Whether the provisions provide for additional public funds being granted, as in Arizona and Maine—the other well-known ''clean election'' state—or additional private-fundraising rights and opportunities, or spending limits being increased. They all appear fatally flawed under the Court's analysis in *Arizona Free Enterprise*. Some lower courts have already agreed—based on either *Arizona Free Enterprise* or *Davis*.[80]

A particularly interesting case will be the New York City public-financing program, in existence for a quarter of a century and much beloved of local editorial writers and public-funding advocacy groups. After *Arizona Free Enterprise*, the spokespeople for both the New York City program and one of the main public-finance advocacy groups rushed to declare the New York program bulletproof, even after the decision, and a model for the country. The program provides six dollars of public money for each dollar of private money a candidate raises in small contributions, up to $175—which is almost the equivalent of a flat-grant system. Spending limits are imposed as a ''voluntary'' condition of accepting the match, as well as mandatory debates and various other restraints. As a practical matter, it is questionable whether the New York City program has succeeded in fostering competitive elections or preventing corruption.[81] In addition, the program contains trigger mechanisms that

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http://www.tnr.com/article/politics/90834/arizona-campaign-finance-supreme-court (last visited Aug. 2, 2011).

[80] A number of ''trigger'' schemes have been declared unconstitutional or are being rewritten in Arizona, Maine, Florida, Albuquerque, San Francisco and Los Angeles. But a former student of mine, Nicholas I. Bamman, Brooklyn Law School Class of 2011, has suggested in an unpublished paper on file with the author that there may be some trigger schemes that might still pass constitutional muster and make good public policy sense.

[81] See Wallison & Gora, Better Parties, Better Government, *supra* note 27; Michael Howard Saul & James Oberman, Indicted Councilman Hands Out Cash, Wall St. J., June 29, 2011, at A19; see also, Sean Parnell, Opposing View: Reject Tax-Financed Campaigns, USA Today, June 27, 2011 (noting press reports that 12 New York City

are certainly vulnerable under *Arizona Free Enterprise*.[82] Finally, there is a good argument that the system forces almost all candidates to participate and abide by the requisite spending limits unless, of course, the candidate is named Bloomberg.

Which brings us to the $64,000 question: Did the Court in *Arizona Free Enterprise* really put its Good Housekeeping Seal of Approval on the no-triggers *Buckley* system, which awarded matching funds for small contributions, conditioned on spending limits, plus a lump sum conditioned on no private contributions? As a practical matter, we've seen how that worked out at the presidential level. From a constitutional perspective, are *Buckley*'s limits-mandated matching funds and lump sum funds still good law?

Here too, the editorialists and public-financing advocates were quick to claim that the *Arizona Free Enterprise* Court turned aside efforts to challenge *Buckley*'s approval of public financing. But, in fact, only one or two amicus curiae briefs criticized *Buckley* or suggested revisiting it, and the parties challenging the law stipulated that they were not arguing that a lump-sum payment in advance, à la Buckley, would be problematic. Their only targets were the triggers, which they claimed put a special and different burden on private speech by having government fund a counterattack to that speech. The Court agreed.

At the end of its opinion, the Court did say, after declaring the Arizona trigger scheme a substantial and unjustified burden on First Amendment rights: ''We do not today call into question the *wisdom* of public financing as a means of funding political candidacy.''[83] Public-funding advocates have seized on this sentence as proof positive of their narrow reading of the effect of the decision. But I think they may be whistling past the graveyard. Conservative justices like to say they are not getting into the ''wisdom'' of legislation. That

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Council members, all elected with public financing, have been caught up in graft and corruption inquiries).

[82] See Larry Levy & Andrew Rafalaf, High Court's Recent Decision on Public Matching Funds Renders New York City's Campaign Finance System Ripe for Constitutional Attack, Albany Gov. L. Rev. Fireplace, July 11, 2011, available at http://aglr.wordpress.com/2011/07/11/high-courts-recent-decision-on-public-matching-funds-renders-new-york-citys-campaign-finance-system-ripe-for-constitutional-attack-2/ (last visited Aug. 2, 2011).

[83] Arizona Free Enterprise, 131 S. Ct. at 2828 (emphasis added).

would be ''legislating from the bench,'' and conservatives presumably do not do that. But the Court did call into question the *constitutionality* of some public-financing provisions. Indeed, in the very next sentence, Chief Justice Roberts made this point explicitly: ''[D]etermining whether laws governing campaign finance violate the First Amendment is very much our business.''[84] Then the Court went on to note: ''We have said governments 'may engage in public financing of election campaigns' and that doing so can further 'significant governmental interest[s],' such as the state interest in preventing corruption in *Buckley*. . . . But the goal of creating a viable public financing scheme can only be pursued in a manner consistent with the First Amendment.''[85] After *Arizona Free Enterprise*, any public-funding scheme will have to meet the tougher tests applied to strike down the particular arrangement there.

How will *Buckley* fare under those more robust standards? *Buckley* identified three interests properly served by public funding: (1) facilitating speech, not abridging it; (2) eliminating the improper influence of large contributions; and (3) relieving major party candidates of the rigors of fundraising. The last interest has been undermined by *Randall v. Sorrell* where the Court held that sparing candidates—particularly incumbents with a government to run—the rigors of private fundraising was not an interest sufficiently compelling to justify direct expenditure limits. With regard to corruption, public funding as an antidote to potential corruption from private contributions was the ultimate justification for the Arizona scheme, and it was rejected as insufficient to justify even indirect restraints on privately funded candidates

The first interest, facilitating speech, is in considerable tension with *Arizona Free Enterprise*. There the Court found that the scheme gave money for speech but had the purpose and effect of *abridging* speech, not facilitating it. Moreover, one of *Arizona Free Enterprise*'s critical themes is that government may not decide how much campaign speech is enough. That's nothing new: *Buckley* said in no uncertain terms that government could not directly limit speech, and *Arizona Free Enterprise* said in no uncertain terms that government could not indirectly limit speech. So if the purpose of public

[84] *Id*.
[85] *Id*.

funding with limits attached is to cap the amount of campaign speech, not merely replace private fundraising, that ''level the playing field'' rationale has been sharply rejected by the Court.

In my view, the dirty little secret of public funding—unless it takes the form of floors without ceilings—has always been to limit spending. The *Buckley* statute did it both directly and through public funding. No presidential candidate could spend more than $20 million and the government would give each exactly that amount for his campaign, just as long as he ''voluntarily'' agreed not to spend a penny more. That sounds like leveling the playing field to me. And the ultimate driving force, which comes mostly from the left, is viewpoint-based preference—that is, muting the voices of the right and the rich on the theory, however mistaken, that the policy views of those groups will prevail unfairly and undemocratically unless there's a level playing field. Necessary ''progressive'' change cannot occur, it is claimed, without changing the campaign finance system to stop favoring the ''special interests.''[86]

That is not to say *Buckley* is in jeopardy on this issue. But the presidential funding system upheld in that case—with its comparatively low limits, its impotence at preventing corruption (think soft money and big checks for party accounts), and its effect on speech (recall Obama's $750 million privately raised versus McCain's $100 million public-funding cap)—might well be overturned if *Buckley* were revisited. If the *Davis/Citizens United/Arizona Free Enterprise* toolbox of strict First Amendment doctrines and presumptions were applied to *Buckley*-style matching contributions or lump-sum mechanisms, with low spending limits and other speech-suppressing or speech-managing requirements (for example, mandatory participation in candidate debates), how would the current Court respond?

Indeed, the Court's sensitivity to public-funding mandates to speak less may even call into question the basic justification for

[86] See Brief of Petitioners-Appellants at 8–12, Arizona Free Enterprise, 131 S. Ct. 2806 (2011) (Nos. 10-238 & 10-239), for examples of such viewpoint-based themes in the language of the Clean Election referendum. More broadly, the complaint for 40 years has been that ''good'' legislation in the ''public interest'' has been systemically stymied by the private funding of our politics and the special-interest power this facilitates. Only one of the most recent iterations of this trope is from Harvard's Professor Lawrence Lessig, see Lessig, Democracy after *Citizens United*, Boston Review, September/October 2010, available at http://bostonreview.net/BR35.5/lessig.php (last visited Aug. 2, 2011).

conditioned spending limits: that they are accepted ''voluntarily'' and therefore pose no First Amendment problem. Remember *Buckley*'s footnote 65, which said that, though spending limits were unconstitutional, candidates could ''voluntarily'' agree to them as a condition of getting the public funding. But there were two problems with this footnote. First, the Court never really discussed why a ''voluntary'' agreement to surrender First Amendment rights was permissible. Second, had there been such a discussion, it would have had to engage the Court's ''unconstitutional conditions'' doctrine. As previously described by Richard Epstein in these pages, that doctrine holds that ''even if a state has absolute discretion to grant or deny any individual a privilege or a benefit, it cannot grant the privilege subject to conditions that improperly coerce, pressure or induce the waiver of that person's constitutional rights.''[87] Another version of the doctrine holds that the government cannot accomplish indirectly what it cannot achieve directly—it cannot purchase what it cannot command.

Partly the issue is whether the particular campaign finance system stacks the deck against private fundraising and spending, for example, with very low contribution limits, so the choice to accept public funding is not ''voluntary.'' But the broader issue is whether you can ever ''voluntarily'' be made to surrender a constitutional right to obtain a government benefit. Put in the *Buckley* context, if you have a First Amendment right to spend as much as you can raise on your campaign, how can the government make you surrender that right in order to get government funding for your campaign? In this context, can the government purchase what it cannot command? Perhaps the *Buckley* justices had an unstated bargain to split the difference: strike down direct limits but allow indirect limits. But this judicial bargain might well fly in the face of the unconstitutional conditions doctrine. If quantity controls are content controls, as the Court has maintained ever since *Buckley*, then government is using its control over funding to control content. The less you can spend, the less you can say, and the less control you have over how you can say it. Does the new *Arizona Free Enterprise* vigilance over First

[87] Richard Epstein, Church and State at the Crossroads: *Christian Legal Society v. Martinez*, 2009–2010 Cato Sup. Ct. Rev. 105, 109 n.7 (2010) (quoting Richard A. Epstein, Bargaining with the State 5 (1993)).

Amendment rights in the context of public funding call into question even the bargain that may have been struck in *Buckley*?

B. Political Possibilities

What else does the future likely hold for public financing of politics? Given the current economic crisis and the constraints on more government spending, there seems to be absolutely no appetite for lavish public funding of politics—''Food Stamps for Politicians'' as some have derisively called it. The politics of this issue has always been that incumbents want limits as part of any public-financing scheme because they do not want to give large campaign benefits to their usually underfunded opponents. Liberal reform groups want limits because the less money in politics the better so far as they are concerned—except, of course, the small ''qualifying'' contributions embedded into ''clean election'' systems. If those groups had their way, we might have complete public funding of campaigns and no private money allowed—however irrational as a practical matter and impermissible as a constitutional matter.

But political realities are influenced by constitutional constraints. When it seemed that the Court had taken a hands-off approach to public financing of political campaigns, reformers pushed through all manner of Rube Goldberg schemes, like the one in Arizona. Now that the Court has made limits-driven public-funding arrangements constitutionally questionable, there may be an incentive to push for approaches that emphasize different values. The later versions of the FENA—the perennial vehicle for public financing of congressional campaigns—quietly deleted any trigger provisions after the *Davis* handwriting on the wall. Similar bills now emphasize limits but allow them to be adjusted upward if there are matching small-donor contributions, without regard to what opponents do. So, in incremental steps we may be slowly moving toward a system with more of an emphasis on ''floors'' and less of an emphasis on ''ceilings.''

That would, of course, still ruffle Senator McCarthy and libertarians, who believe passionately that government should have no role in funding its opposition. But to those who feel that public support for political speech can be reconciled with freedom of speech, ''floors without ceilings'' may be looking better all the time.