Georgia State University Law Review

Volume 28
Issue 2 *Winter 2012*

Article 5

March 2012

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ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC V. BENNETT: TAKING THE GOVERNMENT'S FINGER OFF THE CAMPAIGN FINANCE TRIGGER

Robert Steele*

INTRODUCTION

Running as a political outsider, health care executive Rick Scott[1] found himself engaged in a heated primary race for Governor of Florida during the summer of 2010.[2] His opponent in the primary was Bill McCollum, the state attorney general and a prominent figure in Florida politics for more than twenty years.[3] Whereas Scott chose to privately finance his campaign, McCollum elected to take part in Florida's system of public campaign financing.[4] As June turned to July, campaigning took on a great deal of importance in light of Florida's August primary election. However, this was precisely when Scott drastically reduced spending on his campaign.[5] In fact, Scott

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1. Scott v. Roberts, 612 F.3d 1279, 1282 (11th Cir. 2010) (quoting Scott's description of himself as a "health care executive and businessman" and a "conservative outsider"). Rick Scott later won the election for Governor of Florida. Aaron Deslatte et al., *GOP Upstart Wins Governor's Race*, ORLANDO SENTINEL, Nov. 4, 2010, at A1, *available at* 2010 WLNR 22051029.

2. *See, e.g.*, Aaron Deslatte, *Is GOP Ad War Backfiring?*, ORLANDO SENTINEL, July 22, 2010, at B1, *available at* 2010 WLNR 14604500; William March, *McCollum Slips, Goes on Attack*, TAMPA TRIB., June 23, 2010, at 1, *available at* 2010 WLNR 15696243.

3. *Scott*, 612 F.3d at 1282 ("Before the voters . . . elected [him] attorney general in 2006, McCollum had served for nearly 20 years as a Member of Congress from Florida. McCollum had also twice campaigned . . . for United States Senator from Florida.").

4. *Id.* Public campaign financing refers to a voluntary system where candidates receive campaign funds from the public treasury in exchange for agreeing to limit expenditures (i.e. money spent by candidates) and meeting other conditions. *See* Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 566–68 (1999). Public funding exists in states and cities across the country, as well as at the federal level. *Id.*

5. *See Scott*, 612 F.3d at 1283.

cut the time purchased for television advertisements by about half from June 25 to July 2 and limited the market saturation of those advertisements.[6] Scott then halted all television and radio advertisements from July 3 to July 6.[7]

The explanation for this seemingly counterintuitive behavior lies in a "trigger provision"[8] that was part of Florida's public campaign financing system.[9] This trigger provision granted a publicly funded candidate a dollar-for-dollar subsidy for every dollar that a privately funded, nonparticipating candidate spent over a statutorily defined expenditure limit.[10] The expenditure limit for the 2010 election cycle was approximately $25 million.[11] As Scott approached the $25 million threshold that would trigger the provision, he sued the state of Florida[12] and asked for a preliminary injunction to block public funds from being released to his opponents.[13] Scott argued that the trigger provision violated his right to free speech under the First and

6. *Id.*

7. *Id.* Scott also alleged that he cut the television time he purchased for advertisements by 40% from July 7 to July 13. *Id.*

8. These provisions, which attach adverse consequences for exceeding threshold expenditure amounts, are referred to in many different ways in the campaign finance lexicon. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2813 (2011) (referring to an Arizona campaign finance law that granted funds to candidates based on their opponents' expenditures as a "matching funds" scheme); *Scott*, 612 F.3d at 1281 (referring to a Florida campaign finance provision triggered by expenditures as an "excess spending subsidy"); Green Party of Conn. v. Garfield, 616 F.3d 213, 218 (2d Cir. 2010), *cert. denied sub nom.* Green Party of Conn. v. Lenge, 131 S. Ct. 3090 (2011) (mem.) (referring to a Connecticut campaign finance provision that provided a subsidy to participating candidates for excess expenditures by their opponents as a "trigger provision"); N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427, 433 n.2 (4th Cir. 2008) (stating that a recent amendment to a North Carolina statute containing a trigger provision replaced the term "matching funds" with "rescue funds"). For consistency and to avoid confusion, "trigger provision" will be used throughout this Comment to refer to a provision that is triggered, in whole or in part, by campaign expenditures.

9. Florida Election Campaign Financing Act, FLA. STAT. §§ 106.30–.36 (2010).

10. *Id.* § 106.355. The maximum subsidy that could be paid to a participating candidate was twice the amount of the expenditure limit. *Id.*

11. The expenditure limit was calculated by multiplying $2 by the number of registered voters in Florida. *Id.* § 106.34(1)(a). For 2010, the exact limit was $24,901,170. *Scott*, 612 F.3d at 1283.

12. *Scott*, 612 F.3d at 1281–82.

13. In addition to Scott and McCollum, Mike McCallister was also running for the Republican gubernatorial nomination in 2010. *Id.* at 1282. McCallister, however, was described as a "nominal candidate." *Id.*

Fourteenth Amendments[14] because it forced him to curtail his campaign expenditures in order to give his opponents a "competitive advantage and in turn permit[] them to counteract and diminish [his] campaign speech."[15] After the lawsuit was filed, the McCollum campaign released a statement saying: "Now that [Rick Scott] is failing to win over voters, despite the millions he is personally hemorrhaging into his campaign . . . he wants to change the rules of the game."[16] In response, Scott's campaign shot back: "Only a career politician like Bill McCollum would employ a risky strategy to spend all his money and then demand that taxpayers bail him out when his failing campaign is broke and needs more money . . . ."[17]

A serious legal question lurks behind this political rhetoric: Are trigger provisions in campaign finance laws violative of a privately funded candidate's First Amendment right to free speech? In *Arizona Free Enterprise Club's Free Enterprise PAC v. Bennett*, the United States Supreme Court analyzed a similar trigger provision in an Arizona campaign finance law and answered this question in the affirmative.[18] In addition to curing a jurisdictional split that had developed around trigger provisions, the Court's holding will also have ramifications that reach many current and future campaign finance laws.

Part I of this Comment begins with *Buckley v. Valeo*,[19] the case that established the Supreme Court's framework for First Amendment challenges to campaign finance laws.[20] Next, Part I reviews the challenges to trigger provisions heard by federal courts

14. The First Amendment states, in part, "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. The Due Process Clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1, extends this bar on the abridgement of free speech to the states. *E.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 779–80 (1978). For consistency, all further discussion in this Comment will reference the First Amendment only.

15. *Scott*, 612 F.3d at 1281, 1284.

16. Kevin Derby, *Low on Cash, Bill McCollum Battles Rick Scott's Challenge to Campaign Finance Law*, SUNSHINE ST. NEWS (July 13, 2010, 4:05 AM), http://www.sunshinestatenews.com/story/low-cash-bill-mccollum-battles-rick-scotts-challenge-campaign-finance-law.

17. *Id.*

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

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

20. *See* discussion *infra* Part I.A.

before *Davis v. FEC*,[21] which was the first decision by the Supreme Court to directly address the provisions.[22] Part I concludes with a discussion of *Davis* and of the post-*Davis* circuit split.[23] Part II analyzes the majority and dissenting opinions of the Supreme Court in the *Arizona Free Enterprise* case that cured the circuit split by finding trigger provisions unconstitutional.[24] Finally, Part III suggests alternative ways that states can implement effective campaign finance regulations without using trigger provisions.[25]

I. CHALLENGES TO CAMPAIGN FINANCE LAWS: FROM FECA TO TRIGGER PROVISIONS

A. Buckley v. Valeo *and the Supreme Court's Campaign Finance Framework*

The seminal decision in the Supreme Court's campaign finance jurisprudence came in *Buckley v. Valeo*.[26] Decided in 1976, *Buckley* dealt with several constitutional challenges[27] to the Federal Election Campaign Act of 1971 (FECA),[28] as amended in 1974.[29] In addition to placing limits on the size of certain political contributions and limiting expenditures for candidates running for federal office, FECA

21. Davis v. FEC, 554 U.S. 724 (2008).

22. *See* discussion *infra* Part I.B.

23. *See* discussion *infra* Part I.C–D.

24. *See* discussion *infra* Part II.

25. *See* discussion *infra* Part III.

26. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam). The *Buckley* decision established the framework for all campaign finance challenges to follow. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2830 (2011) (Kagan, J., dissenting) ("As we recognized in *Buckley v. Valeo*, our seminal campaign finance case . . . ." (citation omitted)); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1706 (1999) ("Most of the legal-academic debate about campaign finance begins with *Buckley* and its progeny . . . ."); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1394 (1994) ("By far the most important campaign finance case is of course *Buckley v. Valeo* . . . .").

27. The plaintiffs included a candidate for President of the United States, a United States Senator who was running for re-election, and several political parties and funds. *Buckley*, 424 U.S. at 7–8.

28. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431–441h, 451–455, and in scattered sections of 18 & 47 U.S.C.).

29. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of 2, 18, 26 & 47 U.S.C.).

included provisions that established disclosure requirements for political contributions and expenditures, developed a public funding system for presidential campaign activities, and created the Federal Election Commission (FEC).[30] For the impact of the *Buckley* decision on trigger provisions, it is necessary to focus mainly on the Court's handling of the contribution and expenditure limits established by FECA.[31]

In *Buckley*, the Court made a clear distinction between contribution limits and expenditure limits.[32] While finding the contribution limits in FECA to be constitutional, the Court invalidated the expenditure limits.[33] In its discussion on contribution limits, the Court recognized that FECA presented First Amendment concerns,[34] but examined whether the government's means were "closely drawn" to a "sufficiently important interest."[35] Using this phrasing, the Court examined contribution limits under what has come to be known as "*Buckley* scrutiny."[36] This standard is less

30. *See Buckley*, 424 U.S. at 7. At close to 300 pages long, "*Buckley* is a lengthy and complex decision addressing multiple statutory provisions. The judgment of the Court was expressed in a per curiam opinion, parts of which were joined by different groups of Justices." Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL'Y 283, 290 (2010).

31. For a thorough analysis of the *Buckley* decision, see Daniel D. Polsby, Buckley v. Valeo*: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1. For more recent analyses of campaign finance regulation with *Buckley* as a backdrop, see Esenberg, *supra* note 30; Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997).

32. *Buckley*, 424 U.S. at 58–59.

33. *Id.* Although outside the scope of this Comment, there is disagreement with the Court's decision to treat campaign contributions and campaign expenditures differently. Esenberg, *supra* note 30, at 292–93 ("*Buckley*'s distinction between expenditures and contributions has been criticized by opponents and advocates of regulation alike. . . . [Among the Justices,] Justice Thomas would leave little room for regulation [on expenditures or contributions]. Justice Stevens, on the other hand, believes that expenditure limits should be allowed just as limits on contributions.").

34. The *Buckley* Court framed the First Amendment concerns related to contribution limits in light of protected rights of association. *Buckley*, 424 U.S. at 24 ("[T]he primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association."). However, the Court has since stated that if a contribution limitation survives an associational rights challenge, then it will also survive a free speech challenge. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 388 (2000) ("[W]e did make it clear that [contribution limits] bore more heavily on the associational right than on freedom to speak. We consequently proceeded on the understanding that a contribution limitation surviving a claim of associational abridgment would survive a speech challenge as well . . . .") (citation omitted)).

35. *Buckley*, 424 U.S. at 25.

36. Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When*

stringent than the more common constitutional standard of "strict scrutiny," which requires the government's means to be narrowly tailored to achieve a compelling state interest.[37] The main interest advanced in support of the contribution limits—and the only interest the Court in *Buckley* found to be "sufficiently important"—was an "anticorruption interest" in trying to prevent the corruption, or the appearance of corruption, that accompanies large financial contributions to candidates for office.[38] Because the Court felt limits on campaign contributions to political candidates furthered this anticorruption interest and were closely drawn to that end, they were found to be constitutional.[39]

Conversely, the Supreme Court applied a different level of scrutiny when examining the constitutionality of the expenditure limits in FECA because expenditure limits "impose[d] direct and substantial restraints on the quantity of political speech."[40] Although the *Buckley* Court did not identify the specific test it was using, it has since been interpreted as strict scrutiny.[41] In this discussion, the Court rejected

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Public Opinion Determines Constitutional Law, 153 U. PA. L. REV. 119, 125–26 (2004) ("Unlike restrictions on individual expenditures, which . . . trigger strict scrutiny, contribution restrictions are subject to less-than-strict scrutiny (sometimes called 'Buckley scrutiny')." (footnote omitted)).

37. *See* Citizens United v. FEC, 130 S. Ct. 876, 898 (2010) ("Laws [that burden political speech] are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007))). Although not always explicit in doing so, the Supreme Court has since applied *Buckley* scrutiny to contribution limits in campaign finance challenges, not strict scrutiny. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2817 (2011) ("[W]e have subjected strictures on campaign-related speech that we have found less onerous to a lower level of scrutiny and upheld [the strictures if] closely drawn to serve a sufficiently important interest . . . ." (internal quotation marks omitted)); McConnell v. FEC, 540 U.S. 93, 134 (2003) ("In *Buckley* and subsequent cases, we have subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions."); *cf.* Davis v. FEC, 554 U.S. 724, 737 (2008) ("When contribution limits are challenged . . . we have extended a measure of deference to the judgment of the legislative body that enacted the law.").

38. *Buckley*, 424 U.S. at 25–29. The Court discussed corruption in terms of the danger to the integrity of the political process that results from quid pro quo arrangements, between donors and candidates, for improper political commitments. *See Id.* Of "almost equal concern" to the Court was the perception amongst the public that these types of arrangements could be taking place. *Id.* at 27.

39. *Id.* at 58 ("The contribution ceilings thus serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion.").

40. *Id.* at 39.

41. *See Wis. Right to Life, Inc.*, 551 U.S. at 464 ("Because [the provision restricting independent

an "equalization rationale" as a compelling interest to justify limiting expenditures, stating that attempting to equalize the financial resources of candidates was "wholly foreign to the First Amendment."[42] As for the anticorruption interest, the Court made

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expenditures] burdens political speech, it is subject to strict scrutiny." (citing *Buckley*, 424 U.S. at 44–45)); *see also Ariz. Free Enter.*, 131 S. Ct. at 2817 ("'Laws that burden political speech are' accordingly 'subject to strict scrutiny . . . .'" (quoting *Citizens United*, 130 S. Ct. at 882)).

42. *Buckley*, 424 U.S. at 48–49. Among commentators, there is support for the Supreme Court to adopt an equalization rationale as a compelling interest to satisfy strict scrutiny. *See* Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1, 7 (1996) (discussing the use of a voucher system of campaign finance that "minimizes the impact of wealth on the political system and empowers those who currently lack political capital"); Sunstein, *supra* note 26, at 1392 ("Certainly economic equality is not required in a democracy; but it is most troublesome if people . . . are allowed to translate their wealth into political influence. It is equally troublesome if the electoral process translates poverty into an absence of political influence."); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 645 (1982) ("The growing impact of concentrated wealth on the political process, and the glaring inequalities in political campaign resources, threaten the very essence of political equality."); Grant Fevurly, Case Note, Davis v. Federal Election Commission*: A Further Step Towards Campaign Finance Deregulation and the Preservation of the Millionaires' Club*, 81 U. COLO. L. REV. 627, 674 (2010) ("Rather, the competing concern of equality, with the goals it fosters . . . should provide a mediating influence to the expenditure of unbridled wealth pursuant to a candidate campaign."). *But see* Samuel Gedge, *"Wholly Foreign to the First Amendment": The Demise of Campaign Finance's Equalizing Rationale in* Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008)*, 32 HARV. J.L. & PUB. POL'Y 1197, 1209 (2009) ("Not only has *Davis* reasserted *Buckley*'s long-neglected declaration that equalizing interests are 'wholly foreign to the First Amendment,' it has laid a much-needed foundation upon which to construct new constitutional challenges to numerous facets of campaign finance regulation." (footnote omitted) (quoting *Davis*, 554 U.S. at 742)); David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 160 ("[T]he distorting effects of inequality may be limited. Precluding the private use of wealth will only eliminate a large source of voluntary funding, with no offsetting gain."); Sullivan, *supra* note 31, at 675 ("[S]hort of major revision of general First Amendment understandings, campaign finance reform may not be predicated on equality of citizen participation in elections . . . ."). Since *Buckley*, the Supreme Court has rejected the equalization rationale numerous times. *Ariz. Free Enter.*, 131 S. Ct. at 2825 ("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech."); *Citizens United*, 130 S. Ct. at 904 ("*Buckley* rejected the premise that the Government has an interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections.'" (quoting *Buckley*, 424 U.S. at 48)); *Davis*, 554 U.S. at 741–42 ("Our prior decisions . . . provide no support for the proposition that [the equalization rationale] is a legitimate government objective. . . . The argument that a candidate's speech may be restricted in order to 'level electoral opportunities' has ominous implications because it would permit Congress to arrogate the voter's authority . . . ." (citations omitted)); *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting) ("As we have noted, 'preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.'" (quoting FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985))); Scott v. Roberts, 612 F.3d 1279, 1292 (11th Cir. 2010) ("[The state] argue[s] that the [trigger provision] furthers the interest of the state in fighting corruption and the appearance of corruption, which the Supreme Court has suggested is probably the only

clear that although contribution limits helped alleviate the corrupting influence, or the appearance of a corrupting influence, of large sums of money donated to a campaign, limitations on a person's own expenditures did not further that goal.[43] All of the expenditure limits in FECA—and expenditure limits in general—were held to be unconstitutional.[44]

B. Post-Buckley *Challenges to Trigger Provisions Create a Circuit Split*

In 1994, the Eighth Circuit Court of Appeals heard a challenge to a campaign finance law containing a trigger provision in *Day v. Holahan*.[45] The trigger provision at issue in *Day* was part of Minnesota's public campaign financing system.[46] As in other public campaign financing systems,[47] Minnesota law required candidates participating in the system to abide by expenditure limits in order to receive public funding for their campaign.[48] The trigger provision was activated when independent expenditures[49] were made advocating for the defeat of the publicly financed candidates or in support of nonparticipating candidates.[50] Once triggered, the provision increased the expenditure limits of any publicly funded candidates by the amount of the independent expenditures and

compelling interest that can justify a substantial burden on expenditures.").

43. *Buckley*, 424 U.S. at 53 ("Indeed, the use of personal funds *reduces* the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed." (emphasis added)).

44. *Id.* at 39–59. The provisions struck down in *Buckley* were a $1,000 limitation on expenditures "relative to a clearly identified candidate" by most individuals and groups, a limitation on expenditures by candidates from personal or family resources, and a limitation on overall campaign expenditures by candidates. *Id.*

45. Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994).

46. MINN. STAT. §§ 10A.01–.38 (2010); MINN. STAT. §§ 10A.40–.51 (repealed 1999).

47. *See* Briffault, *supra* note 4.

48. MINN. STAT. § 10A.25(1) (2010).

49. In general campaign finance usage, an independent expenditure is an expenditure for "a communication expressly advocating the election or defeat of a clearly identified candidate" that is not made "in cooperation . . . with" or "at the request . . . of" a candidate. 11 C.F.R. § 100.16(a) (2010).

50. MINN. STAT. § 10A.25(13) (repealed 1999). Unlike the other trigger provisions discussed in this Comment, the provision at issue in *Day* was not triggered, in whole or in part, by the spending of opposing candidates.

granted those candidates an additional public subsidy equal to one-half of the independent expenditures.[51] After finding that the trigger provision had a "chilling effect" on political speech,[52] the court analyzed the provision as a limit on independent expenditures.[53] Following the guidance of *Buckley* in dealing with expenditure limits, the court used strict scrutiny as its standard of review.[54] The court invalidated the provision because the state's asserted interest in encouraging participation in the campaign finance system was "not legitimate" and the burden placed on free speech would not satisfy "even the most cursory scrutiny."[55]

Between 1994 and 2008, three other circuit courts of appeal also heard challenges to trigger provisions: the Sixth Circuit in *Gable v. Patton*,[56] the First Circuit in *Daggett v. Commission on Governmental Ethics and Election Practices*,[57] and the Fourth Circuit

51. *Id.*

52. Day v. Holahan, 34 F.3d 1356, 1360 (8th Cir. 1994). Many of the "independent expenders" alleged that they were choosing not to make independent expenditures because they knew that candidates they did not support would benefit as a result of the trigger provision. *Id.* The court referred to this as "self-censorship." *Id.*

53. *See id.* at 1360–63.

54. *Id.* at 1361 ("Notwithstanding the . . . infringement on protected constitutional rights perpetrated by [the trigger provision], the statute may be upheld as against constitutional challenge if the state can show that it is narrowly drawn to serve a compelling state interest.").

55. *Id.* at 1361–62. After noting that "participation was approaching 100%" prior to the enactment of the trigger provision, the court quipped, "One hardly could be faulted for concluding that this 'compelling' state interest was contrived for purposes of this litigation." *Id.* at 1361.

56. Gable v. Patton, 142 F.3d 940 (6th Cir. 1998). In *Gable*, a candidate for Governor of Kentucky challenged, on First Amendment grounds, a trigger provision in Kentucky's system of public campaign financing that was triggered when a nonparticipating candidate reached more than $1.8 million in combined contributions and expenditures. *Id.* at 943, 947. The practical effect of the trigger was to lift the expenditure limit of candidates participating in the public financing system, while allowing them to continue to receive the contribution-matching subsidy in the system. *Id.* at 947. The court framed the First Amendment challenge as a question of whether candidates are coerced into accepting the public funding, stating, "[T]he central question . . . is whether the [t]rigger . . . rises to the level of constitutional coercion." *Id.* at 948. The court affirmed the district court ruling of the trigger provision's constitutionality because it was not "different in kind from clearly constitutional incentives." *Id.* at 949.

57. Daggett v. Comm'n on Gov'tal Ethics & Election Practices, 205 F.3d 445 (1st Cir. 2000). *Daggett* presented a challenge to a provision in Maine's system of public campaign financing that was triggered when a nonparticipating candidate "raised," via contributions, independent expenditures, or expenditures, more than a threshold amount. *Id.* at 451. When triggered, the provision provided a dollar-for-dollar match to the publicly funded candidate, subject to a specified maximum amount, for each dollar over the threshold that the nonparticipating candidate raised. *Id.* Finding that the trigger provision did not create a burden on the candidate's First Amendment right to free speech, the court upheld the

in *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*.[58] Although each of the trigger provisions at issue was similar to the provision invalidated by the Eight Circuit in *Day*, the First, Fourth, and Sixth Circuits all found that the trigger provisions did not burden First Amendment rights and were constitutionally valid.[59]

In diverging from the holding in *Day*, all three circuit courts that found the trigger provisions to be constitutional cited a case the Eighth Circuit decided two years after *Day*: *Rosenstiel v. Rodriguez*.[60] In *Rosenstiel*, the court considered another trigger provision that was part of the Minnesota public campaign financing system.[61] A nonparticipating candidate would activate this trigger after surpassing a statutorily defined threshold of contributions or expenditures.[62] Once triggered, the provision lifted the expenditure limit on the publicly funded candidate, but still entitled that candidate to the government subsidy inherent in the system.[63] Although the participating candidate was no longer required to abide by the expenditure limit, no additional matching funds were provided.[64] Unlike in its holding in *Day*, the court found that this trigger

provision without analyzing it under any level of scrutiny. *See id.* at 464–65.

58. N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2008). *Leake* involved a challenge to a provision in North Carolina's system of public campaign financing that is triggered when a nonparticipating candidate's "funds in opposition" amount reaches a threshold level. *Id.* at 433. The funds in opposition amount is calculated as the greater amount of funds raised or spent, plus the amount of independent expenditures made in support of the nonparticpating candidate or against their publicly funded opponent. *Id.* Like the provision challenged in *Daggett*, the result of the trigger provision is a dollar-for-dollar match to the publicly funded candidate, subject to a specified maximum amount, for each dollar in excess of the funds in opposition amount. *Id.* Citing both *Daggett* and *Gable*, the court found that the trigger provision did not burden the First Amendment rights of nonparticipating candidates. *Id.* at 437.

59. *See supra* notes 56–58 and accompanying text. For a detailed description of the public funding systems in Kentucky, Maine, and North Carolina as well as additional analysis of *Day*, *Gable*, *Daggett*, and *Leake*, see Chen Li, Article, *Public Funding After* Davis v. FEC*: Is Campaign Finance Reform in the States Still Legally Viable?*, 20 GEO. MASON U. C.R. L.J. 279, 291–97 (2010).

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

61. MINN. STAT. §§ 10A.01–.38 (2010); MINN. STAT. §§ 10A.40–.51 (repealed 1999). For more on the operation of the Minnesota system, see *supra* note 48 and accompanying text.

62. MINN. STAT. § 10A.25(10)(a) (2010).

63. *Id.*

64. *Id.*

provision did not burden the First Amendment rights of nonparticipating candidates.[65] The court further stated that even if it did create a burden on free speech, it would survive strict scrutiny.[66] Because *Day* revolved around a challenge to a provision that was triggered by independent expenditures and resulted in matching funds, whereas *Rosenstiel* dealt with a provision that was triggered by candidate expenditures and did not result in matching funds, the cases are distinguishable. However, the First, Fourth, and Sixth Circuits all saw *Rosenstiel* as either persuasive authority or weakening the authority of *Day*.[67]

C. Davis v. FEC*: The Supreme Court Hears a Challenge to Trigger Provisions*

Although the Supreme Court heard many cases dealing with restrictions on either campaign contributions or campaign expenditures—and sometimes both—after *Buckley*,[68] the Court did not hear a case dealing with a trigger provision until *Davis v. FEC* in

65. *Rosenstiel*, 101 F.3d at 1552–53. Although the Eighth Circuit ruled otherwise, there is evidence that similar trigger provisions in other states have created a burden on candidates' free speech rights. *See infra* note 179.

66. *Id.* In his dissent in *Rosenstiel*, Judge Lay argued that with *Day* as precedent, the trigger provision was unconstitutional. *Id.* at 1562, 1565 (Lay, J., dissenting).

67. *See* N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427, 438 (4th Cir. 2008) ("[T]he *Day* decision appears to be an anomaly even within the Eighth Circuit, as demonstrated by that court's later decision in *Rosenstiel v. Rodriguez* . . . ."); Daggett v. Comm'n on Gov'tal Ethics & Election Practices, 205 F.3d 445, 464 n.25 (1st Cir. 2000) ("[T]he continuing vitality of *Day* is open to question."); Gable v. Patton, 142 F.3d 940, 949 (6th Cir. 1998) (citing to *Rosenstiel*, with no mention of *Day*, as support for finding a trigger provision constitutional).

68. *See generally, e.g.*, FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007) (finding that the Bipartisan Campaign Reform Act (BCRA) unconstitutionally precluded an organization's political advertisements); Randall v. Sorrell, 548 U.S. 230 (2006) (plurality opinion) (holding unconstitutional a Vermont campaign finance statute that had contribution limits that were too restrictive and not narrowly tailored to the compelling state interest); McConnell v. FEC, 540 U.S. 93 (2003) (dealing with several challenges to contribution limits in the BCRA); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (reversing an appeals court decision that invalidated a Missouri campaign finance statute that limited campaign contributions); Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) (holding that the limits on independent political party expenditures in FECA were unconstitutional); FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985) (affirming a holding that the section of the Presidential Election Campaign Fund Act that limited political contributions violated the First Amendment); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978) (finding a Massachusetts statute that forbade certain expenditures to be unconstitutional).

2008.[69] Jack Davis, the appellant in that case, had run two largely self-financed campaigns for a seat in the U.S. House of Representatives and had lost to the incumbent both times.[70] In his lawsuit, Davis challenged a trigger provision[71] in the Bipartisan Campaign Reform Act of 2002 (BCRA)[72]—the "Millionaire's Amendment"—as being in violation of his First Amendment right to free speech.[73]

Unlike the provisions of FECA in *Buckley*, which were basic limits on contribution and expenditure amounts affecting all candidates for federal office,[74] the Millionaire's Amendment of the BCRA relaxed the contribution limits and lifted the caps on coordinated party expenditures[75] only for the candidate whose opponent triggered the amendment.[76] A candidate would trigger the amendment by reaching a statutorily defined amount of campaign funds, including the candidate's own personal expenditures, referred to as the opposition personal funds amount (OPFA).[77] For instance, suppose candidate *A* and candidate *B* were running against each other for federal office when the Millionaire's Amendment was in effect. At the beginning

69. Davis v. FEC, 554 U.S. 724 (2008).

70. *Id.* at 731 ("Davis . . . spent $1.2 million, principally his own funds, on his 2004 campaign. . . . He reports spending $2.3 million in 2006, all but $126,000 of which came from personal funds." (citation omitted)). Some experts feel that entrenchment of incumbents is a side effect of many campaign finance regulations. *See* Sullivan, *supra* note 31, at 685–87; Sunstein, *supra* note 26, at 1400–03.

71. 2 U.S.C. § 441a-1 (2006), *invalidated by Davis*, 554 U.S. at 724.

72. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.). The BCRA is commonly referred to as the "McCain-Feingold Act." *E.g.*, Esenberg, *supra* note 30, at 300.

73. *Davis*, 554 U.S. at 749.

74. *See supra* Part I.A.

75. Coordinated party expenditures are special contributions made to candidates for federal office by national and state political party committees. *See* 2 U.S.C. § 441a(d) (2006); 11 C.F.R. § 109.32 (2010).

76. 2 U.S.C. § 441a-1 (2006), *invalidated by Davis*, 554 U.S. at 724; *see also Davis*, 554 U.S. at 729 ("[When triggered,] the candidate's opponent . . . may receive individual contributions at treble the normal limit . . . and may accept coordinated party expenditures without limit.").

77. Richard Esenberg summarized the OPFA and trigger provision as follows:

> Essentially . . . the 'opposition personal funds amount' (OPFA) [is] obtained by adding each candidate's expenditure of personal funds to 50% of the funds raised from contributors. If one candidate enjoyed an advantage in excess of $350,000, the asymmetrical limits would apply to the disadvantaged candidate until the OPFA advantage was eliminated.

Esenberg, *supra* note 30, at 319 n.222.

of the campaign, both candidates would be subject to specified limits on contributions and coordinated party expenditures. However, if candidate *A*'s campaign funds exceeded the OPFA during the campaign, the contribution limits for candidate *B* would be relaxed and the cap on candidate *B*'s coordinated party expenditures would be completely lifted.

Considering Davis's appeal, the Court first suggested that his argument would "plainly fail" if the trigger provision had simply raised contribution limits for all candidates.[78] However, because the trigger provision did not raise contribution limits across the board, the Court turned to an analysis of whether the provision burdened Davis's First Amendment right to free speech.[79] The Court noted that, unlike the FECA provisions challenged in *Buckley*, the Millionaire's Amendment did not create a limit on a candidate's expenditures.[80] However, according to the Court, the Millionaire's Amendment imposed an "unprecedented penalty"[81] on any candidate who triggered the provision and should therefore be treated as if it were a limit on expenditures.[82] Significantly, the Court cited *Day* in support of the proposition that the trigger provision was a burden on First Amendment rights, thereby reinvigorating the debate over whether or not *Day* was weakened by *Rosenstiel*.[83] Analyzing the Millionaire's Amendment as a limit on expenditures, the Court applied strict scrutiny.[84] The Court recognized that the government's

78. *Davis*, 554 U.S at 737. In support of this suggestion, the Supreme Court revisited the less stringent *Buckley* scrutiny standard of review applied to contribution limits in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). *Id.* For more information on the *Buckley* Court's handling of contribution limits, see *supra* Part I.A.

79. *Davis*, 554 U.S. at 736–40.

80. *Id.* at 738–39.

81. In describing the result of the Millionaire's Amendment as a "penalty," the court noted that candidates who triggered the provision were subjected to "discriminatory fundraising limitations." *See id.* at 743.

82. *See id.* at 738–40. The Court went further: "Even if [the Millionaire's Amendment] were characterized as a limit on contributions rather than expenditures, it is doubtful whether it would survive." *Id.* at 740 n.7.

83. *Id.* at 739; *see also supra* Part I.B.

84. *See Davis*, 554 U.S. at 740 ("Because [the Millionaire's Amendment] imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech, that provision cannot stand unless it is 'justified by a compelling state interest.'" (quoting FEC v. Mass.

asserted anticorruption interest was compelling, but found that a trigger provision penalizing a candidate's spending did not serve that interest.[85] Additionally, the Court again denied that an equalization rationale was a compelling interest.[86] By a 5–4 margin, the Supreme Court found the Millionaire's Amendment unconstitutional.[87]

*D. Post-*Davis *Challenges to Trigger Provisions Exacerbate the Circuit Split*

Far from resolving the circuit split,[88] the Supreme Court's decision in Davis caused even more confusion as lower courts struggled to determine whether the *Davis* holding regarding the BCRA applied to various trigger provisions in individual state campaign finance systems. The Ninth Circuit Court of Appeals, in *McComish v. Bennett*,[89] joined the First, Fourth, and Sixth Circuits in finding trigger provisions unconstitutional.[90] Conversely, as the Eighth Circuit did in *Day*,[91] both the Second Circuit, in *Green Party of Connecticut v. Garfield*,[92] and the Eleventh Circuit, in *Scott v. Roberts*,[93] found trigger provisions to be unconstitutional.

Citizens for Life, Inc. 479 U.S. 238, 256 (1986))).

85. *Id.* at 740–41 ("The burden imposed by [the Millionaire's Amendment] on . . . expenditure[s] . . . is not justified by [the anticorruption interest]. The *Buckley* Court reasoned that reliance on personal funds *reduces* the threat of corruption, and therefore [the Millionaire's Amendment], by discouraging use of personal funds, disserves the anticorruption interest.").

86. *Id.* at 741–42.

87. *Id.* at 727, 744. In a strongly worded dissent, Justice Stevens began by revisiting, and urging reversal of, the Court's holding in *Buckley v. Valeo* that expenditure limits are unconstitutional. *Id.* at 749–52 (Stevens, J., dissenting); *see also supra* note 33. However, even working within the confines of the *Buckley* framework, Justice Stevens would have found the trigger provision at issue in *Davis* to be constitutional. *Davis*, 554 U.S. at 752–53 (Stevens, J., dissenting) ("[R]educing the importance of wealth as a criterion for public office and countering the perception that seats in the United States Congress are available for purchase by the wealthiest bidder—are important Government interests. . . . Congress . . . crafted a solution that was carefully tailored to those concerns.").

88. *See supra* Part I.B.

89. 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).

90. *See supra* Part I.B.

91. *See supra* Part I.B.

92. Green Party of Conn. v. Garfield, 616 F.3d 213 (2d Cir. 2010), *cert. denied sub nom.* Green Party of Conn. v. Lenge, 131 S. Ct. 3090 (2011) (mem.).

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

1. McComish v. Bennett*: Trigger Provisions Satisfy Intermediate Scrutiny*

In 2010, the Ninth Circuit decided *McComish*— the first challenge to a trigger provision to reach a federal circuit court on appeal after *Davis*.[94] The trigger provision at issue in *McComish*[95] was part of Arizona's public financing system for elections.[96] As in most trigger provision cases, challengers to the law included candidates for office and various political funds.[97] In Arizona's system, a publicly funded candidate agreed to be bound by campaign contribution and expenditure limits in exchange for a public subsidy.[98] A nonparticipating candidate would trigger the challenged provision by spending more than a publicly funded candidate's initial public grant.[99] The provision could also be triggered if the amount of the nonparticipating candidate's personal expenditures, combined with independent expenditures used in support of the nonparticipating candidate or against the publicly funded candidate, exceeded the initial public grant.[100] Once triggered, the provision granted the publicly funded candidate close to a dollar-for-dollar match of the spending of the nonparticipating candidate, plus close to a dollar-for-dollar match of the value of the independent expenditures used in support of the nonparticipating candidate or against the publicly funded candidate.[101]

Unlike the other circuits that had invalidated trigger provisions before *Davis*,[102] the Ninth Circuit did not rule that the provision created *no* burden on free speech.[103] Instead, the court viewed the law

94. *McComish*, 611 F.3d 510.

95. ARIZ. REV. STAT. ANN. § 16-952 (2010), *invalidated by* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).

96. Citizens Clean Elections Act, ARIZ. REV. STAT. ANN. §§ 16-940 to -961 (2010).

97. *See McComish*, 611 F.3d at 517–19 (describing each of the plaintiffs' individualized First Amendment concerns).

98. ARIZ. REV. STAT. ANN. § 16-941 (2010).

99. *Id.* § 16-952.

100. *Id.*

101. *Id.* For the court's thorough description of the trigger provision, see *McComish*, 611 F.3d at 516.

102. *See supra* Part I.B.

103. *McComish*, 611 F.3d at 522–23 ("We will only conclude that the Act burdens speech to the

as burdening speech in an "indirect" or "minimal" fashion.[104] The Ninth Circuit also minimized the Supreme Court's citation to *Day* in *Davis* as "for a single, limited proposition."[105] Thus, the Ninth Circuit did not apply strict scrutiny or even *Buckley* scrutiny[106] to the trigger provision.[107] Instead, the court found that since the provision did not directly burden First Amendment free speech rights, "intermediate scrutiny" should be applied as the standard of review.[108] Under intermediate scrutiny, a court looks to whether a challenged law has a "substantial relation" to a "sufficiently important governmental interest."[109] The Ninth Circuit acknowledged that the Supreme Court, in both *Buckley* and *Citizens United v. FEC*,[110] used intermediate scrutiny only when examining disclosure requirements in campaign finance laws, but found that the burden placed on candidates by Arizona's trigger provision was more analogous to a disclosure requirement than to an expenditure limit.[111] Satisfied that the trigger provision reduced the appearance of quid pro quo corruption and encouraged participation in the public financing system, the court held that the provision was substantially related to the state's asserted anticorruption interest and found no First Amendment violation.[112] The decision was appealed, and the Supreme Court granted certiorari and consolidated the case with

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extent that Plaintiffs have proven that the specter of matching funds has actually chilled or deterred them from accepting campaign contributions or making expenditures.").

104. *Id.* at 523 ("Based on the record before us, we conclude that any burden the Act imposes on Plaintiffs' speech is indirect or minimal.").

105. *Id.* at 524 n.9. The Ninth Circuit invoked the *Rosenstiel* decision to question *Day* as precedent: "We decline to follow the Eighth Circuit down a road that even it refused to follow." *Id.* For more on the *Day* and *Rosenstiel* decisions, see *supra* Part I.B.

106. *See supra* note 36 and accompanying text.

107. *See McComish*, 611 F.3d at 525.

108. *Id.*

109. *Id.*; *see also* BLACK'S LAW DICTIONARY 890 (9th ed. 2009).

110. Citizens United v. FEC, 130 S. Ct. 876 (2010).

111. *See McComish*, 611 F.3d at 525. ("We conclude that the burden created by the Act is most analogous to the burden of disclosure and disclaimer requirements in *Buckley* and *Citizens United*. Following the Supreme Court's precedents in those cases, because the Act imposes only a minimal burden on fully protected speech, intermediate scrutiny applies.").

112. *Id.* at 525–27.

Arizona Free Enterprise Club's Freedom Club PAC v. Bennett in November of 2010.[113]

2. Green Party of Connecticut v. Garfield*: Trigger Provisions are an Unconstitutional Burden on First Amendment Rights*

Shortly after *McComish* was decided, the Second Circuit handed down its decision in *Green Party of Connecticut*.[114] *Green Party of Connecticut* involved Connecticut's Citizens' Election Program (CEP), the state's system of public campaign financing.[115] Challengers to the system objected—on First Amendment grounds—to two separate trigger provisions within the CEP.[116] A nonparticipating candidate would activate the first trigger by spending or receiving campaign funds in excess of the publicly funded candidate's expenditure limit.[117] Once triggered, the publicly funded candidate would receive additional public grants based on how far over the limit the nonparticipating candidate ventured—up to a limit of 100% of the system's initial public subsidy.[118] The second provision related to independent expenditures that were used to advocate for the defeat of the publicly financed candidate[119] and was triggered when those expenditures, plus the nonparticipating candidate's own expenditures, exceeded the publicly funded

113. McComish v. Bennett, 131 S. Ct. 644 (2010).

114. Green Party of Conn. v. Garfield, 616 F.3d 213 (2d Cir. 2010), *cert. denied sub nom.* Green Party of Conn. v. Lenge, 131 S. Ct. 3090 (2011) (mem.).

115. CONN. GEN. STAT. §§ 9-700 to -759 (2011).

116. CONN. GEN. STAT. §§ 9-713 to -714 (repealed 2010). The challengers to the public financing program consisted of minor political parties, lobbyists, contractors, and a candidate for state office. *Green Party of Conn.*, 616 F.3d at 222.

117. CONN. GEN. STAT. § 9-713 (repealed 2010).

118. *Id.*

119. Unlike provisions in other states dealing with independent expenditures, the second trigger provision in Connecticut's system did not count independent expenditures made in support of the nonparticipating candidate towards the threshold amount. CONN. GEN. STAT. § 9-714 (repealed 2010). Instead, only independent expenditures that advocated for the defeat of the publicly financed candidate were counted. *Id.* Although outside the scope of this Comment, it is possible the Connecticut legislature felt that clean elections were damaged more by negative campaigning than general advocacy or that basing a trigger provision on support for a candidate was more likely to create a burden on First Amendment rights and be struck down. *See id.*

candidate's public grant amount.[120] The result was a dollar-for-dollar match of the applicable independent expenditures in excess of the initial public grant.[121]

The Second Circuit began by stating that the Supreme Court's ruling in *Davis* governed its analysis.[122] In comparing the first trigger provision in the CEP to the trigger provision in *Davis*, the court explained that the provision invalidated in *Davis* only allowed for the "possibility" that one candidate's spending could result in that candidate's opponent raising more money under relaxed restrictions.[123] The court stressed that the trigger provision in the CEP was "harsher" than the one in *Davis* because it left "no doubt" that the nonparticipating candidate's opponent would receive additional funds as a result of the matching funds benefit.[124] Since the trigger provision placed a "substantial burden" on First Amendment rights, the court analyzed the provision under strict scrutiny[125]—as did the Supreme Court in *Davis*.[126] Turning to the possible state interests in enacting the trigger provision, the Second Circuit rejected an equalization interest[127] and determined that the provision, which was essentially an expenditure limitation, did not serve an anticorruption interest.[128] Thus, the court found the first trigger

120. *Id.*

121. *Id.* For the court's description of both trigger provisions, see *Green Party of Conn. v. Garfield*, 616 F.3d at 221–22.

122. *Green Party of Conn.*, 616 F.3d at 244 ("The Supreme Court's analysis in *Davis* directly governs plaintiffs' challenge to the CEP's trigger provisions . . . .").

123. *Id.* at 244–45 ("In *Davis* . . . there was some possibility that the non-self-financed candidate . . . would be unable to raise additional money under the relaxed restrictions.").

124. *Id.* at 245 ("The penalty imposed by the [trigger provision in the CEP], therefore, is *harsher* than the penalty in *Davis*, as it leaves no doubt that . . . the opponent . . . will receive additional money.").

125. *Id.* at 245 ("[T]he [trigger] provision 'imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech.' To be upheld under plaintiffs' First Amendment challenge, the provision must be 'justified by a compelling state interest.'" (citation omitted) (quoting Davis v. FEC, 554 U.S. 724, 740 (2008))).

126. *See supra* Part I.C.

127. *Green Party of Conn.*, 616 F.3d at 245 ("[I]nsofar as the [trigger] provision is the result of a desire 'to level electoral opportunities,' [it is], under *Davis*, clearly unconstitutional." (quoting *Davis*, 554 U.S. at 741)).

128. *Green Party of Conn.*, 616 F.3d at 245 ("Since the CEP is justified by a governmental interest in eliminating corruption or the perception of corruption, pursuant to the Supreme Court's teaching in *Davis*, encouraging participation in the CEP does not justify the burden on First Amendment rights

provision to be unconstitutional.[129] The court analyzed the second provision in an almost identical fashion and invalidated it as well.[130] Furthermore, as the Supreme Court did in *Davis*, the Second Circuit cited *Day*, the previously questioned Eighth Circuit decision,[131] as support for finding the second trigger provision to be in violation of the First Amendment.[132]

3. Scott v. Roberts*: Trigger Provisions Are Not Narrowly Tailored to Serve the Anticorruption Interest*

In early July of 2010, prior to the decision in *Green Party of Connecticut*, Florida gubernatorial candidate Rick Scott[133] filed a complaint to enjoin a trigger provision in a Florida campaign finance law.[134] After losing at the district court level, Scott appealed to the Eleventh Circuit.[135] The trigger provision that Scott challenged provided a publicly funded candidate with a dollar-for-dollar match for every dollar the nonparticipating candidate spent over a statutorily defined expenditure limit.[136] Unlike any of the previously discussed trigger provisions, the Florida provision was triggered only by candidate expenditures.[137]

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caused by the [trigger] provision.").

129. *Id.* ("Thus, we conclude, pursuant to *Davis*, that the CEP's [first trigger] provision violates the First Amendment."). In a tersely worded footnote, the court also referenced the Ninth Circuit's opinion in *McComish v. Bennett* and declared, "We are not persuaded by the Ninth Circuit's opinion . . . ." *Id.* at 245 n.19.

130. *See id.* at 245–46.

131. *See supra* Part I.B.

132. *Green Party of Conn.*, 616 F.3d at 246.

133. For more background on Rick Scott, see *supra* notes 1–2, 16 and accompanying text.

134. *See supra* notes 9–12 and accompanying text.

135. Scott v. Roberts, 612 F.3d 1279, 1281 (11th Cir. 2010)

136. *See supra* note 10 and accompanying text.

137. *Compare Scott* 612 F.3d 1279 (analyzing a provision triggered only after a candidate's expenditures exceed a threshold amount), *with Green Party of Conn.*, 616 F.3d 213 (analyzing a provision triggered by contributions or expenditures and another provision triggered by independent expenditures), 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) (analyzing a provision triggered by expenditures or independent expenditures), N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2008) (analyzing a provision triggered by contributions, expenditures, or independent expenditures), Daggett v. Comm'n on Gov'tal Ethics & Election Practices, 205 F.3d 445 (1st Cir. 2000) (analyzing a provision triggered by contributions, expenditures, or

In reviewing the trigger provision, the Eleventh Circuit agreed with the Second Circuit and relied heavily on *Davis*.[138] The court began by describing the trigger provision as a substantial burden on Scott's First Amendment right to free speech.[139] The court discussed the Supreme Court's citation to *Day* in *Davis* to further this proposition.[140] Because of the substantial burden it had on speech, the court stated that it was bound to examine the trigger provision under strict scrutiny.[141] The state's asserted interest was, predictably, an anticorruption rationale.[142] The court did not find the state's argument persuasive, explaining that use of a candidate's personal funds actually prevents the appearance of quid pro quo corruption.[143] The court next suggested that even if the trigger provision served the anticorruption interest, it was not narrowly tailored to that end.[144] Because Florida did not prove that the trigger provision "further[ed] the anticorruption interest in the least restrictive manner," the court ruled that Scott was likely to prevail on the merits of his claim and

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independent expenditures), Gable v. Patton, 142 F.3d 940 (6th Cir. 1998) (analyzing a provision triggered by contributions or expenditures), Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996) (analyzing a provision triggered by contributions or expenditures), *and* Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) (analyzing a provision triggered by independent expenditures).

138. *See Scott*, 612 F.3d at 1290–94 (finding that Scott was likely to prevail on the merits because the trigger provision was a burden on his First Amendment rights and was unlikely to survive under strict scrutiny).

139. *Id.* at 1291 ("We agree with Scott . . . that, under *Davis*, the burden of Scott's right of free speech is substantial.").

140. *Id.* at 1292. The Supreme Court's citation to *Day* in *Davis* is discussed *supra* Part I.C. The Second Circuit also cited *Day* in *Green Party of Connecticut*, 616 F.3d at 246.

141. *Scott*, 612 F.3d. at 1290 ("We agree with Scott that *Davis* requires us to subject the [trigger provision] to strict scrutiny.").

142. *Id.* at 1292 ("The [State] and McCollum contend that the subsidy furthers the anticorruption interest by encouraging participation in the public campaign financing system of Florida, which in turn prevents corruption or the appearance of corruption."). The court also rejected any sort of equalization interest: "At bottom, the Florida public campaign financing system appears primarily to advantage candidates with little money or who exercise restraint in fundraising. That is, the system levels the electoral playing field, and that purpose is constitutionally problematic." *Id.* at 1293.

143. *See id.* at 1292–93 ("The Supreme Court has explained that 'the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse' of campaign contributions." (quoting Buckley v. Valeo, 424 U.S. 1, 53 (1976) (per curiam))).

144. *See id.* at 1294 ("Even if we were certain that the public financing system of Florida furthers an anticorruption interest, we agree that Scott has proved a likelihood that the [trigger provision] is not the least restrictive means of encouraging that participation.").

preliminarily enjoined the state from releasing the funds to Scott's opponent.[145] Shortly thereafter, the State of Florida decided not to appeal the injunction.[146]

II. *ARIZONA FREE ENTERPRISE CLUB'S FREE ENTERPRISE PAC V. BENNETT*: THE SUPREME COURT CURES THE TRIGGER PROVISION CIRCUIT SPLIT

In June of 2011, the Supreme Court decided *Arizona Free Enterprise Club's Free Enterprise PAC v. Bennett*[147] and reversed the judgment of the Ninth Circuit Court of Appeals.[148] The Court, by the same 5–4 margin as in *Davis v. FEC*,[149] held that the trigger provision in Arizona's campaign finance system was unconstitutional.[150] Chief Justice John Roberts wrote the majority opinion for the divided Court.[151] Justice Elena Kagan wrote the impassioned—and highly quotable[152]—opinion for the dissenters.[153]

145. *Id.* at 1298.

146. *See* John Frank, *Spending Cap Ruling Won't be Fought*, ST. PETERSBURG TIMES (Florida), Aug. 5, 2010, at 5B, *available at* 2010 WLNR 15565673 ("Florida secretary of state spokeswoman Jennifer Davis said the office would not challenge the decision. 'We need some finality to move through the election process,' she said. The appellate court's ardent decision made a rehearing unlikely to succeed.").

147. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011). This was the appeal of the Ninth Circuit case decided under the name *McComish v. Bennett*. *See supra* note 113 and accompanying text.

148. *Ariz. Free Enter.*, 131 S. Ct. at 2829.

149. Davis v. FEC, 554 U.S. 724 (2008). Although the margin was the same, two new Justices took part in the decision. Between *Davis* in 2008 and *Arizona Free Enterprise* in 2011, Justices Sonia Sotomayor and Elena Kagan replaced retiring Justices David Souter and John Paul Stevens, respectively, on the Supreme Court. *See* Joan Biskupic, *'Dynamic' Duo of Kagan, Sotomayor Add Vigor to Court*, USA TODAY, Mar. 4, 2011, at 9A, *available at* 2011 WLNR 4245425.

150. *Ariz. Free Enter.*, 131 S. Ct. at 2812–13.

151. *Id.* at 2813–29.

152. *See id.* at 2835 (Kagan, J., dissenting) ("[The Petitioners] are making a novel argument: that Arizona violated *their* First Amendment rights by disbursing funds to *other* speakers even though they could have received (but chose to spurn) the same financial assistance. Some people might call that *chutzpah*."); *id.* at 2843 ("[T]he majority claims to have found three smoking guns that reveal the State's true (and nefarious) intention to level the playing field. But the only smoke here is the majority's, and it is the kind that goes with mirrors."); *id.* at 2844 ("So the majority has no evidence—zero, none—that the objective of the Act is anything other than the interest that the State asserts . . . .").

153. *Id.* at 2829–46.

A. The Majority Opinion: "Laws . . . that Inhibit Robust and Wide-Open Political Debate Without Sufficient Justification Cannot Stand."[154]

Chief Justice Roberts began the majority opinion in *Arizona Free Enterprise* by recounting the facts and parties involved,[155] focusing primarily on the operation of the trigger provision in Arizona's campaign finance system.[156] Turning to the Court's campaign finance jurisprudence, the Chief Justice noted that the First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office"[157] and "'[l]aws that burden political speech are' accordingly 'subject to strict scrutiny.'"[158] Next, he acknowledged that some campaign finance restrictions, such as contribution limits and disclosure requirements, are "less onerous," and thus, the Court has subjected them to a "lower level of scrutiny."[159]

Explaining that *Davis* controlled the Court's approach to this case, the Chief Justice concluded that the trigger provision was a "substantial burden" on the speech of a nonparticipating candidate.[160] Chief Justice Roberts recognized that the burden the Millionaire's Amendment in *Davis* placed on a candidate's right to free speech was different than the penalty in Arizona's system.[161] However, the trigger provision in Arizona, he explained, was "*more* constitutionally problematic" than the one in *Davis* because matching funds were guaranteed.[162] The Millionaire's Amendment only provided a potential for the candidate's opponent to raise more funds.[163] Using this logic, the Chief Justice explained that the Ninth

154. *Ariz. Free Enter.*, 131 S. Ct. at 2829.
155. *See supra* Part I.D.1.
156. *Ariz. Free Enter.*, 131 S. Ct. at 2813–16.
157. *Id.* at 2817 (quoting Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989)) (internal quotation marks omitted).
158. *Id.* (quoting Citizens United v. FEC, 130 S. Ct. 876, 898 (2010)).
159. *Id.*
160. *Id.* at 2818, 2824.
161. *Id.* at 2818. See *supra* Part I.C. for more on *Davis* and the Millionaire's Amendment.
162. *Ariz. Free Enter.*, 131 S. Ct. at 2818.
163. *Id.* This was the same reasoning used by the court in *Green Party of Connecticut v. Garfield*, 616

Circuit's analogy to the burden imposed by disclosure requirements was "not even close."[164]

Having determined that the trigger provision was a "substantial burden on the speech of privately financed candidates and independent expenditure groups" and therefore subject to strict scrutiny, Chief Justice Roberts transitioned to a discussion of whether the provision was justified by a compelling state interest.[165] As the Court did in *Davis*, the Chief Justice emphatically discounted any type of equalization rationale as "a dangerous enterprise and one that cannot justify burdening protected speech."[166] Turning to Arizona's asserted anticorruption interest, the Chief Justice invoked the Court's decisions in *Buckley v. Valeo*, *Davis*, and *Citizens United v. FEC* to support the contention that limits on expenditures—by candidates or independent groups—do not prevent corruption or the appearance of corruption.[167] Lastly, he addressed Arizona's argument that allowing trigger provisions encouraged participation in the public financing system, which helped prevent candidates from being susceptible to bribes and corruption—an argument the Ninth Circuit found persuasive.[168] "[B]urdening constitutionally protected speech" to encourage participation in a public financing system, he explained, "does not establish the constitutionality of the [trigger] provision."[169] Cautioning that the "wisdom of public financing" was not questioned by this decision, the Court invalidated the trigger provision in

F.3d 213, 244–45 (2d Cir. 2010), *cert. denied sub nom.* Green Party of Conn. v. Lenge, 131 S. Ct. 3090 (2011) (mem.).

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

165. *Id.* at 2824.

166. *Id.* at 2826. For more on the equalization rationale, see *supra* note 42.

167. *Id.* at 2826–27.

168. McComish v. Bennett, 611 F.3d 510, 526 (9th Cir. 2010), *rev'd sub nom.* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) ("[T]he . . . anticorruption interest is further promoted by high participation in the program. The more candidates that [participate], the smaller the appearance among Arizona elected officials of being susceptible to *quid pro quo* corruption, because fewer of those elected officials will . . . be viewed as beholden to their campaign contributors . . . .").

169. *Ariz. Free Enter.*, 131 S. Ct. at 2827.

Arizona's public financing system and, presumably, trigger provisions in general.[170]

B. The Dissent: "[D]emocracy is not a game."[171]

The main thrust of the dissenters' disagreement with the majority was their belief that the trigger provision encouraged participation in Arizona's public funding system by making it more effective, thereby serving the anticorruption interest.[172] In her opinion, Justice Kagan explained that a significant weakness of public financing systems is the difficulty in finding the appropriate amount of funds to grant to a participating candidate.[173] As she saw it, if the grant is set too low, candidates will not participate, but if it is set too high, it could be "an unsustainable burden" on the treasury.[174] Justice Kagan referred to dealing with this problem as "finding the Goldilocks solution."[175] She felt that Arizona had found this "Goldilocks solution" by incorporating the trigger provision in its system.[176]

Justice Kagan also disagreed with the majority's conclusion that the trigger provision was a substantial burden on speech.[177] She argued that the provision had the opposite result: "It subsidizes [the participating candidate's speech] and so produces *more* political speech."[178] Her opinion stressed that the trigger provision did not restrict speech and referred to the evidence of any deterrence as "spotty at best."[179] To her, finding the trigger provision to be

170. *See id.* at 2828–29.
171. *Id.* at 2846 (Kagan, J., dissenting).
172. *See id.* at 2829–46
173. *Id.* at 2831–32.
174. *Id.* at 2831.
175. *Ariz. Free Enter.*, 131 S. Ct. at 2832.
176. *Id.*
177. *Id.* at 2833.
178. *Id.*
179. *Id.* at 2837 n.6. There is evidence available indicating that trigger provisions do chill speech in elections. Like Florida gubernatorial candidate Rick Scott in *Scott v. Roberts*, 612 F.3d 1279, 1283–84 (11th Cir. 2010), candidates for office in Arizona have described ways that trigger provisions caused them to adjust their strategies and curb their campaign spending. Tony Bouie, a candidate for the Arizona House of Representatives and a plaintiff in *Arizona Free Enterprise*, testified that he delayed campaign expenditures because of the trigger provision and waited "until the last possible minute" to

constitutional would have fallen squarely within the Court's campaign finance precedent.[180]

Finally, Justice Kagan suggested that even if the trigger provision was a substantial burden—and therefore subject to strict scrutiny—Arizona had presented a compelling interest that justified that burden.[181] Returning to the thesis of the dissenting opinion, Justice Kagan explained that participation in the public funding system serves the anticorruption interest, which is an interest the Court has found to be compelling.[182] She described the trigger provision as a "fine-tuning" of the lump-sum program approved in *Buckley v. Valeo*.[183] Justice Kagan concluded the dissenting opinion by accusing the majority of not respecting the objectives of the people of Arizona: "less corruption [and] more speech."[184]

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spend money that would trigger the provision. Petition for Writ of Certiorari at 9, McComish v. Bennett, 131 S. Ct. 644 (2010) (No. 10-239), *available at* http://www.goldwaterinstitute.org/file/4948/download/4950. Further, an electronic and paper survey related to the trigger provision in Arizona's public financing system was conducted of all primary candidates in the 2006 Arizona election. Michael Miller, *Gaming Arizona: Public Money and Shifting Candidate Strategies*, 41 PS: POL. SCI. & POL. 527, 528 (2008). According to Michael Miller, the Ph.D. candidate who conducted the survey, "Stories [about shifting strategies] were echoed by *every* candidate who had ever run traditionally against a [publicly funded] opponent." *Id.* at 529. One respondent metaphorically stated that every dollar spent over the threshold "starts feeding the alligator trying to eat me." *Id.* at 528. In addition, Miller stated, "According to *every informant I interviewed*, [nonparticipating] candidates try to maximize the competitive effect of the money that they do spend by releasing funds at the last moment, giving the [publicly funded] candidate little time to react." *Id.* at 529. Highlighting this point, the author relayed the story of a candidate who had participated in the public funding system two times and had received a trigger funds check the Friday before both elections, with no time to spend it, because the nonparticipating candidate had waited until the last minute to exceed the expenditure limit. *Id.* David M. Primo, who served as an expert witness when *McComish* was at the district court level, found similar evidence while gathering research. David M. Primo, *"Clean Elections" Stifles Speech*, HUFFINGTON POST (Aug. 18, 2010, 2:22 PM), http://www.huffingtonpost.com/david-m-primo/clean-elections-stifles-s_b_686555.html.

180. *Ariz. Free Enter.*, 131 S. Ct. at 2838; *see also id.* at 2836–39 (reviewing the Court's history of campaign finance and speech subsidy cases).

181. *Id.* at 2841.

182. *Id.* at 2841–43.

183. *Id.* at 2842. Chief Justice Roberts addressed this point in the majority opinion: "[T]he fact that the State's matching mechanism may be more efficient than other alternatives—that it may help the State in . . . 'fine-tuning' its financing system to avoid a drain on public resources—is of no moment; 'the First Amendment does not permit the State to sacrifice speech for efficiency.'" *Id.* at 2824 (majority opinion) (citation omitted) (quoting Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988)).

184. *Ariz. Free Enter.*, 131 S. Ct. at 2845.

III. REPORTS OF THE DEMISE OF CAMPAIGN FINANCE REFORM HAVE BEEN GREATLY EXAGGERATED: REPLACING TRIGGER PROVISIONS WITH CONSTITUTIONAL REGULATIONS

There has been some discussion that the invalidation of trigger provisions in *Davis v. FEC* and *Arizona Free Enterprise Club's Free Enterprise PAC v. Bennett* will signal the end of—or greatly diminish the effectiveness of—campaign finance regulation, public funding of campaigns, or both.[185] Indeed, shortly after the Supreme Court's decision in *Arizona Free Enterprise*, federal district courts in Florida[186] and Maine[187] struck down trigger provisions in those states' campaign finance systems accordingly. Additionally, on the day after *Arizona Free Enterprise* was decided, the Supreme Court denied certiorari in the *Green Party of Connecticut v. Lenge* case (formerly *Green Party of Connecticut v. Garfield*)[188] in which the Second Circuit invalidated two trigger provisions in Connecticut's system of public campaign financing—the CEP.[189] However, removing trigger provisions from campaign finance systems will not leave state and federal regulators unarmed to combat the primary

185. *See, e.g.*, Esenberg, *supra* note 30; E. Stewart Crosland, Note, *Failed Rescue: Why* Davis v. FEC *Signals the End to Effective Clean Elections*, 66 WASH. & LEE L. REV. 1265 (2009); Fevurly, *supra* note 42; Emily C. Schuman, Note, Davis v. Federal Election Commission*: Muddying the Clean Money Landscape*, 42 LOY. L.A. L. REV. 737 (2009); Editorial, *Send in the Tycoons*, N.Y. TIMES, July 14, 2010, at A26, *available at* 2010 WLNR 14077783; Jeremy Miller, *Supreme Court Eviscerates Arizona's Public Financing System*, CITIZENS FOR RESP. & ETHICS IN WASH. BLOG (June 27, 2011), http://www.citizensforethics.org/blog/entry/supreme-court-eviscerates-arizonas-public-financing-system.

186. Scott v. Browning, No. 4:10cv283-RH/WCS (N.D. Fla. June 28, 2011) (issuing a permanent injunction of the trigger provision that was temporarily enjoined in *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010)); Brandon Larrabee, *Federal Judge Upholds the Rick Scott Rule of Florida Campaign-Finance*, ORLANDO SENTINEL POL. PULSE BLOG (June 29, 2011, 9:06 PM), http://blogs.orlandosentinel.com/news_politics/2011/06/federal-judge-upholds-the-rick-scott-rule-of-florida-campaign-finance.html.

187. Cushing v. McKee, No. 1:10-cv-00330-GZS (D. Me. July 21, 2011) (invalidating the trigger provision discussed in *Daggett v. Commission on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000)); Clarke Canfield, *Judge Strikes Down Maine's Matching Funds Campaign Finance Law*, BANGOR DAILY NEWS (July 21, 2011, 6:12 AM), http://bangordailynews.com/2011/07/20/politics/judge-strikes-down-maines-matching-funds-law/.

188. Green Party of Conn. v. Garfield, 616 F.3d 213, 218 (2d Cir. 2010), *cert. denied sub nom.* Green Party of Conn. v. Lenge, 131 S. Ct. 3090 (2011) (mem.).

189. Green Party of Conn. v. Lenge, 131 S. Ct. 3090.

evils of campaign financing: corruption and the appearance of corruption. Some commentators even see it as a positive sign for campaign finance reformers that the majority announced that public funding was "not [the Court's] business"[190] in *Arizona Free Enterprise*.[191] Below are three measures that lawmakers can take to improve the effectiveness of campaign finance systems without the use of provisions triggered by candidate spending.

A. Implement Comprehensive Disclosure Requirements

Disclosure requirements aid voters by providing information as to those individuals, groups, and interests that are supporting a particular candidate—and the level of that support.[192] This type of transparency can aid in the prevention of corruption because candidates will be less likely, or at least would seem to be less likely,[193] to pay back financial supporters with improper political favors if those supporters are available for the public to research.[194] As previously discussed, the Supreme Court applies intermediate scrutiny, not strict scrutiny, to campaign finance regulations that require disclosure of financial supporters.[195] Because of this lower level of scrutiny, these regulations are more likely to be found constitutional than regulations impacting expenditures. In fact, in the highly publicized *Citizens United v. FEC* decision, only Justice Clarence Thomas dissented from the portion of the holding that

190. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2828 (2011).

191. *See, e.g.*, Rick Hasen, *The Arizona Campaign Finance Law: The Surprisingly Good News in the Supreme Court's New Decision*, NEW REPUBLIC (June 27, 2011, 1:07 PM), http://www.tnr.com/article/politics/90834/arizona-campaign-finance-supreme-court ("[T]he Court did not level a death blow to public financing laws. Instead, it said that the decision of cities, states, or Congress [to] enact public financing is 'not our business.'"); *see also* Zephyr Teachout, *What the Court Did and Didn't Do*, N.Y. TIMES (June 27, 2011), http://www.nytimes.com/roomfordebate/2011/06/27/the-court-and-the-future-of-public-financing/matching-funds-what-the-court-didnt-touch (discussing the future viability of public funding after *Arizona Free Enterprise*).

192. WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION 257 (4th ed. 2007).

193. As discussed, the Supreme Court is concerned not only with actual corruption, but with the appearance of corruption as well. *See supra* Part I.A.

194. *See* ESKRIDGE ET AL., *supra* note 192.

195. *See supra* note 111 and accompanying text.

found the disclosure and disclaimer requirements of the challenged law to be constitutional.[196] In addition to the Supreme Court's propensity to uphold these requirements,[197] many commentators feel that mandating disclosure is one of the most effective and least constitutionally problematic methods of regulating campaign financing.[198]

B. Provide Larger Initial Grants

If the problem that necessitates trigger provisions in public funding systems is a disparity in spending power between participating and nonparticipating candidates, this disparity can be resolved up front by increasing the initial public grant.[199] By providing this money at the outset, the constitutional problems faced by tying additional funds to the expenditures of nonparticipating candidates are avoided.[200] Furthermore, there is no need for nonparticipating candidates to have to adjust their spending strategies, after the initial decision to reject public funding, if the state provides the funds to their opponents at the outset.[201] This is likely the easiest of the regulations to implement

196. Citizens United v. FEC, 130 S. Ct. 876, 979–82 (2010) (Thomas, J., concurring in part and dissenting in part).

197. *See Citizens United*, 130 S. Ct. 876 (finding disclosure and disclaimer requirements in the BCRA to be constitutional against an as-applied challenge); McConnell v. FEC, 540 U.S. 93 (2003) (finding disclosure and disclaimer requirements in the BCRA to be constitutional against a facial challenge); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (upholding reporting and disclosure requirements in FECA). *But see* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) (finding disclosure requirements unconstitutional in an issue-based election).

198. ESKRIDGE ET AL., *supra* note 192 (discussing the support among scholars for disclosure and disclaimer requirements); *see also* Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265, 266 (2000) ("In the endless debate between supporters and opponents of campaign finance limits, the one thing both sides seem to have agreed upon is the need for effective disclosure of campaign contributions and expenditures.").

199. This was one of the proposals that Rick Scott presented to show that Florida could satisfy its stated objectives with more narrowly tailored means than the trigger provision in *Scott v. Roberts*, 612 F.3d 1279, 1294 (11th Cir. 2010).

200. The majority opinion in *Arizona Free Enterprise* stressed that the problem with the trigger provision was not the "amount of funding," but the fact that the funding was provided "in direct response to . . . political speech. "Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2824 (2011).

201. For examples of candidates shifting their strategies in light of trigger provisions, see *supra* note 179.

for systems that formerly had trigger provisions because the funds allocated for the provisions could be used to pay the higher initial grants.[202]

C. Develop Regulations that Focus on Contributions

Like disclosure requirements, limits on contributions are also afforded a lower level of scrutiny than expenditure limits.[203] Although the Supreme Court has upheld various limits on contributions dating back to *Buckley v. Valeo*, contribution limits can run into constitutional problems if they are deemed to make a public financing system so lucrative that candidates are coerced into participating.[204] Three provisions focusing on contributions are likely to be found constitutional if implemented, provided that they are not so onerous as to make the associated public funding system impliedly mandatory: cap gap provisions, multiplied contribution matching provisions, and contribution trigger provisions.

1. Cap Gap Provisions

A provision in a campaign finance system that provides a higher contribution limit for publicly funded candidates than for nonparticipating candidates is referred to as a cap gap.[205] By making a public financing scheme more attractive to potential participants, a cap gap serves the anticorruption interest by encouraging candidates

202. One issue with this approach is the "Goldilocks" problem discussed by Justice Kagan in her dissent in *Arizona Free Enterprise*, 131 S. Ct. at 2832 (Kagan, J., dissenting). Finding an initial grant that encourages participation, but does not bankrupt the treasury, is a common difficulty with campaign finance systems. *Id.* at 2831–32.

203. *See supra* Part I.A.

204. *See* Buckley v. Valeo, 424 U.S. 1, 57 n.65 (1976) (per curiam) ("Congress . . . may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may *voluntarily* limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding." (emphasis added)); *see also Ariz. Free Enter.*, 131 S. Ct. at 2831 ("[A] public funding program must be voluntary to pass constitutional muster . . . ."); Gable v. Patton, 142 F.3d 940, 948 (6th Cir. 1998) ("[T]he central question . . . is whether the [t]rigger . . . rises to the level of constitutional coercion.").

205. For a detailed discussion of cap gap provisions, including the states that have used them and the constitutional challenges that have been brought against them, see Li *supra* note 59, at 287–91.

to participate.[206] Furthermore, by focusing entirely on the ability of the publicly funded candidate to raise funds and remain competitive, no burden is placed on the First Amendment rights of nonparticipating candidates. Prior to being amended in July of 2011, Rhode Island's campaign finance system included a cap gap provision.[207] Although decided before both *Davis* and *Arizona Free Enterprise*, the First Circuit upheld Rhode Island's cap gap against a constitutional challenge in *Vote Choice, Inc. v. DiStefano*.[208]

2. Multiplied Contribution Matching Provisions: The New York City Model

As part of the Presidential Election Campaign Fund established in FECA (and upheld as constitutional in *Buckley*), the federal government matches up to $250 of an individual's total contributions to an eligible candidate.[209] Some states have campaign finance systems that provide similar contribution matching.[210] In New York City's campaign finance system, publicly funded candidates receive a six-to-one match for contributions up to $175.[211] This type of multiplied contribution matching allows candidates to view public financing as a viable option when running against privately financed candidates who are able to self-fund. In the wake of *Arizona Free Enterprise*, some commentators have opined that the New York City

206. One potential constitutional pitfall of cap gap provisions is that they create an asymmetrical regulatory scheme between participants and nonparticipants. Although the relaxed contribution limits in *Davis* were triggered by candidate spending, the Supreme Court did not approve of the resulting lack of contribution limit symmetry between candidates in the same race. Davis v. FEC, 554 U.S. 724, 738 (2008) ("We have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other . . . .").

207. R.I. GEN. LAWS § 17-25-30(3) (2003) (amended 2011).

208. Vote Choice, Inc. v. DiStefano, 4 F.3d 26 (1st Cir. 1993) (finding Rhode Island's cap gap provision to be "narrowly tailored and logically related, in scope, size, and kind, to compelling governmental interests").

209. 26 U.S.C. § 9034(a) (2006). For a brief summary of the public funding system for presidential elections created by FECA, see FINANCING THE 2008 ELECTION 9–11 (David B. Magleby & Anthony Corrado eds., 2011).

210. *E.g.*, FLA. STAT. § 106.35(2) (2010).

211. N.Y.C. ADMIN. CODE § 3-705(2)(a) (West, Westlaw through Local Law 65 of 2010 and Chapters 1–568 of the Laws of the State of New York for 2010).

system may become a model for the nation.[212] There is even an effort underway at the federal level to implement a campaign finance program with a multiplied contribution matching provision.[213]

3. Contribution Trigger Provisions

While invalidating traditional trigger provisions, *Arizona Free Enterprise* said nothing about the constitutionality of provisions that are not triggered by an opponent's spending, but by their ability to raise funds. These triggers, based on contributions and not expenditures, would seemingly avoid the constitutional problems discussed in *Davis* and *Arizona Free Enterprise*. In both of those cases, the Supreme Court made clear that a provision could not be triggered by expenditures because of First Amendment concerns.[214] If, however, the provision was triggered by an outside party making a contribution, it would be more likely to succeed because the analysis would not involve strict scrutiny.[215] The distinction in *Buckley* between expenditures and contributions was based on the notion that contributions did not implicate the same type of speech as expenditures and therefore could be afforded the lower level of scrutiny.[216] These contribution trigger provisions could be activated once a nonparticipating candidate reached a threshold level of contributions and could then provide the publicly financed candidate with simple matching funds or multiplied matching funds as in the New York City model. This approach would also aid in finding the

212. *See* Alec Hamilton, *Campaign Finance Ruling May Make NYC a Model for the Nation*, WNYC.ORG (June 21, 2011), http://www.wnyc.org/articles/its-free-country/2011/jun/21/campaign-finance-ruling-may-make-new-york-model-nation/; Richard L. Hasen, *New York City as a Model?*, N.Y. TIMES (June 27, 2011, 6:34 PM), http://www.nytimes.com/roomfordebate/2011/06/27/the-court-and-the-future-of-public-financing/new-york-city-as-a-model-for-campaign-finance-laws.

213. Fair Elections Now Act, S. 750, 112th Cong. § 523 (2011). For more on the Fair Elections Now Act, see FAIR ELECTIONS NOW, http://fairelectionsnow.org/ (last visited Oct. 27, 2011).

214. *See generally* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) (invalidating a provision triggered by expenditures that resulted in matching funds); Davis v. FEC, 554 U.S. 724 (2008) (invalidating a provision triggered by expenditures that resulted in asymmetrical contribution limits).

215. See supra notes 36–37 and accompanying text.

216. *See supra* Part I.A.

"Goldilocks solution" that Justice Kagan discussed in her dissenting opinion in *Arizona Free Enterprise* by allowing governments to hold the funds until they were actually needed.[217]

CONCLUSION

The Supreme Court established a framework in *Buckley v. Valeo* for challenges to campaign finance laws.[218] Unfortunately, this framework did not provide specific guidance for courts in dealing with the trigger provisions that state and federal lawmakers began inserting into campaign finance legislation. Prior to the Supreme Court's decision in *Arizona Free Enterprise Club's Free Enterprise PAC v. Bennett*, a split emerged among the circuits in dealing with trigger provisions.[219] In *Arizona Free Enterprise*, the Supreme Court held that trigger provisions burden the free speech of candidates and therefore unconstitutionally infringe on First Amendment rights.[220]

With trigger provisions invalidated, state and federal lawmakers now have a clear directive regarding what not to insert in their campaign finance legislation. Even without the use of trigger provisions, there are still ample means of regulating campaign finance by implementing disclosure requirements, providing larger initial grants, and developing provisions that focus on contributions.[221] Although attempting to ensure fair elections is a noble goal, the Supreme Court made it clear in *Arizona Free Enterprise* that the free discussion of public issues is at the core of the First Amendment and must be protected.

217. *Ariz. Free Enter.*, 131 S. Ct. at 2832 (Kagan, J., dissenting). For more on the "Goldilocks" problem, see *supra* note 202.
218. *See supra* Part I.A.
219. *See supra* Part I.B–D.
220. *See supra* Part II.A.
221. *See supra* Part III.