CLEANING ELECTIONS

Andrew Spencer*

The term "clean elections" refers to systems of full public financing, wherein participating candidates rely entirely on public subsidies to run their campaigns without any private money. Although only a small number of jurisdictions use clean elections, evidence suggests that they have a variety of positive effects on the democratic system. Recently, however, the viability of clean elections has been called into doubt by the U.S. Supreme Court's decision in Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, which ruled an important provision of such systems unconstitutional. This Note first compares the effectiveness of traditional campaign finance reform with clean elections systems and concludes that the latter is superior as a policy matter. It then analyzes the Court's decision in* Arizona Free Enterprise *and applies its reasoning to efforts aimed at campaign finance reform. It concludes that the Supreme Court has made a number of novel attempts at campaign finance reform almost impossible, but has left open venues for reforming clean elections systems to keep them viable and effective. Therefore, clean elections are the best option available to jurisdictions interested in campaign finance reform.*

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INTRODUCTION

Arizona has a colorful political history. Between 1988 and 1998, this history had a particular character: corruption. Despite the existence of campaign contribution limits in Arizona since 1986,[1] corruption scandals hit the state, one after the next.

In 1988, the Arizona Senate impeached Governor Evan Mecham, preempting an imminent recall election.[2] Prior to that, no U.S. governor had been

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1. *See* Joseph Kanefield, *Election Law in Arizona*, ARIZ. ATT'Y, Nov. 2006, at 12, 15.

2. Laurie Asseo, *Arizona Court Cancels Mecham Recall Election*, REG.-GUARD (Eugene, Or.), Apr. 13, 1988, at A1. The Arizona Supreme Court ordered the recall election canceled following Mecham's removal. *Id.*

removed from office in 59 years.[3] Mecham had been indicted for misuse of $80,000 of public money, for an undisclosed campaign loan of $350,000, and allegations that he attempted to thwart the investigation of a death threat allegedly made by one of his campaign staff.[4]

One year later, Arizona Senators John McCain and Dennis DeConcini, along with three senators from other states, became infamous as the "Keating Five."[5] The five senators received a total of $1.3 million in gifts and contributions from Phoenix-based millionaire Charles Keating.[6] Later, these senators intervened with officials of the Federal Home Loan Bank Board on behalf of Lincoln Savings and Loan, which was owned by Keating.[7] Eventually, regulators seized Lincoln and filed a $1.1 billion fraud and racketeering suit against Keating.[8] The Senate Ethics Committee proceeded to investigate the five senators.[9] The Committee admonished DeConcini for giving the "appearance of impropriety" and criticized McCain for exercising "poor judgment."[10] The closure of Lincoln cost taxpayers $2.3 billion.[11]

During the same time, a new corruption scandal erupted, which would later be known as "AzScam."[12] The Maricopa County Attorney's Office and Phoenix Police Department created a 16-month sting operation in which "J. Anthony Vincent," who claimed to be a casino developer, offered bribes to legislators in exchange for votes to legalize gambling in Arizona.[13] The developer was actually an ex-convict named Joseph Stedino. Stedino agreed to work with authorities to uncover corruption, and the meetings were filmed.[14] The video footage, some of which was broadcast nightly on television, featured several

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3. Bob Christie, *Ex-Arizona Gov. Mecham Dies at 83*, SEATTLE TIMES (Feb. 22, 2008, 11:36 PM), http://seattletimes.nwsource.com/html/nationworld/2004195653_apobitmecham22.html.

4. Asseo, *supra* note 2; Linda Deutsch, *Arizona Governor Convicted; 2 Senate Votes Oust Mecham*, TIMES UNION (Albany, N.Y.), Apr. 5, 1988, at A1. Mecham was later acquitted of the criminal charges after a trial at which he never took the stand. Christie, *supra* note 3.

5. *See* Tom Webb & David Everett, *Ethics Hearing Set to Begin for 5 Senators in S&L Case*, PHILA. INQUIRER, Nov. 11, 1990, at A10.

6. *The Lincoln Savings and Loan Investigation: Who Is Involved*, N.Y. TIMES, Nov. 22, 1989, at B8.

7. *Id.*

8. *Id.*

9. Webb & Everett, *supra* note 5.

10. *An Apology, of Sorts, from a Senator*, N.Y. TIMES, Nov. 24, 1991, at E7. McCain has since become an important supporter of campaign finance reform. Helen Dewar, *McCain to Plow Ahead on Campaign Finance Reform; Push for Bill Is a Challenge to Bush, Congress*, WASH. POST, Jan. 22, 2001, at A2.

11. Webb & Everett, *supra* note 5.

12. Roger Gribble, *Baseball Fans Boo Politicians*, WIS. ST. J., Mar. 28, 1991, at 1D.

13. Seth Mydans, *Civics 101 on Tape in Arizona, or, 'We All Have Our Prices*,' N.Y. TIMES, Feb. 11, 1991, at A1.

14. *Id.*

shocking statements by legislators.[15] State Senator Carolyn Walker told "Mr. Vincent" that "[w]e all have our prices," and she described a fondness for "the good life."[16] She accepted $25,880 in bribes.[17] State Representative Bobby Raymond stated, "I don't give a [expletive] about the issues," although he qualified that statement by saying, "[T]here's [sic] two or three issues that I'll fall on my sword over, and that's the people that got me here."[18] He accepted $12,105.[19] Perhaps the most disturbing footage featured State Representative Don Kenney, who not only accepted $55,000, but also gave "Mr. Vincent" advice on how to blackmail other legislators.[20] In one such instance, he gave the following advice to one of his fellow legislators: "I'd check her sex life, check her finances. [Because] she's just a real loudmouth that you just need to shut up."[21] In all, nearly 10% of the Arizona Legislature faced civil or criminal charges related to AzScam; a total of 21 individuals were indicted, including lobbyists, political activists, and seven state legislators.[22]

The revelations of rampant corruption in AzScam left many Arizona citizens disillusioned.[23] When several Arizona legislators attended a spring training baseball game, the crowd booed their announcement.[24] In light of these events, incoming Governor Fife Symington promised to make "turning the image of Arizona around" one of his top priorities.[25] His press secretary announced that he was "advocating ethics reform . . . and holding his staff to financial disclosure."[26] However, in 1997, Governor Symington was convicted of seven felony counts of filing false financial statements.[27] He became the second Arizona governor to leave office in disgrace.[28]

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15. *See* Tony Freemantle, *Tape Catches Officials' Hands Out, Mouths Open*, HOUS. CHRON., Mar. 3, 1991, at A8; Mydans, *supra* note 13.

16. Mydans, *supra* note 13.

17. *Id.*

18. Freemantle, *supra* note 15 (first alteration in original).

19. Mydans, *supra* note 13. After discovering the bribes offered to others, Raymond was described as saying, "I sold way too cheap." *Id.*

20. *Id.*

21. *Id.* Kenney has also been widely quoted for his on-tape jokes about the possible presence of hidden cameras, to which "Mr. Vincent," fully aware of the camera's presence, replied, "Wave to the cameras." *Id.*

22. *See* McComish v. Bennett, 611 F.3d 510, 514 (9th Cir. 2010), *rev'd sub nom.* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).

23. *See* David S. Broder, *How Much Can Arizona Stand?*, TULSA WORLD, May 7, 1991, at A6.

24. Gribble, *supra* note 12.

25. Faye Juliano, *New Governor Rides In to Set Arizona Aright*, CHRISTIAN SCI. MONITOR, Mar. 8, 1991, at 4.

26. *Id.*

27. *Convicted Arizona Governor Resigns; Symington Guilty of 7 Felony Counts*, CHI. TRIB., Sept. 4, 1997, at 3.

28. *See* McComish v. Bennett, 611 F.3d 510, 514 (9th Cir. 2010), *rev'd sub nom.* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).

Each of these scandals took place while campaign finance laws were in place to restrict campaign contributions.[29] In 1991, following AzScam, the Arizona Legislature created a study committee to evaluate comprehensive campaign finance and electoral reform.[30] However, Arizonans were not satisfied with more campaign finance rules written by the very legislators who were subject to them. In 1998, they acted directly through Arizona's initiative process and approved "Proposition 200," which is known as the Citizens Clean Elections Act.[31] The Act begins:

> The people of Arizona declare our intent to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech under the U.S. and Arizona Constitutions. Campaigns will become more issue-oriented and less negative because there will be no need to challenge the sources of campaign money.[32]

Previously, the citizens of Maine had implemented a similar "clean elections" program,[33] and currently some version of a clean elections system is used in seven states and two municipalities.[34]

This Note analyzes the effectiveness and viability of campaign finance reform; specifically, it addresses clean elections laws in the wake of the recent anti-regulatory First Amendment opinions from the U.S. Supreme Court, especially *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.[35] It concludes that "traditional" campaign finance reform is no longer a viable and effective means of combating corruption, and that clean elections remain both viable and effective. In Part I, this Note reviews campaign finance jurisprudence, revealing that traditional forms of campaign finance reform suffer from regulatory gaps and can lead to perverse results. In Part II, it discusses clean elections systems, using Arizona as a model, and shows why they succeed in overcoming

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29. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-905 (2011).

30. Act of June 18, 1991, ch. 241, § 8, 1991 Ariz. Sess. Laws 1187, 1191–92; *see also* Ariz. Right to Life Political Action Comm. v. Bayless, No. 00-CIV-0129-PHX-RGS, slip op. at 9 n.4 (D. Ariz. Aug. 28, 2000) (discussing the study), *rev'd on other grounds*, 320 F.3d 1002 (9th Cir. 2003).

31. Citizens Clean Elections Act, § 1, 1998 Ariz. Legis. Serv. Prop. 200 (West) (codified at ARIZ. REV. STAT. ANN. §§ 16-940 to 16-961 (2011)).

32. ARIZ. REV. STAT. ANN. § 16-940(A) (2011).

33. An Act to Reform Campaign Finance, 1996 Me. Legis. Serv. Initiated Bill Ch. 5 (West) (codified as amended at ME. REV. STAT. tit. 21-A, §§ 1121–1128 (2011)).

34. Arizona, Connecticut, Maine, Massachusetts, New Mexico, North Carolina, and Vermont have some sort of clean elections system, as do the cities of Portland, Oregon and Albuquerque, New Mexico. E. Stewart Crosland, Note, *Failed Rescue: Why* Davis v. FEC *Signals the End to Effective Clean Elections*, 66 WASH. & LEE L. REV. 1265, 1280 (2009).

35. 131 S. Ct. 2806 (2011); *see also* United States v. Stevens, 130 S. Ct. 1577, 1592 (2010) (striking down a law banning depictions of animal cruelty on First Amendment grounds); Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 911–13 (2010) (striking down campaign finance laws on First Amendment grounds).

the weaknesses of traditional campaign finance reform. In Part III, it analyzes *Arizona Free Enterprise* to conclude that the Court's broad language will have sweeping effects in the realm of campaign finance reform. Finally, in Part IV, it argues that *Arizona Free Enterprise* makes novel attempts at campaign finance reform (distinct from traditional regulation or clean elections) all but impossible, while leaving clean elections systems viable and effective with minor regulatory changes. It recommends that states frustrated with ineffective campaign finance laws should consider implementing clean elections systems.

I. TRADITIONAL CAMPAIGN FINANCE REFORM

The movement for campaign finance reform has proceeded in fits and starts, repeatedly beset by unforeseen hazards. Its advocates have sought to prevent corruption and ensure a fair and competitive electoral arena through the application of contribution limits, expenditure limits, and disclosure laws.[36] However, as courts have ruled many aspects of campaign finance regulations unconstitutional,[37] attempts to patch the process have resulted in undesirable consequences. In particular, two constitutional principles prevent the success of traditional campaign finance reform: Expenditures by candidates or others constitute fully protected speech; and the interest in preventing real or apparent quid pro quo corruption qualifies as the *only* state interest compelling enough to justify a burden on protected speech.

A. Expenditures Are Speech

In 1971, President Nixon signed into law the Federal Election Campaign Act, which, among other things, placed limits on contributions to candidates, expenditures by candidates, and expenditures by others "relative to a clearly identified candidate."[38] Challenges to each of these came to the Supreme Court in *Buckley v. Valeo*.[39] Regarding the expenditure limits on both candidates and independent groups, the Court equated campaign expenditures and political speech, treating them the same in terms of First Amendment protection.[40] Because the practical realities of campaigning necessitate expenditures for effective communication, it reasoned that limiting expenditures necessarily restricts communications.[41]

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36. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 7 (1976) (describing the Federal Election Campaign Act, which serves as a representative example of traditional campaign finance reform).

37. *See generally* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708–17 (1999) (reviewing campaign finance jurisprudence and its unintended consequences).

38. *Buckley*, 424 U.S. at 7; *see also* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2, 18, and 47 U.S.C.).

39. *Buckley*, 424 U.S. at 8–9.

40. *Id.* at 19.

41. *Id.*

The Court previously distinguished between individual and corporate election expenditures, and permitted limits on corporate expenditures.[42] In 2010, however, the Court abandoned that distinction. Currently, all expenditures in furtherance of or in opposition to political campaigns are now protected equally, whether made by individuals, corporations, or other groups.[43]

The Court's equation of money and speech has drawn sharp criticism.[44] No one doubts that many traditional campaign expenditures go to speech activities, and many traditional forms of political speech cost money; however, the two are not strictly the same. When a local candidate and his staff canvass a neighborhood, they engage in speech without any expenditure of funds.[45] Conversely, when a candidate's committee purchases a campaign car, the expenditure has only a remote connection to speech. Further, to equate speech and money entitles those with more money to more speech. Recognizing inequality as an entitlement runs afoul of common concepts of social justice, while risking the introduction of market failure into the marketplace of ideas.

Nonetheless, even in light of such criticism, the Court has expanded the protection of campaign expenditures.[46] Although some continue to argue against the doctrine, the Court has given no indication that it will be abandoned.

B. The Anti-Corruption Interest

States and the federal government have attempted to regulate campaign finance to reduce the influence of personal wealth on the democratic process,[47] to allow candidates to spend their time campaigning rather than fundraising,[48] and to

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42. *See, e.g.*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990); Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263–64 (1986).

43. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 911–13 (2010). The status of expenditures made by foreign individuals or groups remains uncertain. *See id.* at 911 ("We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process.").

44. *See, e.g.*, Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407 (1986) ("These cases presented the Court with extremely difficult issues, perhaps the most difficult of all first amendment issues, and thus one would fairly predict divisions. One could also predict some false turns. What startled me, however, was the pattern of decisions: Capitalism almost always won.").

45. Campaign finance laws typically do not include volunteer labor as either a contribution or expenditure. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-901(5)(b)(i) (2011) (excluding volunteer labor from the definition of contribution).

46. Not only may expenditures not be capped, but they may currently not be burdened, even incidentally, regardless of the identity of the speaker. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2828–29 (2011) (holding that campaign finance laws may not burden expenditures absent a compelling state interest); *Citizens United*, 130 S. Ct. at 883 ("There is no basis for the proposition that, in the political speech context, the Government may impose restrictions on certain disfavored speakers.").

47. *See* Buckley v. Valeo, 424 U.S. 1, 48–49 (1976); *see also* Davis v. Fed. Election Comm'n, 554 U.S. 724, 742 (2008).

48. *See* Randall v. Sorrell, 548 U.S. 230, 245–46 (2006).

reduce the skyrocketing costs of political campaigns.[49] However, under the current doctrine, none of these interests is constitutionally sufficient. The Court has plainly stated that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."[50]

Further, the "corruption" that may be properly prevented consists only of the quid pro quo "buying" of politicians, in which campaign contributions are exchanged for favors.[51] The ordinary definition of "corruption" might include the distorting effects of money from the economic marketplace on the democratic process.[52] However, *Citizens United v. Federal Election Commission* significantly narrowed the scope of the anti-corruption interest.[53] Therefore only one state interest—and a narrow one at that—may justify any laws regulating campaign finances: the interest in preventing real or apparent quid pro quo corruption.

The rationales for rejecting a broader set of compelling interests stem from sensitivity to a significant conflict of interest in election law. Laws typically are passed by legislators who often are subject to those laws in their own re-election campaigns. Allowing regulations to be written and put into law by the individuals being regulated is "dangerous business," especially when the subject of regulation is the process by which individuals may acquire positions of political power.[54] Although the risk of incumbent bias in campaign finance law has never been invoked explicitly as a rationale for narrowing the classification of compelling interests, Justice Scalia has raised it more than once at oral arguments.[55] Much of the supporting rationale behind rejecting alternative interests

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49. *See Buckley*, 424 U.S. at 57.

50. Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985).

51. *See* Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL'Y 283, 297–300 (2010).

52. The Merriam–Webster Dictionary lists the first definition of corruption merely as "impairment of integrity, virtue, or moral principle," with the narrower meaning of "inducement to wrong by improper or unlawful means (as bribery)" given as the third definition. *Corruption Definition*, MERRIAM–WEBSTER, http://www.merriam-webster.com/dictionary/corruption (last visited Nov. 28, 2011).

53. The only support for the anti-corruption interest extending to the undue influence of wealth on the democratic process appears to come from *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which *Citizens United* overruled. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 911–13 (2010); *see also* McComish v. Brewer, No. CV-08-1550-PHX-ROS, 2010 WL 2292213, at *9 n.16 (D. Ariz. Jan. 20, 2010) (analyzing Supreme Court precedent with regard to corruption), *rev'd sub nom.* McComish v. Bennett, 611 F.3d 510 (9th Cir. 2010), *rev'd sub nom.* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).

54. Davis v. Fed. Election Comm'n, 554 U.S. 724, 742 (2008).

55. In *Davis*, for example, Justice Scalia asked of the interest in leveling electoral opportunities: "Do you think we should trust our incumbent senators and representatives to level the playing field for us?" Transcript of Oral Argument at 13, *Davis*, 554 U.S. 724 (No. 07-320). Likewise, in reference to clean elections, he noted: "It seems to me it's very much pro-incumbent rather than anti-incumbent." Transcript of Oral Argument

is aimed at preventing legislators from slipping this pro-incumbent bias into campaign finance law.

For example, in *Davis v. Federal Election Commission* the Supreme Court considered the purported government interest in leveling electoral opportunities between wealthy self-financing candidates and those who must raise their funds from other sources.[56] It concluded that wealth is merely one political strength among many, such as family name recognition.[57] It therefore held that reducing the influence of wealth constitutes a judgment call as to which characteristics may contribute to electoral outcomes.[58] For Congress to make such a judgment call was deemed inappropriate because "[t]he Constitution . . . confers upon voters, not Congress, the power to choose the Members of the House of Representatives."[59]

As a matter of logic, this rationale applies with less force to laws passed directly by voters. The Supreme Court has stated that the constitutional analysis of a law does not depend on whether legislators or citizens enacted it.[60] However, at the very least, any rejection of a broader state interest based on the fear of a pro-incumbent bias should give way when a law has not been introduced by incumbents and lacks any empirical evidence of such bias.[61]

C. Campaign Contributions

Buckley v. Valeo contrasted the impermissible restrictions on expenditures with limitations on campaign contributions, which it held entail "only a marginal restriction" on speech.[62] The Supreme Court reaffirmed this distinction in 2000 and upheld restrictions on campaign contributions, even where those restrictions involve "'significant interference' with associational rights."[63]

Restricting contributions without restricting expenditures, however, has led to undesirable effects. For example, it has given rise to the modern phenomenon of the millionaire politician.[64] Spending more tends to give a

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at 45, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) (Nos. 10-238, 10-239).

56. *Davis*, 554 U.S. at 728–30.

57. *Id.* at 742–44.

58. *Id.* at 742.

59. *Id.* (citing U.S. CONST. art. I, § 2).

60. A 1981 campaign finance decision stated: "It is irrelevant that the voters rather than a legislative body enacted [the law in question], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981).

61. Arizona and Maine experienced no change in incumbent re-election rates after implementing clean elections. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-453, CAMPAIGN FINANCE REFORM: EARLY EXPERIENCES OF TWO STATES THAT OFFER FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES 29 (2003).

62. 424 U.S. 1, 20 (1976).

63. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387–88 (2000) (quoting *Buckley*, 424 U.S. at 25).

64. Esenberg, *supra* note 51, at 285.

candidate a competitive advantage, so where both candidates remain subject to the same contribution limits, the one with an extra reserve of personal funds has the competitive advantage. Congress attempted to correct this imbalance by raising the contribution limit for candidates with wealthy, self-funding opponents, but the Court struck down this measure as an unconstitutional burden on the self-funding candidates' rights to make political expenditures.[65]

The coupling of contribution limits with unlimited expenditures also figuratively gives campaigns an unlimited appetite but only a tiny spoon.[66] To outspend their opponents, candidates must fundraise again and again at the expense of other campaign activities.[67] This requires candidates to reach out to a broader base of support, but the communication with that base must always be accompanied by a request for more money if the candidate is to remain competitive.

Both the major proponents of campaign finance reform and its opponents argue that expenditures and contributions should be treated the same. Proponents favor permitting regulation of expenditures,[68] while opponents favor treating both contributions and expenditures alike as fully protected political speech.[69] The same debate has been expressed in opinions of the Supreme Court. In *Nixon v. Shrink Missouri Government PAC*, Justice Kennedy indicated in dissent that he would favor overruling *Buckley*'s "wooden formula,"[70] Justices Thomas and Scalia agreed in a separate dissent that *Buckley* ought to be overruled and contributions treated as speech,[71] and Justice Stevens introduced his concurrence with the words, "Money is property; it is not speech."[72]

Since the replacement of Chief Justice Rehnquist and Justice O'Connor with Chief Justice Roberts and Justice Alito, the Court has continued to reaffirm the constitutionality of contribution limits.[73] However, a passage within *Citizens United* indicates that Chief Justice Roberts and Justice Alito may now also favor overruling *Buckley*'s distinction and narrowing the authority of states to restrict contributions:

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65. Davis v. Fed. Election Comm'n, 554 U.S. 724, 742–44 (2008).

66. Issacharoff & Karlan, *supra* note 37, at 1711 ("The effect is much like giving a starving man unlimited trips to the buffet table but only a thimble-sized spoon with which to eat.").

67. *Id.*

68. *See* Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 732 (2011) ("[T]he Court's treatment of spending money as speech, rather than as conduct that communicates, is questionable.").

69. *See* Issacharoff & Karlan, *supra* note 37, at 1736 ("[I]f expenditures cannot realistically be limited, then we should consider removing the caps on contributions to candidates and political parties.").

70. 528 U.S. 377, 407, 409–10 (2000) (Kennedy, J., dissenting).

71. *Id.* at 410 (Thomas, J., dissenting).

72. *Id.* at 398 (Stevens, J., concurring).

73. *See, e.g.*, Davis v. Fed. Election Comm'n, 554 U.S. 724, 737 (2008) ("When contribution limits are challenged as too restrictive, we have extended a measure of deference to the judgment of the legislative body that enacted the law." (citations omitted)).

> With regard to large direct contributions, *Buckley* reasoned that they could be given "to secure a political *quid pro quo* . . . ." The practices *Buckley* noted would be covered by bribery laws if a *quid pro quo* arrangement were proved. The Court, in consequence, has noted that restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements. The *Buckley* Court, nevertheless, sustained limits on direct contributions . . . .[74]

This passage, joined by all five Justices deciding *Citizens United*, casts doubt on whether the Court continues to endorse the notion that "preventative" contribution limits may be justified by the anti-corruption interest. If the Court ultimately strikes down a law banning large contributions, it will resolve the tension between expenditures and contributions, but it will leave states with disclosure laws as the only constitutional form of traditional campaign finance reform.

D. The Limits of Traditional Campaign Finance Reform

Apart from the difficulties with traditional campaign finance laws, there is a lack of evidence that they effectively promote their stated ends.[75] Corporations and special interest groups circumvent low caps on contributions by bundling, the practice wherein an organization solicits many smaller donations from its members, encouraging them to donate to a particular candidate.[76] From the perspective of the candidate, this type of contribution lacks any meaningful distinction from a direct contribution from the organization.[77]

Even to the extent that campaign finance laws prevent corporations and special interest groups from contributing directly to campaigns, these entities retain the unfettered right to make independent expenditures advocating the election or defeat of candidates. These expenditures may result in the same undue influence on elected officials as contributions.[78] Independent expenditures may not be coordinated with the campaign directly, but in some cases, they may nonetheless result in more influence than direct contributions.[79]

The lifting of limitations on independent expenditures by corporations has special relevance to the public perception of negative campaigning from non-candidates.[80] Federal law requires candidates to approve of their own messages in order to prevent them from running especially negative or misleading ads.[81] Non-

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74. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 908 (2010) (citations omitted).

75. *See* Esenberg, *supra* note 51, at 328–29.

76. John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 616 (2005).

77. *Id.*

78. *Citizens United*, 130 S. Ct. at 965–66 (Stevens, J., dissenting).

79. *Id.* at 966.

80. *See Fresh Air* (NPR radio broadcast Oct. 7, 2010), *available at* http://www.npr.org/blogs/itsallpolitics/2010/10/07/130399554/fresh-air.

81. *See* 2 U.S.C. § 441d(d) (2006) (requiring candidates to state their approval of messages contained in radio and television advertisements).

candidates, however, have no such requirement and thus face fewer incentives to avoid those kinds of ads. The increase in non-candidate electioneering may therefore account for some of the seemingly pervasive negative tone of the 2010 elections.[82]

The limits of traditional campaign finance reform are illustrated by the Arizona example. In 1998, Arizona already had laws in place limiting contributions and requiring extensive disclosure.[83] Nonetheless, Arizona voters agreed that the campaign finance laws then in place allowed "elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction," and they cost the state "millions of dollars in the form of subsidies and special privileges for campaign contributors."[84] They responded by enacting the Citizens Clean Elections Act.

II. CLEAN ELECTIONS

"Clean elections" generally refers to a system of full public financing of elections.[85] Any system in which candidates may accept public funds with which to run their campaigns as long as they agree to spend no other funds qualifies as clean elections.[86]

The Arizona system works as follows: Candidates must choose early in their campaigns whether they will seek traditional, private financing or participate in clean elections.[87] Those who participate in the program run their campaigns without raising any funds from private contributors[88] and are only allowed to spend a limited amount of their own money on the campaign.[89] Instead, they receive two lump sums from the Clean Elections Commission to fund their campaigns: one for the primary election and one for the general election.[90] This

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82. Disclosure laws may provide some incentives as corporations do not want negative ads associated with their brands, but as recently as 2010, many groups found ways of circumventing those disclosure laws. *See Fresh Air*, *supra* note 80.

83. *See* Kanefield, *supra* note 1, at 15.

84. *See* ARIZ. REV. STAT. ANN. § 16-940(B)(1), (6) (2011).

85. *See* Crosland, *supra* note 34, at 1279–80.

86. *Id.*

87. There is no explicit timeframe for the election, but if a candidate accepts any contributions other than five-dollar qualifying contributions after declaring but prior to being certified as a participating candidate, that candidate is disqualified from participation in the program. As such, candidates must decide whether to participate no later than the end of the exploratory phase of their campaigns. *See* ARIZ. REV. STAT. ANN. § 16-947(B)(1) (2011).

88. *See id.* § 16-941(A)(1) ("[A participating candidate shall] not accept any contributions . . . ."). Candidates may raise limited amounts during the exploratory period, *id.* § 16-945, and they can collect five-dollar qualifying contributions after deciding to accept clean money, *id.* § 16-946, but neither of these may be spent during the campaign period.

89. A candidate may only spend up to $500 of personal funds. *Id.* § 16-941(A)(2).

90. *Id.* § 16-951. The lump-sum amounts for primary elections originally ranged from $12,921 (candidates for state legislature) to $638,222 (candidates for governor). *Id.* § 16-961(G). The spending limit for the general election is 150% of the primary election

public financing constitutes virtually everything they spend in furtherance of their campaigns.[91] Of course, the Commission could not afford to award these sums to frivolous candidacies, so candidates must first demonstrate public support by gathering some number of qualifying contributions of exactly five dollars each and turning those over to the Commission.[92] Where candidates attempt to cheat the system by accepting public funds and misspending them or by accepting private money, they face both civil and criminal penalties as well as disqualification from office.[93]

As a voluntary system, the clean elections program suffers from one important vulnerability: What should happen when participating candidates face nonparticipating opponents? Where their opponents may have access to large amounts of private money, even candidates in favor of public financing face incentives to opt out and fund their campaigns privately as well.[94] Prior to 2011, clean elections attempted to solve this problem by applying "matching funds."[95] In Arizona, this meant that if a nonparticipating opponent of a participating candidate spent more, or had more spent on his or her behalf, than the lump sums awarded to the participating candidate, then the Commission awarded an additional lump sum to the participating candidate equal to the excess amount minus 6%.[96] The matching funds ceased when the participating candidate received three times the amount of the original lump sum.[97]

The fund from which candidates receive their money does not come from ordinary tax revenue.[98] The primary source of funding is a 10% surcharge on traffic violations, although additional sources of money include a voluntary check-off on state tax returns and voluntary contributions.[99] The Commission donates excess funds into the Arizona general fund, so not only were Arizona citizens able

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amount. *Id.* § 16-961(H). These amounts are adjusted for inflation every two years. *Id.* § 16-959(A).

91. *Id.* § 16-941(A)(3)–(4).

92. *Id.* § 16-946(B) (defining "qualifying contribution"); *id.* § 16-950(D) (requiring the collection of between 200 (candidates for state legislature) and 4,000 (candidates for governor) qualifying contributions to qualify for public funds).

93. *Id.* § 16-942 (providing civil penalties and forfeiture of office for violations); *id.* § 16-943 (defining criminal penalties for knowing violations).

94. For a general illustration, note that during the 2008 presidential campaign, both candidates Barack Obama and John McCain favored public financing, yet Obama opted out of the Presidential Election Campaign Fund. This fund is similar to clean elections but without matching funds, and consequently Obama was able to outspend McCain, who participated in the system, by almost a four-to-one margin between September 2008 and election day. *See* Jim Rutenberg, *Nearing Record, Obama Ad Effort Swamps McCain*, N.Y. TIMES, Oct. 18, 2008, at A1.

95. *See* ARIZ. REV. STAT. ANN. § 16-952 (2011).

96. *Id.* § 16-952(A)–(B). The 6% reduction reflects that the nonparticipating candidate had to make some expenditure in order to fundraise that the participating candidate need not make. *See id.*

97. *Id.* § 16-952(E).

98. *See id.* § 16-954.

99. *Funding*, CITIZENS CLEAN ELECTIONS COMM'N, http://www.azcleanelections.gov/about-us/funding.aspx (last visited Jan. 12, 2011).

to move to a system of full public financing of elections without any increase in their tax liabilities, but the Clean Elections Commission has actually donated over $64 million back into the general fund.[100]

Although this Note focuses on Arizona's Citizens Clean Elections Act as a representative example, seven states and two municipalities have enacted clean elections programs.[101] Of the other state systems, Maine's bears the closest resemblance to the Arizona system.[102] The Connecticut system also tracks the Arizona system quite closely, differing primarily in its exclusion of candidates from "minor" political parties.[103]

Other state systems vary in more significant ways. The Florida system, for example, allowed nonparticipating candidates to outspend participating candidates, but once the nonparticipating candidate reached a trigger amount—almost $25 million in 2010—the public financing system grants the participating candidate an additional subsidy.[104]

A. Constitutionality of Clean Elections in General

Shortly after the Citizens Clean Elections Act's inception, it faced challenges in state court. Immediately following its enactment, a political committee and several individuals brought suit to enjoin its enactment on state constitutional grounds.[105] The Arizona Supreme Court found some aspects of the Act unconstitutional and ordered all such provisions severed.[106] For example, judicial involvement in the appointment of members of the Clean Elections Commission was held to violate separation of powers principles in the Arizona Constitution.[107] However, the Act as a whole survived.[108]

Subsequently, a state lawmaker challenged the Act's primary source of funding on free speech grounds.[109] After receiving a $27 parking fee, State Legislator Steve May refused to pay the $2.70 clean elections surcharge, arguing that it constituted compelled speech for candidates with whom he disagreed.[110] A

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100. *Funding*, CITIZENS CLEAN ELECTIONS COMM'N, http://www.azcleanelections.gov/about-us/funding.aspx (last visited Feb. 16, 2012).

101. As mentioned previously, Arizona, Connecticut, Maine, Massachusetts, New Mexico, North Carolina, and Vermont have some sort of clean elections system; likewise, both Portland and Albuquerque have similar clean elections systems in place. *See supra* note 34.

102. *See* ME. REV. STAT. tit. 21-A, § 1125(9) (2011).

103. *See* CONN. GEN. STAT. § 9-702(a) (2011).

104. *See* Scott v. Roberts, 612 F.3d 1279, 1281 (11th Cir. 2010) (citing FLA. STAT. §§ 106.34, 106.355 (2010)).

105. Citizens Clean Elections Comm'n v. Myers, 1 P.3d 706, 709 (Ariz. 2000) (arguing that the Citizens Clean Elections Act violated separation of powers).

106. *Id.* at 715.

107. *Id.*

108. *Id.* (severing the unconstitutional portions and remanding).

109. May v. McNally, 55 P.3d 768, 770 (Ariz. 2002).

110. *Id.*

line of prior U.S. Supreme Court cases had held that groups of individuals could not be compelled to fund speech they disagreed with.[111]

However, *Buckley* expressly exempted public financing of elections with tax revenue from this sort of objection.[112] At issue in *Buckley* was the Presidential Election Campaign Fund, which provided public financing for the presidential election.[113] That fund received its revenue from voluntary, one-dollar tax check-offs.[114] Plaintiffs in *Buckley* argued that this scheme was too broad.[115] Instead, they claimed, individuals should be able to specify to which candidates or political parties their dollars went; otherwise they were compelled to support the speech of those with whom they disagreed.[116]

The Court in *Buckley* not only upheld the breadth of this funding mechanism, it suggested that it actually was narrower than it needed to be.[117] The tax check-off was just another government appropriation, and the mechanism it employed determined only how much the government would appropriate.[118] Apparently, had it so desired, Congress could have simply funded the Presidential Election Campaign Fund from general revenue.[119] No First Amendment violation occurs simply because an individual's tax dollars go to something the individual dislikes.[120]

With *Buckley* as precedent, the Arizona Supreme Court distinguished the clean elections surcharges from impermissible compelled speech.[121] Indeed, *Buckley*'s praise of public financing makes challenging such systems especially difficult. Most significantly, the U.S. Supreme Court stated that:

> Subtitle H is 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, Subtitle H furthers, not abridges, pertinent First Amendment values.[122]

The goal of the First Amendment is to secure the "widest possible dissemination of information from diverse and antagonistic sources,"[123] so the

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111. The Arizona Supreme Court specifically cited to *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). *See May*, 55 P.3d at 771.

112. *See* Buckley v. Valeo, 424 U.S. 1, 90–92 (1976).

113. *Id.* at 86–90.

114. *Id.* at 86. The check-off amount has since been raised to three dollars. 26 U.S.C. § 6096(a) (2006).

115. *Buckley*, 424 U.S. at 91.

116. *Id.*

117. *Id.* at 91–92.

118. *Id.* at 91.

119. *See id.* ("But the appropriation to the Fund in § 9006 is like any other appropriation from the general revenue . . . .").

120. *See id.* at 91–92.

121. May v. McNally, 55 P.3d 768, 773 (Ariz. 2002).

122. *Buckley*, 424 U.S. at 92–93 (footnotes omitted). "Subtitle H" refers to the public financing provisions that the plaintiffs in *Buckley* challenged. *Id.* at 86.

123. *Id.* at 49 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964)).

enabling of more voices in the electoral arena through public funding will generally not violate the First Amendment.[124]

B. The Strengths of Clean Elections

With the exception of matching funds provisions, as long as participation in public financing remains voluntary and not coerced, it burdens no speech at all.[125] Accordingly, it may constitutionally seek to accomplish any rational goal.[126] Candidates running on public money do not accept any campaign contributions, so the system works to prevent quid pro quo corruption as to them. In addition, it accomplishes a number of ancillary goals. A study by the Center for Governmental Studies found that clean elections systems, including the Arizona system, expand the number and diversity of candidates, increase competition among candidates, control the costs of elections, increase opportunities for public participation in elections, and help elect candidates representing a broader segment of the population.[127]

Arizona's Citizens Clean Elections Act also provides a means of enhancing voter education. Participating candidates must agree to participate in debates held by the Clean Elections Commission to which all ballot-qualified candidates are invited.[128] The Commission also publishes a pamphlet containing pictures and statements from any ballot-qualified candidate who wishes to submit to it.[129] The Commission has even published statements from candidates in its pamphlet who use their allotted space almost exclusively to detail why they refuse to participate in clean elections and believe it should be repealed.[130]

C. The Weaknesses of Clean Elections

Of course, clean elections do not achieve "cosmic justice in the realm of campaign finance."[131] For example, some hoped that clean elections would increase the participation of women in politics, but evidence suggests that it does

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124. *But see infra* Part III.

125. As a matter of logic, a person who voluntarily agrees to stay silent without coercion cannot argue he or she was censored. *See Buckley*, 424 U.S. at 95.

126. Even a law that burdens speech may attempt to accomplish non-compelling goals as long as its primary goal is a compelling one, such as the anti-corruption rationale. *Id.* at 26 ("It is unnecessary to look beyond the Act's primary purpose . . . in order to find a constitutionally sufficient justification . . . .").

127. *See* STEVEN M. LEVIN, CTR. FOR GOVERNMENTAL STUDIES, KEEPING IT CLEAN: PUBLIC FINANCING IN AMERICAN ELECTIONS 4–12 (2006), *available at* http://users.polisci.wisc.edu/kmayer/466/Keeping_It_Clean.pdf.

128. ARIZ. REV. STAT. ANN. § 16-956(A)(2) (2011).

129. *Id.* § 16-956(A)(1).

130. The 2006 candidate statement pamphlet included a statement by nonparticipating Libertarian gubernatorial candidate Barry Hess in which he used most of his statement to decry the system, explaining that he refused to run on "stolen money." CITIZENS CLEAN ELECTIONS COMM'N, CANDIDATE STATEMENT PAMPHLET – GENERAL ELECTION 12 (2006), *available at* http://www.azcleanelections.gov/2005-2006-docs/General_Candidate_Statement_Pamphlet.sflb.ashx.

131. Esenberg, *supra* note 51, at 284.

not do so.[132] Two major criticisms have been raised against clean elections: First, clean elections fail to account for non-candidate expenditures. Second, clean elections contribute to polarization through the election of less mainstream candidates. Evidence plainly suggests that clean elections do nothing to control independent expenditures by corporations and special interests.[133] In fact, when candidates have equal funding for their own expenditures, the competitive advantage gained by non-candidate independent expenditures may be exaggerated.[134] Indeed, at least one study has found that non-candidate electioneering increased in both Arizona and Maine following the adoption of clean elections systems.[135]

However, in the wake of *Citizens United*, non-candidate expenditures will likely remain an enduring feature of any election system.[136] Prior to *Citizens United*, states remained free to limit the political expenditures of corporations as long as they did not limit personal expenditures.[137] However, *Citizens United* removed that distinction, extending the First Amendment right to make political expenditures without limit to corporations.[138] The result has been an influx of non-candidate electioneering that cannot be constitutionally restricted.[139] Various individuals and groups, including President Obama, have called for overturning *Citizens United*—by constitutional amendment if necessary—but unless and until such efforts are realized, the prominence of independent expenditures will remain inevitable, with or without clean elections.[140]

The claim that clean elections contribute to polarization has little empirical support.[141] Scholars have identified a number of other causes of

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132. *See* LAURA RENZ, CTR. FOR COMPETITIVE POLITICS, DO "CLEAN ELECTION" LAWS INCREASE WOMEN IN STATE LEGISLATURES? 1–2 (2008), *available at* http://www.campaignfreedom.org/docLib/20080826_Issue_Analysis_3.pdf.

133. LEVIN, *supra* note 127, at 17–18.

134. *See id.*

135. *Id.* On the other hand, under the reasoning in *Citizens United*, this is better characterized as a strength. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 910 (2010) ("The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.").

136. *See* LEVIN, *supra* note 127, at 18.

137. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 654–55 (1990), *overruled by Citizens United*, 130 S. Ct. 876.

138. *Citizens United*, 130 S. Ct. at 913.

139. *See Fresh Air*, *supra* note 80.

140. *See* Sam Favate, *Obama Supports Constitutional Amendment on Campaign Finance 'If Necessary,'* WALL ST. J. L. BLOG (Feb. 7, 2012, 12:09 PM).

141. Arizona District Court Judge Neil Wake raised this criticism at an event held at the University of Arizona James E. Rogers College of Law. Judge Wake admitted that he had merely "seen comments that some people think" clean elections were "one of the several reasons" for polarization, although he admitted he did not know if it were true. The 13th Annual Constitution Day Supreme Court Review, held by the William H. Rehnquist Center on the Constitutional Structures of Government, at 21:12 (Sept. 16, 2011) [hereinafter Supreme Court Review] (video available at http://mediasite.law.arizona.edu/mediasite/Viewer/?peid=b92f0d41e1f442c59036ee15b08c78701d).

polarization.[142] The purported connection between clean elections and polarization rests upon the claim that candidates with ties to greater fundraising will be more mainstream because major funders are generally averse to radical viewpoints. Judge Neil Wake characterized this as candidates being elected despite having "no community support."[143] However, even ignoring the demonstration of some support through gathering qualifying contributions, candidates must receive more votes than their opponents to be elected. The criticism therefore really amounts to a claim that in a level electoral arena with a diverse group of candidates, voters make poor choices more often than if campaign backers were able to distort the pool to better reflect their interests. Even assuming that voters are incompetent in this sense, it would be strange to argue that, to the extent voters need some sort of regulation narrowing their choices, campaign funders represent a legitimate source of such regulation.

Although these criticisms should not be wholly dismissed, the perfect should not be the enemy of the good. Arizona's system demonstrates that clean elections can succeed where other campaign finance rules fail, and they even go above and beyond the traditional goals of campaign finance reform. It does this without any increase in general tax liabilities. The issue should not be whether such a system is perfect, but only whether it is better than its traditional campaign finance reform alternatives.

In 2011, however, the Supreme Court threw the continued viability of clean elections systems into doubt when it held that matching funds provisions violate the First Amendment. Matching funds are not an essential part of clean elections,[144] but they do serve an important function.

III. *ARIZONA FREE ENTERPRISE*

When candidates choose to participate in clean elections, they agree to limit their expenditures to the amounts of the disbursements. As a result, they run a significant risk of being outspent by a nonparticipating opponent. Most public financing systems addressed this issue by the use of matching funds.[145] Again, if

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142. *See generally* Geoffrey C. Layman & Thomas M. Carsey, *Party Polarization and Party Structuring of Policy Attitudes: A Comparison of Three NES Panel Studies*, 24 POL. BEHAV. 199 (2002) (evaluating the psychological causes of polarized voting behavior); David C. King, Congress, Polarization, and Fidelity to the Median Voter (Mar. 10, 2003) (unpublished manuscript) (on file with *Arizona Law Review*) (discussing the effects of district demographics and campaign strategies).

143. Supreme Court Review, *supra* note 141, at 22:35.

144. *See infra* Part IV.B.

145. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-952 (2011) (awarding dollar-for-dollar match of money spent by nonparticipating opponents); FLA. STAT. §§ 106.34, 106.355 (2011) (participating candidates receive a subsidy when nonparticipating opponent spends above a trigger amount); ME. REV. STAT. tit. 21-A, § 1125(9) (2011) (participating candidate received dollar-for-dollar match of monies raised by nonparticipating opponent after exceeding the initial disbursement amount); N.C. GEN. STAT. § 163-278.67 (2011) (participating judicial candidates receive dollar-for-dollar matching funds after opponent exceeds a trigger amount); CONN. GEN. STAT. § 9-713 (Supp. 2006) (repealed 2010) (awarding 25% of the initial grant when participating candidate is outspent by

outspent by a nonparticipating opponent, participating candidates receive additional funds to ensure they remain competitive.

In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Supreme Court ruled that Arizona's matching funds provision violated the First Amendment by unduly burdening the right of nonparticipating candidates to make unlimited expenditures.[146] Similar challenges had been brought as early as 1994.[147] Courts hearing the earlier challenges easily dismissed them as a "claim of a First Amendment right to outraise and outspend an opponent," and held that the First Amendment was not implicated at all.[148] Yet by 2011, when the Supreme Court granted certiorari to hear *Arizona Free Enterprise*, most lower courts had reversed course, and many observers correctly guessed that the Supreme Court would strike down the matching funds provisions.[149] To analyze what this holding means for campaign finance reform requires a brief look at the cases leading up to *Arizona Free Enterprise*, an examination of the Court's reasoning, and an understanding of what the Court held as well as what it did not.

A. The Lead-up to **Arizona Free Enterprise**

*1. Pre-*Davis *Cases*

Until 2008, challenges to matching funds provisions received virtually no support in the courts. One early Eighth Circuit Court of Appeals case, *Day v. Holahan*, struck down a matching funds provision of a Minnesota public financing law on First Amendment grounds,[150] but it was quickly called into question by another Eighth Circuit case upholding a similar matching funds provision of another Minnesota public financing law over a dissent.[151]

The First Circuit Court of Appeals, in a challenge to Maine's matching funds provision, dismissed the plaintiffs' argument as "a claim of a First Amendment right to outraise and outspend an opponent."[152] Maine placed no direct limit on expenditures; as in Arizona, all candidates may decline to participate in the program, and once doing so, they may spend as much as they wish without restriction.[153] The First Circuit construed the matching funds provision not as indirectly restricting speech, but as *enabling* responsive speech.[154]

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nonparticipating candidate); MINN. STAT. § 10A.25 subd. 13 (Supp. 1993) (repealed 1999) (participating candidates have raised expenditure limits and receive extra public funds when nonparticipating candidates spend above a certain amount).

146. 131 S. Ct. 2806, 2828–29 (2011).

147. *See, e.g.*, Day v. Holahan, 34 F.3d 1356, 1362–63 (8th Cir. 1994).

148. Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445, 464 (1st Cir. 2000).

149. *See* Esenberg, *supra* note 51, at 318–25.

150. 34 F.3d at 1362–63.

151. Rosenstiel v. Rodriguez, 101 F.3d 1544, 1557 (8th Cir. 1996).

152. *Daggett*, 205 F.3d at 464.

153. *Id.* at 450–51.

154. *Id.* at 464.

No First Amendment interest was implicated because "there exists no right to speak 'free from vigorous debate.'"[155]

The Fourth Circuit Court of Appeals, in a challenge to a matching funds provision of North Carolina's publicly funded judicial elections, considered the possibility of self-censorship in response to matching funds, but distinguished self-censorship from direct government censorship.[156] Here, the court acknowledged that matching funds may provide incentives to make fewer expenditures, but it considered mere incentives to be a matter of political strategy, not censorship.[157]

These early cases stand for the proposition that enabling unwanted speech cannot be considered a First Amendment burden.[158] In 2010, this argument convinced at least one member of the Ninth Circuit Court of Appeals.[159] However, opinions diverged over the tenability of this proposition in 2008, when the Supreme Court decided *Davis v. Federal Election Commission*.[160]

2. Davis *and Its Progeny*

Davis struck down the "Millionaires' Amendment" to the Bipartisan Campaign Reform Act of 2002.[161] The Millionaires' Amendment involved a novel way of restricting campaign contributions to address the "millionaire politician" problem.[162] If a candidate made expenditures of personal funds exceeding $350,000, the candidate's opponents were permitted increased contribution limits.[163] This, the Court held, placed a severe restriction on the self-funded candidate's ability to make expenditures, an act of fully protected speech.[164]

Davis gave rise to a dispute over interpreting how the regulation burdened the self-funding candidate's ability to make expenditures. The severe restriction in *Davis* could be best understood in two ways: narrowly, as the imposition of asymmetrical contribution limits, which would likely be unconstitutional even if not triggered by speech; or more broadly, as providing any substantial benefit to a political opponent at all. The dispute over *Davis*'s application to matching funds largely centered on these distinct ways of reading the case.

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155. *See id.* (quoting Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 14 (1986)).

156. N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427, 438 (4th Cir. 2008).

157. *Id.*

158. *See id.* at 438–39.

159. McComish v. Bennett, 611 F.3d 510, 527 (9th Cir. 2010) (Kleinfeld, J., concurring), *rev'd sub nom.* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).

160. 554 U.S. 724 (2008).

161. *Id.* at 744–45.

162. *Id.* at 728–29.

163. *Id.*

164. *Id.* at 739 ("[The Bipartisan Campaign Reform Act] imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right.").

The Court hinted that its holding may extend to matching funds provisions of public financing law by favorably citing *Day v. Holahan*, an early Eighth Circuit decision striking down such a provision.[165] Even though *Day* had since been called into question, and even though two other circuit courts had explicitly rejected *Day*, the Court in *Davis* nonetheless singled it out as an example of how campaign finance laws may force candidates to "shoulder a special and potentially significant burden" for exercising their rights.[166] Although that line could be read as dictum, it has since been expanded to become the central holding of *Davis*.[167]

Shortly after *Davis*, legal commentators began buzzing about its application to matching funds provisions of clean elections systems.[168] When the *Harvard Law Review* published its analysis of leading cases, the publication took the position that the dichotomy between penalties and subsidies would leave such systems unaffected.[169] Later, Richard Esenberg of the Election Law Blog argued that this distinction would not save clean elections, and asserted that public campaign financing would soon face its "lonely death" along with so many of its campaign finance reform brothers.[170] Court challenges soon followed.

When a challenge came to the matching funds provision in Florida's system of public financing, the Eleventh Circuit Court of Appeals held that the law severely burdened speech because it enabled participating candidates to "speak in support of their own candidacies" and "raise[d] the cost of their nonparticipating opponent's speech in support of his candidacy."[171] It asserted that "what triggered strict scrutiny [in *Davis*] was the grant of a competitive advantage—an increase in

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165. *See id.* (citing Day v. Holahan, 34 F.3d 1356, 1359–60 (8th Cir. 1994)).

166. *Id.*

167. *See infra* Part III.B.

168. *Compare* Eliza Newlin Carney, *Campaign Finance Laws Under Siege*, NAT'L J. (July 28, 2008), http://www.nationaljournal.com/njonline/rg_20080728_5842.php (questioning the continued viability of public finance laws after *Davis*), Rick Esenberg, Davis v. FEC*: The Day's Most Important Decision*, SHARK & SHEPHERD BLOG (June 26, 2008, 1:22 PM), http://sharkandshepherd.blogspot.com/2008/06/davis-v-fec-days-most-important.html (arguing that *Davis* will end matching funds provisions in clean elections systems), *and* Rick Hasen, *Initial Thoughts on* FEC v. Davis*: The Court Primes the Pump for Striking Down Corporate and Union Campaign Spending Limits and Blows a Hole in Effective Public Financing Plans*, ELECTION L. BLOG (June 26, 2008, 7:55 AM), http://electionlawblog.org/archives/011095.html (stating that *Davis* calls all matching funds provisions of public financing laws into question), *with* Bob Bauer, *Something To Be Said for* Davis*?*, MORE SOFT MONEY HARD L. WEB UPDATES (July 3, 2008), http://www.moresoftmoneyhardlaw.com/news.html?AID=1295 (arguing that clean elections matching funds are distinguishable from the Millionaires' Amendment), *and* Paul S. Ryan, *Public Financing After* Davis*: "The Reports of My Death Are Greatly Exaggerated*,*"* CAMPAIGN LEGAL CENTER BLOG (July 23, 2008), http://www.clcblog.org/blog_item-239.html (arguing that *Davis* may not have a significant impact on clean elections matching funds).

169. *The Supreme Court, 2007 Term—Leading Cases*, 122 HARV. L. REV. 375, 385 (2008).

170. Esenberg, *supra* note 51, at 284–90.

171. Scott v. Roberts, 612 F.3d 1279, 1291 (11th Cir. 2010).

the ability of Davis's opponent to speak."[172] According to the Eleventh Circuit, enabling responsive speech does not further important First Amendment values.[173] In fact, the First Amendment forbids it.[174]

The Second Circuit Court of Appeals, in a challenge to Connecticut's clean elections law, also adopted the broad reading of *Davis* without acknowledging an alternative.[175] It held that the law's matching funds provision could not stand.[176] Also, the court read *Davis* to mean that, as a matter of law, the interest in preventing real or apparent corruption could not serve to uphold any law burdening the expenditure of personal funds.[177]

When a group of incumbents, candidates, and special interests challenged Arizona's matching funds provision, they argued that *Davis* compelled striking it down.[178] The district court agreed, although it made clear that it found the result unsatisfactory.[179] The court referred to the result as "illogical"[180] and "difficult to establish,"[181] and described the Court's finding of a substantial burden in *Davis* as an "ipse dixit," unsupported by even "the slightest veneer of reasoning to shield the obvious fiat by which it [is] reached."[182] Nonetheless, the district court felt compelled by *Davis* to rule that matching funds subjected the plaintiffs to a substantial burden.[183]

On appeal, the Ninth Circuit agreed that the result below was illogical, but unlike the district court, it concluded that the Supreme Court had not intended any such a result with *Davis*.[184] Accordingly, it adopted the narrow interpretation of *Davis*.[185] The burden at issue in *Davis*, according to *McComish v. Bennett*, was the imposition of an asymmetrical regulatory scheme designed to disadvantage the rich for their speech, not the granting of a competitive advantage to a political opponent.[186] Arizona's law imposes no asymmetrical regulations and does not aim

172. *Id.* at 1291–92 (citing Davis v. Fed. Election Comm'n, 554 U.S. 724, 739 (2008)).

173. *See id.*; *see also* Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

174. *Scott*, 612 F.3d at 1291–92.

175. *See* Green Party of Conn. v. Garfield, 616 F.3d 213, 244–48 (2d Cir. 2010).

176. *Id.* The Connecticut law is virtually identical to the Arizona law in all respects relevant to the Second Circuit's analysis in that case. *See id.* at 221–22.

177. *Id.* at 245–46.

178. McComish v. Brewer, No. CV-08-1550-PHX-ROS, 2010 WL 2292213, at *7 (D. Ariz. Jan. 20, 2010), *rev'd sub nom.* McComish v. Bennett, 611 F.3d 510 (9th Cir. 2010), *rev'd sub nom.* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).

179. *Id.* at *7–9.

180. *Id.* at *7 (citing Buckley v. Valeo, 424 U.S. 1, 49 (1976)).

181. *Id.* at *8.

182. *Id.* (alteration in original) (quoting Francis v. Henderson, 425 U.S. 536, 552 (1976) (Brennan, J., dissenting)).

183. *Id.*

184. McComish v. Bennett, 611 F.3d 510, 521 (9th Cir. 2010) ("[W]e conclude that *Davis* is easily and properly distinguished from the case at bench."), *rev'd sub nom.* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).

185. *Id.* at 522.

186. *Id.*

to disadvantage the rich, so the Ninth Circuit distinguished it from *Davis* and upheld it.[187]

B. The Final Word on Matching Funds' Constitutionality

In *Arizona Free Enterprise*, the Supreme Court held the clean elections matching funds provision unconstitutional.[188] The proceeding commentary on the case largely focused on its effect on clean election systems, with some arguing the case would have limited application outside of those laws.[189] However, three aspects of the case are particularly notable to campaign finance jurisprudence in general. First, *Davis* must be interpreted broadly, so that expenditures cannot be capped, and they may not be disfavored with incentives. Second, laws that burden expenditures may never be justified by the anti-corruption interest, in effect rendering them per se unconstitutional. Finally, the justification for upholding disclosure requirements in *Citizens United* may not be extended to nondisclosure regulations.

1. Laws May Not Disfavor Expenditures

When the Court decided *Citizens United* in 2010, widespread public outrage followed.[190] Legislators at various levels attempted to respond with additional campaign finance reform legislation to address public concern over the case without running afoul of the Court's hardline rule prohibiting any limits on expenditures, irrespective of the speaker's identity.[191] In *Arizona Free Enterprise*, the Court effectively put an end to any attempts at creative solutions. It extended the holding in *Citizens United* to regulations that merely disfavor expenditures.

To reach this result, the Court adopted the broad reading of *Davis* over a forceful dissent by Justice Kagan arguing for a narrower interpretation.[192] In fact, the Court went beyond the broad reading of *Davis* by holding that providing a substantial benefit to one candidate not only burdens that candidate's opponents, but also the opponents' supporters.[193] Connecting the burden in *Davis* to the rule

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187. *Id.*

188. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2813 (2011). The name of the case changed as *Arizona Free Enterprise* was a consolidated case with *McComish v. Bennett*. The opinion thus abandoned its tidy, two-word name in favor of a name consisting of 16 syllables and in which the word "club" appears twice.

189. *See* Supreme Court Review, *supra* note 141, at 14:06.

190. For example, shortly after the decision, a group organized to push for a constitutional amendment reversing it. *See* Kaitlin Sopoci-Belknap et al., *An Amendment to End Corporate Rule*, MOVE TO AMEND (Nov. 23, 2011), http://www.movetoamend.org/news/amendment-end-corporate-rule. The decision also received criticism from President Obama in the 2010 State of the Union address. *See* Alan Silverleib, *Gloves Come Off After Obama Rips Supreme Court Ruling*, CNN.COM (Jan. 28, 2010), http://articles.cnn.com/2010-01-28/politics/alito.obama.sotu_1_supreme-court-court-s-conservative-majority-high-court.

191. *See, e.g.*, Democracy Is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, H.R. 5175, 111th Cong. (2010).

192. *Ariz. Free Enter.*, 131 S. Ct. at 2839–40 (Kagan, J., dissenting).

193. *Id.* at 2819–20 (majority opinion).

announced in *Citizens United*, the Court held that giving non-candidates the choice to "trigger matching funds, change [their] message, or do not speak . . . contravenes 'the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.'"[194] Of course, matching funds did not actually limit non-candidate expenditures; it merely tied them to additional subsidies to participating candidates when non-candidates opposed them. However, the Court again cited *Davis* for the proposition that such subsidies severely burden the right of non-candidates to spend money.[195]

Therefore, after *Arizona Free Enterprise*, states contemplating solutions to the issues imposed on them by the Court's decision in *Citizens United* must watch out that they not only do not cap expenditures, but also do not burden them in a way analogous to *Davis*. Any such burden would be subject to strict scrutiny.

2. Expenditure Burdens Are Per Se Unconstitutional

Davis held that laws disfavoring personal expenditures are unjustified by the anti-corruption interest, because candidates do not corrupt themselves by spending their own money.[196] The Second Circuit interpreted this to mean that any law burdening personal expenditures could not be justified by the anti-corruption interest.[197]

However, even assuming that clean elections matching funds did burden both personal and independent expenditures, it could arguably remain constitutional after *Davis* provided it did so incidentally as part of a larger regulatory scheme that combated real or apparent corruption. For example, in a state with clean elections but without matching funds, a candidate might prefer to participate rather than raise potentially corrupting funds from contributors. However, if the candidate faces a nonparticipating opponent who happens to be a millionaire, the candidate may feel pressured to opt out and accept the contributions to remain competitive. Thus, matching funds tied to personal expenditures may continue to serve the anti-corruption interest by giving candidates a reason to participate when they otherwise would not. However, the Court rejected this argument in *Arizona Free Enterprise*:

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194. *Id.* at 2820 (quoting Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995)).

195. *See id.*

196. Davis v. Fed. Election Comm'n, 554 U.S. 724, 740–41 (2008). Expenditure of personal funds and independent expenditures by non-candidates are equally unjustified by the anti-corruption interest. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 910 (2010).

197. A close reading of the analysis of the burden in *Davis* reveals that the Court made a statement less categorical than the one apparently quoted by the Second Circuit. *Compare Davis*, 554 U.S. at 740 (referring to "*[t]he* burden imposed *by* § 319(a) on the expenditure of personal funds" (emphasis added)), *with* Green Party of Conn. v. Garfield, 616 F.3d 213, 245 (2d Cir. 2010) (referring to "*a* 'burden'" on such expenditures (emphasis added) (quoting *Davis*, 554 U.S. at 740)).

> But even if the ultimate objective of the matching funds provision is to combat corruption—and not "level the playing field"—the burdens that the matching funds provision imposes on protected political speech are not justified.
>
> Burdening a candidate's expenditure of his own funds on his own campaign does not further the State's anticorruption interest. Indeed, we have said that "reliance on personal funds *reduces* the threat of corruption" . . . because "the use of personal funds reduces the candidate's dependence on outside contributions . . . ."[198]

In dissent, Justice Kagan pointed out that no one claimed the burden on expenditures itself prevented real or apparent corruption.[199] Rather, matching funds served to attract candidates to participate in the first place.[200] Nonetheless, the distinction between direct and incidental burdens made no difference to the majority. After *Arizona Free Enterprise*, any law that burdens expenditures cannot be justified by the anti-corruption interest. That interest is the only one identified thus far as sufficiently compelling to uphold campaign finance laws.[201] Therefore, any campaign finance law burdening expenditures, even incidentally, is effectively per se unconstitutional.

Further, plaintiffs may find a burden within a campaign finance law without presenting any empirical evidence of such a burden. No plaintiff in *Arizona Free Enterprise* could point to an instance where they reduced speech to avoid matching funds.[202] One candidate claimed to have been burdened by matching funds, yet could not recall if he had ever triggered them.[203] One incumbent plaintiff argued that matching funds should not be available despite accepting them in 2004 when he won his seat in the Arizona House of Representatives.[204] The plaintiffs claimed their speech had been burdened, but produced nothing in support of such a burden in the face of this rebutting evidence.

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198. 131 S. Ct. at 2826 (citations omitted).

199. *Id.* at 2843 n.12 (Kagan, J., dissenting).

200. *Id.*

201. *See supra* Part I.B.

202. McComish v. Bennett, 611 F.3d 510, 523 (9th Cir. 2010) ("No Plaintiff, however, has pointed to any specific instance in which she or he has declined a contribution or failed to make an expenditure for fear of triggering matching funds."), *rev'd sub nom. Ariz. Free Enter.*, 131 S. Ct. 2806.

203. Dean Martin, former State Treasurer, had in fact triggered matching funds in 2006, but if the event constituted any burden on his campaign, it was apparently not memorable. McComish v. Brewer, No. CV-08-1550-PHX-ROS, 2010 WL 2292213, at *5 (D. Ariz. Jan. 20, 2010), *rev'd sub nom. McComish*, 611 F.3d 510, *rev'd sub nom. Ariz. Free Enter.*, 131 S. Ct. 2806; *see also All Candidates – Primary Election*, CITIZENS CLEAN ELECTIONS COMM'N [hereinafter *Primary Election*], http://www.azcleanelections.gov/election-data/search.aspx (click "2004" Election Year filter; browse candidate listing by using "Next" hyperlink) (last visited Jan. 3, 2012).

204. Rick Murphy was awarded $7,393.16 in matching funds during the 2004 Republican primary election. *Primary Election*, *supra* note 203. One of Mr. Murphy's campaign consultants opined that he "would not have been elected [in 2004] if Clean Elections did not exist." *McComish*, 2010 WL 2292213, at *5 n.10 (alteration in original).

The Court responded by dismissing any need for empirical support at all to find a burden.[205]

3. Disclosure Laws Are Unique

In Part IV of *Citizens United*, the Court, in a section joined by eight of the Justices, upheld mandatory disclosure laws for non-candidate expenditures.[206] There the Court held:

> Disclaimer and disclosure requirements *may burden the ability to speak*, but they "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking." The Court has subjected these requirements to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest.[207]

On its face, this establishes the general rule that campaign finance laws that "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking," are subject to a lower level of scrutiny, even if they "may burden the ability to speak." Arizona argued, and the Ninth Circuit held, that this general rule would apply to Arizona's matching funds provision.[208] Nonparticipating candidates and their supporters faced no ceiling and were not stopped from speaking. Accordingly, the matching funds provision should have been subject only to "exacting scrutiny."

However, the Court in *Arizona Free Enterprise* applied strict scrutiny, not exacting scrutiny.[209] The Court distinguished matching funds from disclosure laws with one curt sentence: "A political candidate's disclosure of his funding resources does not result in a cash windfall to his opponent, or affect their respective disclosure obligations."[210] Apparently the Court believes a cash windfall to an opponent is more analogous to a ban, which would be subject to strict scrutiny, than to the burdens accompanying disclosure laws, which would be subject to intermediate scrutiny. However, no rationale has yet been articulated for why the burden of matching funds is different from the burden of disclosure laws. Both allow any amount of speech but tie the speech to a consequence undesirable to the speaker.

At least one district court has applied this test in a novel context.[211] In a challenge to a state law requiring certain registration and reporting activities of corporations engaged in independent expenditures, a federal district court in Iowa

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205. *Ariz. Free Enter.*, 131 S. Ct. at 2823 ("As in *Davis*, we do not need empirical evidence to determine that the law at issue is burdensome." (citing Davis v. Fed. Election Comm'n, 554 U.S. 724, 738–40 (2008))). Recall that Arizona District Court Judge Rosalyn Silver referred to *Davis* as an "ipse dixit." *McComish*, 2010 WL 2292213, at *8.

206. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913–16 (2010).

207. *Id.* at 914 (emphasis added) (citations omitted).

208. *Ariz. Free Enter.*, 131 S. Ct. at 2822.

209. *Id.* at 2824.

210. *Id.* at 2822.

211. *See, e.g.*, Iowa Right to Life Comm., Inc. v. Tooker, 795 F. Supp. 2d 852 (S.D. Iowa 2011).

recited the test from Part IV of *Citizens United*—that a burden on campaign expenditures may be constitutional so long as it does not impose any ceiling on expenditures or prevent anyone from speaking—alongside the mandate from *Arizona Free Enterprise* that the law not "substantially burden speech by 'impos[ing] an unprecedented penalty on [those] who robustly exercise[] [their] First Amendment rights.'"[212] It then concluded that the law in question fell into the former category and not the latter.[213] It did not explain why.[214] After all, the Supreme Court has provided no coherent way of determining *why* disclosure laws are subject to a lower standard of scrutiny than other campaign finance laws. They are simply an anomaly.

4. What Arizona Free Enterprise *Did Not Hold*

In light of the above analysis, the Court's decision in *Arizona Free Enterprise* could reasonably be considered quite broad. Importantly, however, there are two respects in which the decision remains narrow: The Court did not undermine *Buckley*'s distinction between contributions and expenditures, nor did it question the wisdom of public financing absent matching funds.

The Court in *Arizona Free Enterprise* described contribution limits as "strictures on campaign-related speech . . . less onerous" than expenditure limits.[215] It then recognized in passing that the Court has "upheld government-imposed limits on contributions."[216] Further, whenever the case parses the burden matching funds place on candidates and supporters, it does so in terms of funds matched for expenditures, even though the matching funds provision also provided additional subsidies based on contributions.[217] Although there is some indication that the Court will require contribution limits to be justified by a higher level of scrutiny at some point in the future,[218] *Arizona Free Enterprise* took no steps in that direction.

The Court reaffirmed that public financing itself remains a legitimate method of campaign finance reform, subject only to rational basis.[219] In addition, it did not question the ability of states to determine the appropriate amount of public funding. For example, the Court noted that "[i]t is not the amount of funding that the State provides to publicly financed candidates that is constitutionally problematic in this case."[220] Instead, the Court focused entirely on the fact that funds were triggered by an act of protected speech to find a burden.[221] Absent the

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212. *Id.* at 863 (alteration in original) (quoting *Ariz. Free Enter.*, 131 S. Ct. at 2818).

213. *See id.*

214. The law at issue *resembled* a disclosure law, but the court did not explicitly say that was its reasoning. *Id.*

215. 131 S. Ct. at 2817.

216. *Id.* (citing Buckley v. Valeo, 424 U.S. 1, 23–25 (1976)).

217. *See id.* at 2826 (characterizing the burden as one on personal expenditures and independent expenditures).

218. *See supra* Part I.C.

219. *Ariz. Free Enter.*, 131 S. Ct. at 2828 ("We do not today call into question the wisdom of public financing as a means of funding political candidacy.").

220. *Id.* at 2824.

221. *See id.*

disbursements of funds based on an expenditure trigger, public financing remains constitutional.

IV. THE FUTURE OF CAMPAIGN FINANCE REFORM

At first glance, *Arizona Free Enterprise* is one of several recent anti-regulatory decisions striking down a campaign finance law on First Amendment grounds. The Court has invalidated laws striking down corporate expenditures close to the election period,[222] contribution limits it deemed too restrictive,[223] asymmetrical contribution limits,[224] and corporate expenditures in general.[225] This has led some to argue that the Roberts Court is simply pursuing a substantive agenda against various forms of campaign finance reform.[226] To the extent the Court's decision merely expands this agenda to clean elections, *Arizona Free Enterprise* appears to have a relatively limited scope, as not many jurisdictions use clean elections.

However, the decision may impact other forms of campaign finance reform *in addition to* clean elections. The broad language of *Arizona Free Enterprise* calls any new methods of regulating campaign finances into question. Meanwhile, by focusing on what it did not hold, clean elections may remain viable and effective with only minor alterations.

A. The Effect of **Arizona Free Enterprise** *on Campaign Finance Reform in General*

In the wake of the regulatory gap left by *Citizens United*, states and the federal government began pursuing alternative forms of campaign finance reform.[227] The Court has explained that reasonable contribution limits are constitutional, as are disclosure laws.[228] However, those forms of campaign finance regulation are insufficient.[229] States should therefore consider alternatives. However, *Arizona Free Enterprise* foreclosed states from pursuing any form of legislation that could burden expenditures, even incidentally, with the exception of disclosure laws.[230]

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222. *See, e.g.*, Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 464–68 (2007).

223. *See, e.g.*, Randall v. Sorrell, 548 U.S. 230, 232–33 (2006).

224. *See, e.g.*, Davis v. Fed. Election Comm'n, 554 U.S. 724, 743–44 (2008).

225. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 911–13 (2010).

226. *See* Chemerinsky, *supra* note 68, at 734 ("[T]hese cases reflect a Court that is hostile to campaign finance laws . . . much more than it is committed to freedom of speech.").

227. For example, Congress responded by proposing the DISCLOSE Act, which attempts to prohibit political spending by government contractors, among other goals. Democracy Is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, H.R. 5175, 111th Cong. (2010).

228. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2817 (2011).

229. *See supra* Part I.D.

230. *See supra* Part III.B.

Under *Arizona Free Enterprise*, a plaintiff needs no evidence of a burden to argue that one exists.[231] Therefore, any new form of campaign finance reform should expect a First Amendment challenge. If the plaintiffs can point to any potential burden on campaign expenditures, such a challenge could succeed. Therefore, under the Supreme Court's current First Amendment jurisprudence, legislators are limited in their options to preexisting reforms that courts have already blessed as constitutional if they wish to avoid a protracted legal battle.

Further, this jurisprudence can be expected to remain the same for some time. The most controversial campaign finance decisions coming from the Supreme Court, including *Arizona Free Enterprise*, were each decided by a majority composed of the same five Justices, facing dissent from the other four.[232] This suggests that the Court's jurisprudence may be somewhat unstable. However, as constitutional scholar Erwin Chemerinsky has pointed out, if Justices are expected to retire at 90, the age at which Justice Stevens retired, every one of those five will remain on the Court until 2026.[233] Even retirement may not alter the doctrine in this politically charged area, however. As Justice Stevens famously noted in 2007, "[E]very judge who's been appointed to the Court since Lewis Powell . . . has been more conservative than his or her predecessor."[234]

States and the federal government wishing to avoid protracted litigation are therefore left with three options. First, they can have few or no campaign finance regulations and accept any corresponding corruption. Second, they can impose only reasonable contribution limits and disclosure laws, despite such measures' limitations. And, finally, to the extent that they remain viable, states and the federal government can consider public financing options like clean elections.

B. Clean Elections Remain Viable

Matching funds serve an important role in maintaining effective clean elections systems. For the 2010 election season, the Supreme Court reinstated the district court's injunction against Arizona's matching funds while it decided whether to grant certiorari to hear an appeal of *McComish*.[235] As a result, the 2010 Arizona participation rate gives an imperfect glimpse at how candidates might approach a clean elections system that lacks matching funds. In prior elections,

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231. 131 S. Ct. at 2817.

232. *See, e.g.*, *id.*; Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010); Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008); Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).

233. *See* Erwin Chemerinsky, The Roberts Court and Freedom of Speech, Remarks at the Federal Communications Bar Association's Distinguished Speaker Series (Dec. 16, 2010), *in* 63 FED. COMM. L.J. 579, 588 (2011) (discussing the Justices' ages).

234. Jeffrey Rosen, *The Dissenter*, N.Y. TIMES, Sept. 23, 2007, § MM (Magazine), at 50.

235. Danielle Citron, *Hellman on the Fate of Arizona's Matching Fund Law*, CONCURRING OPINIONS (June 10, 2010, 5:49 PM), http://www.concurringopinions.com/archives/2010/06/hellman-on-the-fate-of-arizonas-matching-fund-law.html.

between 52% and 67% of candidates participated.[236] In 2010, roughly 49% participated.[237]

This provides empirical support for Justice Kagan's argument that clean elections cannot survive without matching funds.[238] States like Arizona and Maine may continue to provide the initial subsidies to participating candidates, and they retain the right to raise or lower the amounts of the subsidies. However, if the amount is too low, candidates will opt out rather than participate and risk being outspent. Conversely, if the amount is too high, the system will bankrupt itself. Matching funds allowed states to find the "Goldilocks solution" and provide funding that is "not too large, not too small, but just right."[239] The future of clean elections is uncertain without matching funds, but states retain the right to approach the Goldilocks solution through two means: They may maintain matching funds tied only to contributions from third parties, and they may tailor disbursements to particular races.

1. Retaining Matching Funds Tied to Contributions

The Supreme Court in *Arizona Free Enterprise* struck down matching funds based entirely on the burdens they place on *expenditures*, whether made by candidates or non-candidates.[240] However, the Court did not question the ability of states to burden contributions, even to the point of full bans on contributions of more than a reasonable amount.[241] To the extent that matching funds tied only to contributions from third parties would burden those contributions, the burden would plainly be less severe than such absolute bans. It stands to reason that clean elections systems may retain matching funds, so long as those matching funds are tied only to third-party contributions rather than expenditures. Indeed, the district court in Arizona stated as much explicitly.[242]

Matching funds only to contributions would encourage participation in clean elections somewhat less than matching funds to expenditures. When facing independently wealthy opponents, candidates may have to opt out and accept traditional funding to compete, because the wealthy candidate would retain the

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236. McComish v. Brewer, No. CV-08-1550-PHX-ROS, 2010 WL 2292213, at *3 (D. Ariz. Jan. 20, 2010), *rev'd sub nom.* McComish v. Bennett, 611 F.3d 510 (9th Cir. 2010), *rev'd sub nom. Ariz. Free Enter.*, 131 S. Ct. 2806.

237. *Primary Election*, *supra* note 203. Of course it cannot be stated definitively that the lack of matching funds was the sole reason for the decline in participation.

238. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2842 (2011) (Kagan, J., dissenting) (describing clean elections without matching funds as "a wholly ineffectual program").

239. *Id.* at 2832.

240. *See id.* at 2822–24 (majority opinion).

241. *See id.*

242. McComish v. Brewer, No. CV-08-1550-PHX-ROS, 2010 WL 2292213, at *9 (D. Ariz. Jan. 20, 2010) ("[T]he Act could tie matching funds solely to contributions made by third parties to a candidate. Such a structure would achieve the anticorruption goal recognized by the Supreme Court without burdening a candidate's decision to expend personal funds."), *rev'd sub nom.* McComish v. Bennett, 611 F.3d 510 (9th Cir. 2010), *rev'd sub nom. Ariz. Free Enter.*, 131 S. Ct. 2806.

ability to make unlimited personal expenditures. However, in most cases, nonparticipating candidates raise most of the money they spend from contributions; thus, tying matching funds to contributions would ensure that participating candidates will be only modestly outspent in most races.

With matching funds applied only to contributions and not expenditures, participating candidates would also not receive matching funds tied to expenditures by independent groups, but nonparticipating candidates cannot rely on the presence of such expenditures, which are by definition not coordinated with the campaign. Further, independent groups retain the right to make expenditures in support of participating candidates or in opposition to nonparticipating candidates, so nonparticipating candidates could not rely on any advantage from such independent expenditures.

Tying matching funds to contributions directly addresses the advantage nonparticipating candidates gain from ties to networks of fundraising. These are exactly the ties most susceptible to corruption. Consequently, a clean elections system with matching funds tied to contributions could remain viable, reduce corruption, and be consistent with the Supreme Court's First Amendment jurisprudence.[243]

2. Tailoring Disbursements

Matching funds are successful because they mete out appropriate awards to participating candidates based on the level of overall activity in the election. If all candidates participate, then that level of activity has been effectively and voluntarily stabilized. If, however, one or more candidates do not participate, the amount they choose to spend serves as a good measuring stick of how much a candidate might need to spend in that race to effectively communicate his or her message. The best alternative to matching funds would do the same, but use a different measuring stick to avoid any speech-based trigger.[244]

For example, the commission responsible for disbursing the clean elections subsidies could award the initial amount as a default without matching funds or with matching funds tied only to contributions. If a nonparticipating candidate wins the election, the amount could be adjusted for the *next* election to roughly the amount spent by the victorious candidate. The commission would have to retain some level of discretion to keep the disbursal amount from getting too high based on a single anomalous race involving a particularly well-funded candidate, perhaps being authorized to reduce the amount by some modest percentage each cycle.

This proposed alternative could not be as easily attacked as unconstitutional on the same grounds as matching funds. A nonparticipating candidate wishing to outspend participating opponents would only trigger

243. *But see supra* Part I.C. Arguably, such an attempt would be a perfect opportunity for the Court to rule contribution limits unconstitutional, should it be looking for one.

244. The only constitutionally problematic part of the law was making the trigger for matching funds an act of protected speech. *Ariz. Free Enter.*, 131 S. Ct. at 2824.

additional funds to the candidates in the following term. That could only be a burden where the candidate knows that next time the same office is up for election, he will seek election to the office again, will not himself participate in the system, and will have a participating opponent.

However, such a system would not be ideal. If a person with vast personal wealth were to run as a nonparticipating candidate one year, opponents would not be any more likely to participate simply because they will have access to competitive funds next time. Further, some additional complexities may arise when such a system is applied to primary elections, where competitiveness of the election may vary more significantly from one cycle to the next. Further, allowing discretion in assigning the amounts may raise concerns of agency bias.

Despite the shortcomings of such alternatives, they would retain the benefits that clean elections have over traditional campaign finance reform. Consequently, when making the decision between traditional campaign finance reform and clean elections, substantial reasons remain for choosing clean elections.

CONCLUSION

The modern era of campaign finance reform began in 1971 with the passage of the Bipartisan Campaign Reform Act. According to some, it ended in 2010 when the Supreme Court decided *Citizens United*.[245] After the publication of that opinion, John McCain declared that campaign finance reform was dead.[246]

Certainly, the Supreme Court has dealt a blow to the movement for campaign finance reform. The line of cases culminating in *Arizona Free Enterprise* has made novel attempts at reform difficult. States and the federal government are facing increasing frustration at the ineffectiveness and unanticipated perverse results of contribution limits and disclosure laws. Fortunately, an alternative remains, which not only avoids those consequences and addresses corruption, but which expands the number and diversity of candidates, increases competition among candidates, controls the costs of elections, increases opportunities for public participation in elections, and helps elect candidates representing a broader segment of the population.[247] That alternative is clean elections.

Modern objections to campaign finance reform often focus on its potential pro-incumbent bias while downplaying its effectiveness at combating real or apparent corruption.[248] However, the experience of Arizona discredits some of these concerns. Clean elections programs do not seem to favor incumbents.[249] The

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245. *See* Michelle Levi, *McCain: Campaign Finance Reform Is Dead*, CBS NEWS (Jan. 24, 2010, 4:46 PM), http://www.cbsnews.com/stories/2010/01/24/ftn/main6136386.shtml.

246. *Id.*

247. *See* LEVIN, *supra* note 127, at 4–12.

248. *See generally* Esenberg, *supra* note 51, at 292–300.

249. By 2003, Arizona and Maine apparently experienced no change in incumbent re-election rates after implementing clean elections. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 61, at 29.

systems used in Arizona and Maine were not drafted or passed by legislators. Indeed, it has been incumbents leading the charge against them.[250] As for corruption, in Arizona, the shame of allegations against two governors, two senators, and nineteen state legislators—all in a matter of ten years—indicates that public corruption has and continues to be a serious concern.[251] Since 1998, such stories have been scant, other than the occasional candidate facing charges for attempting to misappropriate clean elections money.[252]

As far as effective traditional campaign finance reform goes, it may indeed be dead. Constitutional mandates and changes in the costs of elections may leave all such systems as relics of the past. However, the drive to prevent corruption in the democratic process carries on, so concerned voters must seek alternatives. After *Arizona Free Enterprise*, the available options for combating corruption have become extremely narrow. Nevertheless, clean elections remain a viable and effective option.

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250. *See, e.g.*, McComish v. Brewer, No. CV-08-1550-PHX-ROS, 2010 WL 2292213, at *3–6 (D. Ariz. Jan. 20, 2010) (five of the six plaintiffs were officeholders), *rev'd sub nom.* McComish v. Bennett, 611 F.3d 510 (9th Cir. 2010), *rev'd sub nom.* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011); May v. McNally, 55 P.3d 768, 770 (Ariz. 2002) (suit brought by incumbent state legislator).

251. *See supra* Introduction.

252. For example, one 2004 Libertarian candidate faced serious charges after spending over $41,000 in clean elections money "court[ing] young voters" at "bars, restaurants, and nightclubs." Robbie Sherwood & Amanda J. Crawford, *Libertarian Indicted in Campaign Fraud*, ARIZ. REPUBLIC, July 20, 2004, at B1. A brief filed in *McComish v. Bennett* argued that such stories demonstrate that clean elections do not prevent corruption. Plaintiffs/Appellees' Brief in Opposition to Appellants' Opening Brief at 11–12, McComish v. Bennett, 611 F.3d 510 (9th Cir. 2010) (Nos. 10-15165, 10-15166), 2010 WL 3051442. However, the existence of failed attempts to circumvent a law does not generally mean the law does not work.