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The Last Rites of Public Campaign Financing?

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James Sample*

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What if the absolutely debilitating corruption that we face is a corruption caused by decent souls, not crooks? Could America rally to respond then? Can we get angry enough about small but systemic distortions that block the ability of democracy to work if those distortions are the product of good people working in a corrupted system? I am unsure. – Lawrence Lessig[1]

I. INTRODUCTION

The setting: Capitol Hill, Washington, D.C. The time: the last hours of 2012 and the first hours of 2013. The rhetoric on all sides: economic responsibility, albeit differently defined. The view: peering over the edge of the so-called fiscal cliff—the expiration of broad tax cuts and the scheduled onset of draconian spending cuts.[2] The American people: finding no room at the K Street Inn and certainly no seats—much less on both sides of the aisle—akin to those occupied by a biotech company that, just two weeks earlier, pleaded guilty in a major federal fraud case.[3] The company's key noncriminal credentials: a "small army of 74 lobbyists in the capital;"[4] its "employees and political action committee have distributed nearly $5 million in contributions to political candidates and committees since 2007, including $67,750 to [Senator Max] Baucus, the Finance Committee chairman, and $59,000 to [Senator Orrin] Hatch, the committee's ranking Republican;"[5] and, in a nod to the constitutional requirements of bipartisan passage and presentment, the company's lobbyists "show[ed] up more than a dozen times since 2009 on logs of visits to the White House" and "gave an additional $73,000 to [Senator Mitch] McConnell, some of it at a fund-raising event for him that [the company] helped sponsor in December while the debate over the fiscal legislation was under way."[6]

The tragically ironic result: buried in Section 632 of the crisis-averting, fiscally necessitated law is a paragraph postponing the implementation of a long-scheduled set of Medicare price restraints on

1. LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT, at xi–xii (2011).
2. Janet Hook & Siobhan Hughes, *Fiscal Cliff Edge Drawing Close in U.S.*, WALL ST. J. (Dec. 31, 2012, 8:55 AM), http://online.wsj.com/article/SB10001424127887323320404578212840882082434.html.
3. Eric Lipton & Kevin Sack, *Fiscal Footnote: Big Senate Gift to Drug Maker,* N.Y. TIMES (Jan. 19, 2013), http://www.nytimes.com/2013/01/20/us/medicare-pricing-delay-is-political-win-for-amgen-drug-maker.html?pagewanted=all&_r= ("On Dec. 19, as Congressional negotiations over the fiscal bill reached a frenzy, Amgen pleaded guilty to marketing one of its anti-anemia drugs, Aranesp illegally. It agreed to pay criminal and civil penalties totaling $762 million, a record settlement for a biotechnology company, according to the Justice Department.").
4. *Id.*
5. *Id.*
6. *Id.*

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the company's lucrative pill for dialysis patients for two years—a delay "projected to cost Medicare up to $500 million over that period."[7]

The denouement: champagne corks pop at company headquarters; bonus season on K Street; Democratic and Republican leaders expand already burgeoning treasure chests; and, not incidentally the American people—of all political stripes—will pick up the $500 million tab. The people need a lobby. The question is whether public campaign financing remains a robust option.

If public campaign financing is on its deathbed, the eventual autopsy will reveal not a fatal blow, but rather a thousand cuts. The patient's wounds have been exacerbated by a neglect born of a dynamic in which even episodically broad support for investing in the democratic process has been routinely thwarted by a shortness of attention span and a shallowness of political will to push such investment through.

Less patently, but no less significantly, decades of emphasis on what this article terms the "negatives" or "limits" of campaign finance as opposed to innovations on the campaign finance "affirmatives"—i.e. the steps that directly fund and facilitate idea-based rather than dollar-based campaigns—while by definition cheap, have come at a tremendously substantial cost to deliberative democracy.

The prior decade of campaign finance cases eliminates or circumscribes many of the key "negatives" that limited certain types of spending and are thus responsible for dramatically increasing campaign expenditures. At the same time, the Supreme Court's 5–4 decision in *Arizona Free Enterprise v. Bennett*[8] eliminated the single "affirmative" mechanism—trigger-matching funds—that made public financing politically and fiscally viable.

This Article asserts the current predicament of public campaign financing is this: options that are still on the table under the Court's First Amendment jurisprudence are, with only rare and idiosyncratic exceptions, fiscal and political non-starters. Conversely, options that would be, and indeed previously had been, fiscally and politically viable, are now, even after years of their routine practice in varied jurisdictions, no longer constitutional. It is, in short, simultaneously a legal and practical dilemma. Short of highly unlikely swings of the

7. *Id.* When asked about the delayed implementation of the planned reimbursement cuts, aides for Senators Baucus and Hatch said the delay was necessary to give regulators time to prepare for the price change because the price change would occur at the same time as other changes to kidney treatments and would require regulators to do "too much and too quickly." *Id.* However, the planned reimbursement reduction had already been delayed two years ago ostensibly for the same reason. *Id.* Other congressional aides were stunned to find another two-year delay in the price reduction and called the delay a giveaway to the company. *Id.*

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

Supreme Court pendulum, and absent an even more unlikely constitutional amendment, cities, states, and federal government actors, who might otherwise consider allowing candidates for office to opt for voluntary public financing, now find themselves between a legal rock and a fiscal hard place: unless a jurisdiction adopts, via extraordinarily high initial lump sum funding that grossly overspends the people's money to the point of fiscal ruin, any candidate opting in is effectively volunteering only to play the role of a sitting duck. On the more promising side, this Article asserts that systems that operate based on offering funding as a multiple for small-donor donations offer one potential solution to the dilemma. However, the Article ultimately contends that such systems are particularly vulnerable in jurisdictions with small populations insofar as moneyed interest groups from outside the jurisdiction can easily overwhelm, for example, even the multiplied donations of the citizens of largely rural states or jurisdictions.

By recent standards, the Supreme Court's 2011 decision in *Free Enterprise*[9] was a sleeper. Relative to the rare campaign finance blockbuster of *Citizens United v. FEC*[10] or the preceding Term's *Caperton v. A.T. Massey Coal Co.*,[11] the Court's 5–4 decision in *Free Enterprise* received relatively little attention outside niche campaign finance circles.[12] *Free Enterprise* struck down the matching-fund component of Arizona's public campaign finance laws.[13] The Court struck down the Arizona campaign finance law because it found the law imposed a burden on political speech in violation of the First Amendment.[14] Under Arizona's system, voluntarily participating candidates would receive an initial allotment of funds, and then, if the participating candidates were outspent (over various thresholds monitored via ancillary reporting requirements) by nonparticipating, privately financed opponents and the independent expenditure groups supporting those opponents, the participating candidates would receive additional public matching funds.[15] *Free Enterprise* effectively eliminated the key available mechanism to accommodate democratic ends of public financing without making the systems so financially wasteful as to eliminate politically viability.

The force of the holding in *Free Enterprise* is effectively doubled in the sense that in striking down Arizona's matching-funds provision, the Court simultaneously upholds the concept of public financing as a

9. *Id.*
10. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
11. Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).
12. *See* Neomi Rao, *A Modest Proposal: Abolishing Agency Independence*, *in* Free Enterprise Fund v. PCAOB, 79 FORDHAM L. REV. 2541, 2548–49 (2011).
13. *Ariz. Free Enter.*, 131 S. Ct. at 2813–14.
14. *Id.*
15. *Id.*

matter of formalism but cripples most actual public financing systems as a practical matter. The Court, by holding that public financing matching-fund systems unduly burden free speech, upheld the principle of public financing while simultaneously striking a major blow to public financing systems by invalidating one of the most effective public financing systems. *Free Enterprise's* prioritization of formalism was such that, in Justice Kagan's words in dissent, the "suit, in fact, may merit less attention than any challenge to a speech subsidy ever seen in this Court."[16] Contending the matching funds at issue expanded rather than contracted political speech, and noting in support of that point that the public campaign funds were offered to "any person running for state office,"[17]

Justice Kagan, dissenting in sustained high dudgeon, notes that the nonparticipants challenging the scheme "*refused* that assistance."[18] Accordingly, those challenging the scheme were, in Justice Kagan's view, "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*."[19] Precedent, practice, and Justice Kagan's point notwithstanding, *Free Enterprise* is now the law.

Drawing from the recent jurisprudence and recent data and dynamics in the political realm, this Article analyzes both the legal and real politick aspects of the new landscape of public financing. While not all public financing systems follow the Arizona matching funds model, most advocates of public financing considered it to be the most politically viable form of public financing,[20] precisely because it protects the public fisc by keeping initial funding allotments low enough so as not to needlessly spend taxpayer funds on low-dollar races, noncompetitive contests, or both, while simultaneously assuring candidates considering opting in to public financing (and thus foregoing significant private funds) that they would, in an expensive or highly competitive race, actually be able to counter speech with speech.[21] This Article asserts the combination of three factors: (1) challenging federal and state economies; (2) *Citizens United*'s opening of new financial spigots; and (3) the *Free Enterprise* decision arguably spells the doom of public financing as we have known it. The Arizona model

16. *Id.* at 2835 (Kagan, J., dissenting).
17. *Id.*
18. *Id.*
19. *Id.*
20. *See* Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445, 469 (1st Cir. 2000) (noting that "the matching funds provision allows [the State] to effectively dispense limited resources while allowing participating candidates to respond in races where the most debate is generated.").
21. *Id.*

might be justified in a judicial public-financing context by the additional compelling interests present in that circumstance. Far from a mere hypothetical, this argument has direct applicability to North Carolina, which had a matching-funds system in place prior to *Free Enterprise*, the constitutionality of which had been, prior to *Free Enterprise*, upheld by the Fourth Circuit.[22]

Part I situates public campaign financing in the historical and democratic tradition of the public square, and more pointedly, the *facilitated* public square. In positioning public financing within this "pre-history" of campaign finance, the Article asserts that the "affirmatives" represented by the early kinds of forum creation and speech fostering and facilitation were entirely consistent with the potential role of public financing in more modern deliberative democracy and republican governance. Having so positioned public financing, the Article then, in a purposefully brief but contextualizing fashion, considers the evolution of the ancient public square through, for example, extended public debates, the likes of which twenty-first century voters would scarcely recognize. The Article transitions from those early "affirmatives" in fostering the public's political discourse to a consideration of the early legal and political theories of public financing as having been, in large measure, continuations and extensions of the public square.

Building on the theories of public financing, Part II considers the extent to which those theories have been realized or thwarted by the legal and logistical aspects of America's experiments with public financing. This analysis begins with the Presidential Election Campaign Fund Act's authorization of publicly financed presidential party nominating conventions, primary elections, and general elections.[23]

Next, the Article examines the systems adopted in states and smaller jurisdictions that have embraced public financing. The Article divides these state systems into three categories. In the first category are the systems that—less effectively but less controversially—track the Federal Election Campaign Act's (FECA or the Act) presidential public-financing scheme.

The second category consists of the systems that, prior to *Free Enterprise*, were generally effective at achieving their ends but are now unconstitutional. With respect to the second category, the Article analyzes the Court's decision in *Free Enterprise*, and the room, if any, the decision leaves for variations of the matching funds struck down by the Court.

22. N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2008).
23. Buckley v. Valeo, 424 U.S. 1, 86 (1976) (per curiam); David M. Ifshin & Roger E. Warin, *Litigating the 1980 Presidential Election*, 31 AM. U. L. REV. 485, 492–94 (1982).

The third category is comprised of systems and proposals that seek to forge an alternative to the fixed-sum/Presidential model or the matching-funds/*Free Enterprise* model. The most prominent, and in some idiosyncratic jurisdictions, successful alternatives involve small-donor matching funds. The best-known iteration of such an alternative exists in the (idiosyncratic to be sure) jurisdiction of New York City.

With these categories and the legal context in mind, Part III examines anecdotal and empirical evidence pertaining to modern political campaigns, both in terms of the now pragmatically moribund presidential public financing system and in terms of the dynamics specific to the post-*Citizens United* era. The Article asserts that, for all the attention paid to presidential contests, public financing is most important at the federal legislative level and in state races for legislative, executive, and judicial offices alike. Finally, the Article asserts that the less populated the jurisdiction but the more important the office—for example, a U.S. Senate race in North Dakota (population: 699,628)[24] with the Senate majority possibly hanging in the balance—the more vulnerable the people's interests are to being thwarted in precisely the manner described at the outset of this Article, in which the fiscal cliff legislation provided the vehicle to pass on $500 million in unnecessary Medicare costs to the taxpayers.

II. PUBLIC FINANCING AS PUBLIC SQUARE

"We allow people to speak so others can vote. Speech allows people to vote intelligently and freely, aware of all the options and in possession of all the relevant information."[25]

The political and self-governance roots of America's First Amendment norms reach at least as far back as ancient Athenian notions of democracy,[26] in which large groups of ordinary citizens assembled to debate and vote on governmental decisions.[27] Every citizen had an equal opportunity to participate in political decision-making, regardless of economic status.[28] Athenian "direct" democracy was based on the very notion that each citizen had the opportunity to persuade his

24. *North Dakota*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/38000.html (last visited Feb. 9, 2013) [hereinafter *North Dakota*].
25. OWEN M. FISS, LIBERALISM DIVIDED 13 (1996).
26. Keith Werhan, *The Classical Athenian Ancestry of American Freedom of Speech*, 2008 SUP. CT. REV. 293, 296 (2008); *see* Ellen Meiksins Wood, *Demos Versus "We, the People": Freedom and Democracy Ancient and Modern*, *in* DÇMOKRATIA: A CONVERSATION ON DEMOCRACIES, ANCIENT AND MODERN 121, 122 (Josiah Ober & Charles Hedrick eds., 1996).
27. Werhan, *supra* note 26, at 294–95.
28. *Id*. (indicating that only adult males registered as citizens were able to participate in this process); *see generally* MOGENS HERMAN HANSEN, THE ATHENIAN ASSEMBLY IN THE AGE OF DEMOSTHENES (1987).

fellow citizens to support his political ideology.[29] Political institutions encouraged citizen volunteers to speak among large groups so that their fellow citizens could learn to discuss and decide the merits of the opposing viewpoints.[30] Free and open speech ultimately enabled the Athenian democracy to flourish.[31]

There were four principal governing institutions in Athens: the Assembly, the Council of 500, lawmaking boards, and the jury court.[32] These institutions consisted of up to 6,000 citizen volunteers who would listen to debate and vote on the issues, the outcome of which was the final decision on law and policy.[33]

"The Assembly was the centerpiece of the classical Athenian democracy."[34] It was at the Assembly where both the major policy issues and the minor cases in fact would be decided.[35] The Assembly would meet approximately every ten days, and each citizen had a right to attend and vote on every issue presented at every session.[36] There were no procedural rules limiting the number of speakers or the length of each speech.[37] The herald of the Assembly would begin each session with the simple, yet simultaneously profound question, "Who wishes to speak?"[38]

Euripides described the herald's invitation to open public debate as "the call of freedom."[39] There is evidence suggesting that Athenians regularly participated at the Assembly and that a small group of orators dominated the session debates.[40] The orators were unelected and possessed no decision-making authority. Most, in fact, were members

29. Werhan, *supra* note 26, at 297; *see* MARK MUNN, THE SCHOOL OF HISTORY: ATHENS IN THE AGE OF SOCRATES 293 (2000) ("All significant enactments of law, politics, philosophy, and poetry relied on living speech before their respective audiences.").
30. Werhan, *supra* note 26, at 297.
31. *See id.*; *see also* Plato, *Republic*, *in* PLATO: COMPLETE WORKS 971, 557, 1168 (John M. Cooper ed., 1997 G. M. A. Grube trans., 1997) (discussing the common notion that, in a democracy, freedom of speech is the epitome of freedom itself for it gives everyone the "license to do what he wants").
32. Werhan, *supra* note 26, 294–95.
33. *Id.*
34. *Id.* at 300.
35. *Id.* at 300–01; *see* Claude Mossé, *Inventing Politics*, *in* GREEK THOUGHT: A GUIDE TO CLASSICAL KNOWLEDGE 147, 154 (Jacques Brunschwig & Geoffrey E. R. Lloyd eds., Elizabeth Rawlings & Jeannine Pucci trans., 2000).
36. Werhan, *supra* note 26, at 300–01.
37. *Id.*
38. *Id.* at 302; Ryan K. Balot, *Free Speech, Courage, and Democratic Deliberation*, *in* FREE SPEECH IN CLASSICAL ANTIQUITY 233, 233 (Ineke Sluiter & Ralph M. Rosen eds., 2004) (describing the herald's call as a "well-known symbol" of free speech).
39. Werhan, *supra* note 26, at 302; Euripides, *The Suppliant Women*, 437, *in* EURIPIDES IV, 57, 74 (David Grene & Richard Lattimore eds., Frank Jones trans., 1958).
40. Werhan, *supra* note 26, at 303; *see* HANSEN, *supra* note 28, at 142–46.

of the wealthy elite who had "the skill and courage that debate in the Athenian Assembly demanded."[41]

However, Athenian direct democracy was not free from corruption and politics. Plutarch, a citizen of Rome and historian of Ancient Greece, wrote *Lives of Noble Grecians and Romans*, a record of corruption in Ancient Greek politics.[42] Plutarch wrote of Themistocles, a prominent Athenian politician and general, that he was "eager in the acquisition of riches"[43] and of the Athenian democracy generally:

> [T]he buying and selling of votes crept in and money became a feature of the elections. But afterwards, bribery affected even courts and camps, and converted the city into a monarchy, by making armies the utter slaves of money. For it has been well said that he first breaks down the power of the people who first feasts and bribes them.[44]

Remarkably, freedom of speech and debate survived the centuries of tumult, war, and oppression that marked the evolution of the western world. In the early twentieth century, Justice Brandeis highlighted the democratic value of free speech in what is widely regarded as among the "most important judicial opinions ever written on American freedom of speech"—his concurrence in *Whitney v. California*.[45] For Justice Brandeis, as for the Athenian democrats, without free speech "assembly discussion would be futile," as its purpose is to aid free citizens in political decision-making.[46]

Justice Brandeis also noted the role of free speech in the search for truth in political debate.[47] However, there is a longstanding debate in American history as to whether free speech actually facilitates the search for truth. On one hand, John Milton and Thomas Jefferson had faith that, in a free society with free speech, the truth would al-

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41. Werhan, *supra* note 26, at 304; *see* S. SARA MONOSON, PLATO'S DEMOCRATIC ENTANGLEMENTS: ATHENIAN POLITICS AND THE PRACTICE OF PHILOSOPHY 59 (Princeton, 2000) ("the Athenians delighted in excellent oratory, for the most part taking enormous pleasure in hearing competing views argued intensely and beautifully . . . ").

42. *See* PLUTARCH, LIVES OF NOBLE GRECIANS AND ROMANS (A.H. Clough ed., John Dryden Trans., 1979) *available at* http://ebooks.adelaide.edu.au/p/plutarch/lives/chapter10.html; *see also* James H. Warner, *The Triumph of Hope over Experience: The Bipartisan Campaign Reform Act of 2002 and the First Amendment*, 13 GEO. MASON U. CIV. RTS. L.J. 1, at n.1 (2003) (noting the "numerous accounts of corruption in ancient Greece and Rome").

43. *See* PLUTARCH, *supra* note 42.

44. Plutarch, *The Parallel Lives*, *in* Loeb Classical Library ed. vol. IV (1916), *available at* http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Plutarch/Lives/Coriolanus*.html.

45. Werhan, *supra* note 26, at 307; Whitney v. California, 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring).

46. *Whitney*, 274 U.S. at 375.

47. Werhan, *supra* note 26, at 309.

ways prevail and rise to the top of public discourse.[48] John Stuart Mill conversely asserted that although free speech may not lead to the best decision, it would lead to collective action and perhaps the public could come to rational rather than arbitrary decisions.[49]

In American democracy, the most direct descendant of the Athenian public square's function in promoting an idea-based discourse is perhaps the political debate between candidates competing for electoral office. Many would argue that the Athenians could scarcely have imagined a higher form of speech and assembly than what many claim to be the high-water mark of American political discourse: the Lincoln–Douglas Debates.[50] Taking place in 1858 during the Illinois Senate race, the Debates were a series of seven debates between the incumbent, Democrat Stephen A. Douglas, and the challenger, Republican Abraham Lincoln.[51] The overriding topic: slavery.[52] Douglas represented, for the sake of shorthand, a *Dred Scott*[53] position and Lincoln an abolitionist view.[54] Yet despite the truly fundamental nature of the scope of disagreement, these profoundly civilized, thoughtful debates fostered collective and informed action on the part of the people.[55] Moreover, the discussions possessed many of the key attributes of the Athenian public square.

America's political debates can be seen in the broader American tradition of individuals, standing on equal footing, both actually and metaphorically in the pursuit of the most meritorious ideas, however imperfect. The concept of promoting actual equality as opposed to merely the freedom of formally equal opportunity can, in the more modern political day, occasionally seem antiquated. At the very least, such notions of actual equality seem limited to the judicial branch, and even there, the engravings above the courthouse entryways often prove quixotic.[56]

48. John Milton, Areopagitica 51–52 (John W. Hales ed., Clarendon Press 1904) (1644); Virginia Statute of Religious Liberty, Jan 16, 1786, § I, *in* Documents of American History 125, 126 (Henry Steele Commager ed., Meredith Corp. 1968); *see* Werhan, *supra* note 26, at 322.

49. John Stuart Mill, *On Liberty* (1859), *in* On Liberty and Other Writings 5, 31 (Stefan Collini ed., 1989); *see* Werhan, *supra* note 26, at 322.

50. *See, e.g.*, Michel Les Benedict, *Lincoln and Constitutional Politics*, 93 Marq. L. Rev. 1333, 1345–46 (2010).

51. Michael Taube, *Obama and Romney Should Debate Lincoln–Douglas-Style*, Wash. Times (Aug. 3, 2012), http://www.washingtontimes.com/news/2012/aug/3/obama-and-romney-should-debate-lincoln-douglas-sty/#ixzz28GZOXqR8.

52. *Id.*

53. Dred Scott v. Sandford, 60 U.S. 393 (1857).

54. *Id.*

55. Les Benedict, *supra* note 50, at 1348–49.

56. *The Court and Constitutional Interpretation*, Supreme Ct. U.S., http://www.supremecourt.gov/about/constitutional.aspx (last visited Feb. 9, 2013) ("Equal Justice Under Law").

The Lincoln–Douglas debates can be seen as but one anecdotal illustration of the American adaptation of the equality norms of the Athenian square to a republican, rather than direct, form of democracy. Even within republicanism, evolving norms of political campaigns and political processes, however, inevitably required more creative and complex adaptations to serve similar norms. Early theoretical arguments for campaign finance regulations, and especially public financing, were one byproduct of that need to adapt, and in a sense, to expand, the dialogue of ideas represented by the public square.

A. Adapting the Public Square: The Three Key Theories

Many scholars consider the "original theoretical justification of campaign finance regulation" to be the normative goal of "equalizing influence," "not as a guarantor of structured democratic deliberation *before* the election, but as an effort to assure that certain powerful groups do not exercise undue influence on its *outcome*."[57] This theory traces John Rawls's "fair value of political liberties," which is defined as a "guarantee of roughly equal influence for everyone over all stages of the electoral process," and which includes an equal opportunity for anyone to hold public office.[58] However, it is worth noting here that in the modern era of political campaigns, and without public financing, such inclusion is only rarely actual, as opposed to illusory.

Proponents of campaign regulation on equality grounds assert that government intervention and regulation is required to equalize the financial participation of all voters. Equality proponents also seek to bring access to all voters, rather than the system today that gives greater access to wealthy donors.[59] Under this theory, financial capital is a form of political capital, and in order to equalize political capital, by reducing the importance of fundraising as a way to generate political power, some equalizing of financial capital via redistribution promotes a kind of *ex ante* equality in the political arena[60]—the goal being to ensure that subsequent political disparities or inequalities will be the product of meritorious ideas and not superior financial clout.[61]

57. Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 601 (2008) (emphasis added).

58. *Id.* at 601, 638.

59. *Id.* at 640, 643 (citing JOHN RAWLS, POLITICAL LIBERALISM 328 (1993)).

60. *See, e.g.*, Jamin Raskin & Jon Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1203 (1994).

61. *Id.* (concluding "[t]he time has come to abolish the tyranny of private wealth in the American political process").

A second significant strand of theory advanced in favor of campaign finance regulation is, quite naturally, deliberative democracy, which "ties legitimacy of self-rule to substantive and structural discourse about matters of public concern."[62] In response to what was seen by scholars as the "deterioration of public discourse" in the country during the 1980s, legal scholars offered structured public "deliberation" as a remedy.[63]

Based on Alexander Mieklejohn's model of the traditional American town meeting, deliberative democrats argued in favor of fora in which voters communicate their political observations and opinions in a regulated setting.[64] In addition to a base of public funding intended to create an equalizing effect, the need for a structured public political discourse justified limits on expenditures, thus making campaigns less expensive and, most importantly, allowing for more diverse viewpoints.[65]

Frank Pasquale is among those who have most clearly identified the degree to which collective autonomy, a sub-theory of deliberative democracy, assumes that democracy has the potential to empower citizens.[66] The collective autonomy theory envisions collective awareness of self-determination.[67] For collective autonomy to be guaranteed, the state must intervene and structure access to a public forum.[68] Despite the many theories advanced as a reason for equalization of political influence, the Supreme Court has not accepted equalization as a sufficient rationale to uphold campaign finance restrictions or programs in the face of the First Amendment

For reasons explored in Part II, however, the theoretical basis upon which modern campaign regulation and financing overwhelmingly rests is anticorruption. Anticorruption theory takes as its premise the intuitive and historically verifiable realities that, in at least some instances, campaign contributions, even where legal, function as a kind of legalized bribery that constrains or animates political actors'

62. Pasquale, *supra* note 57, at 600.
63. *Id.* at 622; *see also* ETHAN J. LEIB, DELIBERATIVE DEMOCRACY IN AMERICA 2 (2004) (identifying the basic problems of American republican democracy that deliberation is supposed to "cure").
64. Pasquale, *supra* note 57, at 624 (noting in this ideal setting, speakers stay on topic and exhibit mutual respect).
65. *Id.* at 625.
66. *Id.* at 628.
67. *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407 (1986).
68. Pasquale, *supra* note 57, at 629; *see also* Raskin & Bonifaz, *supra* note 60, at 1163 ("The purpose of campaign finance reform should be to fashion a system in which electoral and governmental decision-making is based on the participation, deliberation, and interests of all citizens rather than on the awesome wealth of the few."). For a response to the fears of state influence in this area of the public sphere, see Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 787 (1987).

judgment and actions.[69] Accordingly, and even apart from the more practical reason why advocates of campaign regulation emphasize anticorruption—namely, that the first two theories are legally foreclosed[70]—many commentators advocate measures to mitigate "the importance of private money" in campaign finance precisely for this reason.[71] Anticorruption theory, and the anticorruption meme, is thus the driving force behind the majority of campaign finance regulation law in the United States today.[72]

One goal of public financing is to democratize, from a distributional perspective, the responsiveness and representativeness of political leaders. The goal is to reduce the degree to which leaders prioritize the relentless pursuit of contributions, even where those contributions are entirely legal and ethical. The relentless pursuit of contributions creates, in the aggregate, a tragedy of the political commons. Moreover, at least in theory, public financing mitigates the tendency of politicians to secure money in unethical and sometimes even illegal ways.

Support for public financing must overcome recent anecdotal examples ranging from Randy "Duke" Cunningham[73] to Congressman Jesse Jackson Jr.[74] to former Connecticut Governor John Rowland,[75] which "have cast a shadow of doubt in voters' minds and have disintegrated the public trust in the democratic process" to the point that many voters question whether politicians, so many of whom have

69. Bradley A. Smith, *The Sirens' Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & POL'Y 1, 6 (1997).

70. That is, equalization and deliberative democracy theories rely on systems of public campaign financing. But most modern American campaigns are made possible by private financing. Richard Briffault, *Reforming Campaign Finance Reform: A Review of Voting with Dollars*, 91 CAL. L. REV. 643, 645 (2003). As discussed *infra*, and as with any campaign finance regulation, for any public financing system to prevail against the inevitable challenge it must satisfy the anti-corruption purpose. *See* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

71. *E.g.*, ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 118 (1988).

72. *See infra* Part I.B.

73. Representative Cunningham pleaded guilty to taking bribes totaling over $2.4 million while a he was a member of the House of Representatives. Bill Chappell, *Former Rep. 'Duke' Cunningham Freed After Bribery Sentence*, NPR (June 4, 2013), http://www.npr.org/blogs/thetwo-way/2013/06/04/188667106/former-rep-duke-cunningham-freed-after-bribery-sentence.

74. Representative Jackson pleaded guilty to spending $75,000 in campaign funds to buy personal items. *Gov't Recommends 4 Years in Prison for Jesse Jackson Jr.*, CBS NEWS (June 7, 2013) http://www.cbsnews.com/8301-250_162-57588331/govt-recommends-4-years-in-prison-for-jesse-jackson-jr/.

75. Rowland resigned as Governor and later pleaded guilty to conspiracy to steal honest service because he accepted more than $100,000 worth of personal gifts in exchange for government contracts. Matt Apuzzo & John Christofferson, *Former Gov. Rowland Gets a Year in Prison for Graft*, USA TODAY (Mar. 18, 2005), http://usatoday30.usatoday.com/news/nation/2005-03-18-rowland_x.htm?POE=NEWISVA.

proven to be untrustworthy and selfish, are deserving of their tax dollars.[76] It is rational to query why voters would or should support and participate in what has been deemed "a welfare program for politicians."[77]

Supporters of public financing maintain that the system is crucial for the health of our democracy and that, despite these few bad apples,[78] the system has worked to some degree or has the potential to if structured and implemented correctly. Public funds have paved the way for many politicians who lack the resources to run in competitive races.[79] This phenomenon has "foster[ed] diversity in the electoral process" and enabled those from historically underrepresented groups to hold office.[80] Public funds have also enabled politicians to focus more on the interests of a broader cross section of the population, including groups such as the retired elderly couple and high school teachers, rather than focusing primarily on those of the hedge fund manager who spent millions supporting their campaign.[81] The shifting of attention from the elite and wealthy supporters to the everyday constituent will, in theory, foster and redevelop voter engagement that has eroded over the years, at least in part because of the influence of money in elections.[82]

One consequence that follows in part from the emphasis on anticorruption theory is a derivative emphasis on the *no*s of campaign regulations—most notably contribution limits—as opposed to affirmative steps such as public financing, which not only serves the anticorruption interest but more significantly fosters the equalization and deliberative democracy norms.[83] Public financing serves interests

76. J. Mijin Cha & Miles Rappaport, *Fresh Start: The Impact of Public Campaign Financing in Connecticut*, DEMOS 4 (Apr 2013) http://www.demos.org/sites/default/files/publications/FreshStart_PublicFinancingCT_0.pdf.
77. Huma Khan, *Public Financing for Presidential Campaigns on Chopping Block*, ABC NEWS (Jan. 27, 2011), http://abcnews.go.com/Politics/public-financing-presidential-campaigns-chopping-block/story?id=12778579 (quoting Senate Minority Leader Mitch McConnell).
78. It is worth noting that none of the aforementioned scandals involved publicly funded candidates.
79. Cha & Rappaport, *supra* note 76, at 11.
80. Mimi Marziani, Laura Moy, Adam Skaggs & Marcus Williams, *More Than Combating Corruption: The Other Benefits of Public Financing*, BRENNAN CENTER FOR JUSTICE (Oct. 7, 2011), http://www.brennancenter.org/analysis/more-combating-corruption-other-benefits-public-financing; STEVEN M. LEVIN, KEEPING IT CLEAN: PUBLIC FINANCING IN AMERICAN ELECTIONS 3 (Jan. 2006), *available at* http://policyarchive.org/handle/10207/bitstreams/4523.pdf.
81. Cha & Rappaport *supra* note 76, at 6–8.
82. *See* LEVIN, *supra* note 80, at xi.
83. *See* Raskin & Bonifaz, *supra* note 60, at 1176 (linking "[t]he ability to raise large quantities of money" with incumbency); *id.* at 1183 (arguing that "the accumulation of huge private war chests by incumbent officials pervasively discourages political competition and, as a result, stifles debate"); Emma Greenman,

that go beyond the anticorruption rationale that contribution limits seek to address. Public financing is an affirmative, rather than just a restrictive, system that seeks to prevent corruption, encourage diversity among candidates, and promote service to the public as a whole rather than donors.

B. The Development of Campaign Finance Reform in the United States

The late nineteenth and early twentieth centuries saw the promulgation of a number of campaign finance laws. In the 1890s, four states, Nebraska, Missouri, Florida, and Tennessee, passed laws prohibiting corporate contributions.[84] These early state laws, enacted in response to the corporate contributions supporting William McKinley's presidential campaign, helped shape the federal campaign finance laws that followed only a few years later.[85]

The first round of federal campaign finance laws was significantly motivated by a concern that corporations were too involved in government.[86] This first attempt at regulating money in politics was driven by the fear of aggregated money, through the corporate form, being used to unduly influence politicians and the government. In 1907, the Tillman Act banned campaign contributions and spending by federally chartered banks and corporations.[87] In 1910, the first of the two Federal Corrupt Practices Acts required disclosures for certain Senate and House races.[88] In 1925, following on the heels of the Teapot Dome scandal,[89] Congress enacted the second Federal Corrupt Practices Act. This Act extended the Tillman Act's reach well beyond federally chartered banks and corporations by banning all corporate contribu-

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*Strengthening the Hand of Voters in the Marketplace of Ideas: Roadmap to Campaign Finance Reform in a Post-*Wisconsin Right to Life *Era*, 24 J.L. & POL. 209, 209 (2008) (identifying the fear that "organized money in politics" and "[outside] groups are neither representative nor transparent and they exert influence in the political arena that interferes with the core [value] of . . . democratic deliberation").

84. Pasquale, *supra* note 57, at 604–05.

85. *See* Smith, *supra* note 69, at 20.

86. William Jennings Bryan set up the following dichotomy: "On the one side stand[s] the corporate interests of the nation . . . . On the other side stands [the] unnumbered throng . . . . Work-worn and dust-begrimed . . . ." JAMES L. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES 137–38 (1983). Senator Ben Tillman believed federal legislators were "instrumentalities and agents of corporations." Smith, *supra* note 69, at 21.

87. Smith, *supra* note 69, at 21.

88. *Id.*

89. *See* MUTCH, *supra* note 71, at 24.

tions.[90] The Hatch Act of 1939, also enacted in response to charges of corruption in the highest office (this time in the Roosevelt administration), set broad prohibitions of certain political activities of federal employees.[91] Congress expanded the Hatch Act's reach only one year later by banning donations by federal contractors and employees of federally funded state agencies.[92] The last major round of campaign finance reform prior to the enactment of the Federal Elections Campaign Act of 1971 targeted labor unions' influence in politics. The 1943 Smith-Connally Act and the Taft-Hartley Act of 1947 prohibited campaign contributions from labor union organizations.[93]

The Federal Election Campaign Act of 1971[94] (FECA) was Congress's first attempt at imposing campaign spending limits and requiring campaign financing disclosure.[95] However, initially, the Act did not establish contribution limits or overall spending limits.[96] Rather, under four titles, FECA regulated campaign media advertising, limited a candidate's use of personal funds, required reports of contributions and expenditures to be filed with Congress, and repealed the Federal Corrupt Practices Act of 1925.[97]

FECA was amended in 1974 in the wake of the 1972 election in an attempt to close the loopholes exposed in the Watergate scandal.[98] Congress attempted to further regulate campaign spending, activity, and contributions through the amendment.[99] The new legislation sought to stop the abuses of the prior election and of the Nixon administration through comprehensive regulation of the campaign finance system.[100] Most notably, the 1974 amendments created the Federal

90. Smith, *supra* note 69, at 21–22. Direct contributions from corporations to candidates for federal office are still prohibited. *See* 2 U.S.C. § 441b (2012); Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010) (permitting independent expenditure but passing on the question of direct expenditure).
91. Pasquale, *supra* note 57, at 608.
92. Smith, *supra* note 69, at 22.
93. Pasquale, *supra* note 57, at 608. Though the *Citizens United* decision found independent expenditures permissible, direct contributions from labor unions, like direct contributions from corporations, to independent groups are still prohibited. *Citizens United*, 130 S. Ct. at 913; 2 U.S.C. § 441b (2012). For a discussion on the clean election bills passed between Taft-Hartley and the Federal Election Campaign Act, see HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 26-28 (2d ed. 1980).
94. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).
95. *See* Ifshin & Warin, *supra* note 23, at 490.
96. *Id.* at 491; *see* Federal Election Campaign Act, *supra* note 94.
97. Ifshin & Warin, *supra* note 23, at 490–91; Federal Election Campaign Act of 1971.
98. *See* Ifshin & Warin, *supra* note 23, at 492.
99. *Id.*
100. Fed. Election Comm'n v. NRA Political Victory Fund, 513 U.S. 88, 102 (1994) (discussing how the legislative history of the 1974 amendments shows that Congress intended to limit executive influence by affording the FEC jurisdiction to regulate presidential campaigns).

Election Commission (FEC).[101] The FEC was designed to be the federal elections regulatory agency.[102] In this capacity, the FEC could investigate, issue advisory opinions, promulgate regulations enacting FECA, and even bring suit against anyone who violated the laws.[103] The amendments also created a public financing option for the presidential race, including a matching fund and lump sum system for presidential candidates.[104]

Almost immediately after the 1974 amendments, the constitutionality of FECA was challenged in *Buckley v. Valeo*.[105] In *Buckley*, the Supreme Court, per curiam, struck down several key provisions of FECA as unconstitutional, including the manner in which the FEC commissioners were appointed,[106] restrictions on campaign spending,[107] and the restrictions on the use of candidates' personal funds.[108]

Regarding the restrictions on campaign spending, the Court struck down the $1,000 ceiling on independent expenditures,[109] the overall campaign spending ceilings, and the limits on a candidate's use of personal funds.[110] With regard to fundraising, the Court upheld the

101. *See* Ifshin & Warin, *supra* note 23, at 492.

102. *Id.* at 494.

103. *Id.*; *see, e.g.*, 2 U.S.C. § 437g(a)(5)(C) (Supp. III 1979) (granting authority to refer violations of FECA to the attorney general)

104. I.R.C. §§ 9001-9013 (1976); *see* Ifshin & Warin, *supra* note 23, at 492–94.

105. Buckley v. Valeo, 424 U.S. 1, 8 (1976) (per curiam).

106. *Id.* at 109-43. Under the 1974 amendments, there were to be six FEC commissioners. Ifshin & Warin, *supra* note 23, at 494. The President, the President of the Senate, and the Speaker of the House would each select two commissioners, one from each party, so there would be an equal number of Democrat and Republican members. *Id*. Each selection would be subject to Senate confirmation, and the commissioners would be appointed for staggered six-year terms. *Id*. The *Buckley* Court found that appointment of executive branch officials by members of Congress presented serious separation of powers issues and violated the appointments clause of Article II of the Constitution. *Buckley*, 424 U.S. at 109–43; Ifshin & Warin, *supra* note 23, at 494–95.

107. *Buckley*, 424 U.S. at 54–59. FECA restricted the amount a candidate for President, the Senate, or the House could spend in both the primary and general election. *Id.* at 54–55. The Court rejected a number of rationales for spending limits, including slowing the growth in campaign costs, equalization of candidates' resources, and preventing corruption. *Id.* at 54–59.

108. *Id.* at 51–54. The Court again rejected the equalization-of-resources rationale because the restriction abridged First Amendment rights and did not serve to prevent corruption. *Id.* at 54.

109. *Id.* at 51. The Court did uphold the limits on independent expenditures that "expressly advocate" for the election or defeat of a candidate. *Id.* at 80. The Court listed the so-called magic words that qualify as express advocacy, which include "vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat, [and] reject." *Id.* at 44 n.52 (internal quotation marks omitted).

110. *Id.* at 51-54; *see* Ifshin & Warin, *supra* note 23, at 495.

$1,000 limit on contributions to candidates.[111] As Part II explores more fully, the Court also upheld Congress's conditioning the receipt of public campaign funds on similar campaign spending and fundraising restrictions as a valid method to force candidates into said spending limits.[112]

Buckley largely scuttled Congress's efforts to avoid Watergate, Part II, causing Congress to scale back some of its initial regulations in 1979.[113] Congress, among other things, raised the threshold that triggers reporting requirements, and removed spending limits on local parties for materials associated with volunteer activities.[114] In *Buckley*'s wake, the vast majority of the action in the campaign regulation arena continued to revolve around limits and prohibitions as opposed to facilitation.

In keeping with *Buckley*, the Supreme Court continued the tradition of striking down limits on campaign spending while upholding government regulation of campaign contributions.[115] In 1996, the Court in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, struck down a FECA provision that prohibited political party expenditures in elections, holding that political parties may spend an unlimited amount on elections as long as the expenditures are uncoordinated with a candidate's campaign.[116] In 2000, the Court revisited *Buckley* in *Nixon v. Shrink Missouri Government PAC*[117] and affirmed the constitutionality of limiting campaign contributions.[118]

111. *Buckley*, 424 U.S. at 28–29 (holding that the compelling government interest in preventing both actual and apparent corruption was sufficient to uphold the $1,000 contribution limit).

112. *Id.* at 94-96.

113. Ifshin & Warin, *supra* note 23, at 497 (discussing the main purpose of the 1979 amendments—to reduce and simplify the reporting requirements and encourage more volunteering in campaigns).

114. 2 U.S.C. § 434(a) (Supp. III 1979). The original trigger requirement for disclosure was set at just $10. *Buckley*, 424 U.S. at 62. For any contribution greater than $10, the name and address of the donor must be reported, and for any person who contributes $100, his or her employer and occupation must be reported. *Id.* at 63. The reporting threshold was raised to $200 by the 1979 amendment, where it still remains today. 2 U.S.C. § 434(a) (Supp. III 1979).

115. *See* Richard Briffault, Nixon v. Shrink Missouri Government PAC*: The Beginning of the End of the* Buckley *Era?*, 85 MINN. L. REV. 1729, 1735 (2001).

116. Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 619 (1996).

117. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386–97 (2000).

118. *Id.* at 386–97 (upholding the contribution limits as a means to prevent corruption and because the limits were not so restrictive as to prevent the campaign from raising the necessary funds for "effective advocacy").

Congress responded to the Court's campaign finance jurisprudence with the Bipartisan Campaign Reform Act of 2002 (BCRA),[119] more commonly known as the McCain-Feingold law.[120] BCRA again focused on limits and prohibitions and was enacted to prohibit the use of corporate general treasury funds in federal elections (by prohibiting corporate spending on campaign advertisements) and to revisit regulation of political party campaign spending (by prohibiting party committees from raising or spending soft money).[121] The main purpose of BCRA was to address the combined use of soft money and issue advertisements that were being used to circumvent contribution limits.[122]

Shortly thereafter, in *McConnell v. Federal Election Commission*,[123] the Court upheld the majority of BCRA's prohibitions, including the prohibition of most corporate-funded "electioneering communications"[124] within blackout periods immediately preceding elections.[125] The blackout period applied to any corporate-funded electioneering communication that was aired within thirty days of a primary or sixty days of a general election.[126] The Court abruptly reversed course in 2007, less than five years later, when it found that the BCRA blackout periods violated corporate free speech in *Federal Election Commission v. Wisconsin Right to Life, Inc.*[127] Under *Wisconsin Right to Life*, only express advocacy for the victory or defeat of a political candidate could be regulated, and "issue ads"—so called because they only reference a particular candidate in association with a particular issue—could not be regulated as "electioneering communications."[128]

119. *See* Michelle D. Clark, *Unleashing Electioneering: Analyzing the Court's Decision in* Federal Election Commission v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007), 33 S. ILL. U. L.J. 121, 125–26 (2008); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

120. Robert Bauer, *The McCain-Feingold Coordination Rules: The Ongoing Program to Keep Politics Under Control*, 32 FORDHAM URB. L.J. 507, 508 (2005).

121. *See* Clark, *supra* note 119, at 126.

122. *See* Craig Holman & Joan Claybrook, *Outside Groups in the Campaign Finance Environment: The Meaning of BCRA and the* McConnell *Decision*, 22 YALE L. & POL'Y REV. 235, 243 (2004).

123. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

124. An "electioneering communication" is an advertisement that refers to a clearly identifiable candidate for federal office and is run in that candidate's electoral jurisdiction. 2 U.S.C § 434(f)(3) (2012); *see* Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 7–8 (2012).

125. *McConnell*, 540 U.S at 205–06; Clark, *supra* note 119, at 127.

126. 2 U.S.C. § 434(f)(3); *McConnell*, 540 U.S. at 206.

127. Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 460 (2007) (identifying the advertisements in question as within the electioneering communication blackout period); *id.* at 476–77 (holding that the advertisements in question were not express advocacy and thus cannot be restricted).

128. *Id.* at 446–48.

The other shoe dropped in 2010 in the more widely known *Citizens United v. Federal Election Commission*[129] when the Court, essentially reversing its decision in *McConnell*,[130] found limits on independent corporate expenditures unconstitutional.[131] The Court has continued to remain true to the essential elements of *Buckley*: restrictions on political expenditures violate the First Amendment while restrictions on contributions are justified as a means of preventing corruption.[132] Notably, however, for all of the complexities and machinations represented by the cursory references to the above decisions, over the course of decades, the Court basically left the public financing aspects of campaign regulation undisturbed. The solicitude would not prove eternal.

III. PUBLIC FINANCING IN AMERICA: DREAMS MEET CONSTRAINTS

FECA's prohibitions and limits and the various state and federal analogs that followed have had mixed success in the courts and even more mixed success in the public sphere. In contrast, initially at least, the presidential public financing system was a highly successful facilitation of the nation's highest "public square."

A. FECA Public Financing: Teddy Roosevelt's Idea Sixty Years Later

In his 1907 State of the Union Address, President Theodore Roosevelt called upon Congress to enact legislation to curb corruption and increase transparency in campaign financing.[133] President Roosevelt noted that in order to "hamper an unscrupulous man of unlimited means from buying his way into office," Congress ought to "provid[e] an appropriation for the proper and legitimate expenses of

129. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).
130. *McConnell*, 540 U.S. at 93.
131. *Citizens United*, 130 S. Ct. at 913. *See also id.* at 910 (recognizing that "independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption"). The Court rejected an opportunity to revisit *Citizens United* in 2012 when it issued a summary reversal of a Montana statute prohibiting independent expenditures by corporations. American Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490, 2491 (2012).
132. Buckley v. Valeo, 424 U.S. 1, 58–59 (1976) (per curiam); J. Robert Abraham, *Saving* Buckley*: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1084 (2010). However, restrictions on contributions to expenditure-only groups, which would come to be known as super PACs, are not allowed and violate the First Amendment. Speechnow.org v. Fed. Election Comm'n, 599 F.3d 686, 696 (D.C. Cir. 2010); James A. Kahl, Citizens United*, Super PACs, and Corporate Spending on Political Campaigns: How Did We Get Here and Where Are We Going?*, 59 FED. LAW. 40, 42 (2012).
133. President Theodore Roosevelt, Seventh Annual Message (Dec. 3, 1907) (transcript available at http://www.presidency.ucsb.edu/ws/index.php?pid=29548).

each of the great national parties, an appropriation ample enough to meet the necessity for thorough organization and machinery, which requires a large expenditure of money."[134] Roughly sixty years later, President Roosevelt's campaign financing proposal was finally brought to life in the form of the 1971 Revenue Act and FECA.[135]

The 1971 Revenue Act laid the foundation for today's public campaign financing system. The Act set up the Presidential Election Campaign Fund (the Fund) and established a voluntary checkoff on federal tax returns to be used to finance the Fund—$1 for individual returns and $2 for joint returns.[136] Although President Nixon staunchly opposed the portion of the Act dealing with campaign financing, Congress declined his request for "reconsideration" and reinforced the campaign financing provisions through the enactment of FECA and its subsequent amendments.[137]

FECA and its amendments were considered "the most comprehensive reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress."[138] The relevant public campaign finance provisions included the initiation of Fund payments to finance presidential nominating conventions; the creation of the Presidential Primary Matching Payment Account, which matched donations up to $250 made by individuals to candidates in the primaries; and the establishment of a general election spending limit of $20 million plus cost-of-living allowance.

As discussed in Section I, the constitutionality of FECA's provisions was immediately challenged in *Buckley v. Valeo*.[139] With regard to the public finance provisions, the Court upheld the Fund on three grounds: (1) the General Welfare Clause, (2) the First Amendment, and (3) the Equal Protection Clause.[140] Congress satisfied the General Welfare Clause requirement because the purpose of the Act was to "reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electo-

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134. *Id.*
135. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972); Revenue Act of 1971, Pub. L. 92-178, 85 Stat. 573 (1971).
136. Revenue Act of 1971; JOSEPH E. CANTOR, CONG. RESEARCH SERV., RL32786, THE PRESIDENTIAL ELECTION CAMPAIGN FUND AND TAX CHECKOFF: BACKGROUND AND CURRENT ISSUES 1 (2005). The checkoff has since been raised to $3 for individual filers and $6 for joint filers. *The FEC and Federal Campaign Finance Law*, FEDERAL ELECTION COMMISSION (updated Jan. 2013), http://www.fec.gov/pages/brochures/fecfeca.shtml.
137. Statement About the Revenue Act of 1971, PUB. PAPERS; RICHARD NIXON, 1971, 1181–82 (Dec. 10, 1971), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=3255.
138. Buckley v. Valeo, 424 U.S. 1, 7 (1976) (per curiam) (quoting Buckley v. Valeo, 519 F.2d 821, 831 (D.C. Cir. 1975)).
139. *Id.* at 6.
140. *Id.* at 91–96.

rate, and to free candidates from the rigors of fundraising."[141] First Amendment standards were satisfied because rather than limiting or restricting speech the public financing system functioned to "facilitate and enlarge" speech.[142]

The challenges to the Act in *Buckley* by Senators McCarthy and Buckley were premised on a conviction that the Act was not an attempt at reform in reaction to Watergate but an attempt to entrench incumbents and "freeze out the voices of change."[143] The Court rejected this argument under the Equal Protection Clause because the public funding system was not discriminatory and provided the opportunity to use the system for any candidate that qualified.[144] The challengers believed that the government should not be in the business of funding elections, which are designed to be a check on government.[145] They believed that, like the separation of church and state, the separation of government funding from the political process is required to avoid "dangerous 'entanglement.'"[146] The Court rejected this argument and held that the Act did not violate the First Amendment.[147] Congressional intent had been to broaden public participation and increase speech in the presidential election process.[148] The Court reasoned that the Act "furthers, not abridges, pertinent First Amendment values."[149]

In contrast, Senator McCarthy famously compared public campaign finance to the King of England financing the American Revolution by asking people to imagine King George III saying to the

141. *Id.* at 91.
142. *Id.* at 92–93.
143. Joel M. Gora, *Don't Feed the Alligators: Government Funding of Political Speech and the Unyielding Vigilance of the First Amendment*, 2010–2011 CATO SUP. CT. REV. 81, 88 (2011).
144. *Buckley*, 424 U.S. at 93–94 (distinguishing the public financing system from ballot access cases).
145. Gora, *supra* note 143, at 91.
146. *Id.*
147. *Buckley*, 424 U.S. at 92–93 (holding that the analogy to separation of church and state inapplicable because public financing is Congress's attempt to use public funding to "facilitate and enlarge" speech); J. Robert Abraham, Note, *Saving* Buckley*: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1081-83 (2010).
148. *Buckley*, 424 U.S. at 92–93; *see also* Stephanie Pestorich Manson, Note, *When Money Talks: Reconciling* Buckley*, the First Amendment, and Campaign Finance Reform*, 58 WASH. & LEE L. REV. 1109, 1121 (2001) ("In defending the limitation, the government also urged that an interest in equalizing the ability of various groups and individuals to influence campaigns warranted the expenditure restrictions.") (footnote omitted).
149. *Buckley*, 424 U.S. at 92–93; *see also* Matthew A. Melone, Citizens United *and Corporate Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?*, 60 DEPAUL L. REV. 29, 43 (2010) (discussing the Court's recognition of "the strong link between money and the ability to amplify and effectively disseminate political messages to the electorate.") (footnote omitted).

Colonists: "'Why don't you raise a few thousand pounds? We will provide matching funds, and you can run a pure revolution with matching funds from the Crown. We will have a few things to say about how you run the revolution and where it goes . . . .'"[150] Opponents of campaign finance regulation feel that any restriction is both a burden on free speech and that the government should not be involved in electing politicians. They see the government as meddling in the people's job of choosing their elected officials. Apt analogy to King George? Not exactly. But it encompasses the ideological divide between those for and those against public campaign finance.

B. The Presidential System in Operation

1. *Primaries*

The FECA public financing system is voluntary.[151] Public funding for the primaries comes in the form of matching funds.[152] Candidates running for a party's nomination can qualify for matching funds by raising $5,000 in twenty different states.[153] Once the FEC determines that a candidate qualifies, the candidate can submit evidence of contributions for the distribution of matching funds.[154] Only contributions from individuals are matched, and although a candidate can receive contributions up to $2,600 from individual donors, only the first $250 of each donation is matched.[155] By accepting public primary funds, candidates agree to abide by an overall national spending limit, as well as spending limits in each state.[156] In 2012, the applicable overall national spending limit for the primaries was $54,744,840.[157]

The *Buckley* Court commented specifically on the matching formula for the primary elections, noting that the requirement that a candidate solicit a minimum number of small donations promotes a diverse voter base.[158] Moreover, "[t]he thrust of the legislation is to reduce financial barriers and to enhance the importance of smaller contributions."[159] Of particular note to some commentators is how the

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150. Mary Meehan, *The Federal Election Commission*, CATO INST. POL'Y ANALYSIS No.-2 (Nov. 1, 1980), http://www.cato.org/sites/cato.org/files/pubs/pdf/pa-00c.pdf.
151. *Presidential Election Campaign Fund*, FED. ELECTION COMMMISSION, http://www.fec.gov/press/bkgnd/fund.shtml (last visited June 25, 2013) [hereinafter *Campaign Fund*].
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*; *Contribution Limits 2013–14*, FED. ELECTION COMMISSION, http://www.fec.gov/pages/brochures/contriblimits.shtml (last visited June 25, 2013).
156. *Campaign Fund*, *supra* note 151.
157. *Id.* This value is tied to inflation and has increased from its original limit of $10 million set in 1976. *Id.*
158. *See* Buckley v. Valeo, 424 U.S. 1, 106 (1976) (per curiam).
159. *Id.* at 107 (footnotes omitted).

Court struck down personal spending limits on candidates but upheld those spending limits when attached as a condition of receipt of public funds.[160] The Court justified the disparity in a small footnote in the *Buckley* opinion:

> For the reasons discussed in Part III, *infra*, Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chose to accept, he may decide to forgo private fundraising and accept public funding.[161]

The footnote effectively sanctioned the receipt of a government benefit—public campaign funds—conditioned on the candidate's voluntary acceptance of the commensurate limits that were imposed as part of the overall scheme.[162]

2. *General Election*

The nominee of each major party is eligible for a grant of public money for the general election.[163] In order to receive the grant, candidates agree to refrain from accepting private contributions for the remainder of the campaign.[164] Although both nominees opted out of the program, the grant for 2012 was approximately $91,241,400.[165] Prior to 2008, when then-Senator Barack Obama opted out of the system, every major party presidential candidate had accepted the public grant for the general election.[166]

C. Declining Viability of the Presidential Campaign Financing System

In 2011, the House of Representatives voted on various occasions to abolish public financing for presidential elections.[167] The bills, introduced by Representative Tom Cole (R-Okla.) in January and by

160. *Id.* at 92–93 (upholding the public financing spending restrictions and saying that public financing "furthers, not abridges, pertinent First Amendment values" after striking down limits on privately financed campaigns).
161. *Id.* at 57 n.65.
162. *Id.*
163. *Campaign Fund*, *supra* note 151.
164. *Id.*
165. *Id.*
166. Glenn Hudson, Note, *Think Small: The Future of Public Financing After* Arizona Free Enterprise, 47 WAKE FOREST L. REV. 413, 426 (2012).
167. Pete Kasperowicz, *House Votes to End Publicly Funded Presidential Campaigns,* THE HILL (Jan. 26, 2011, 3:07 PM), http://thehill.com/blogs/floor-action/house/140459-house-votes-to-end-publicly-financed-presidential-campaigns; Ben Pershing, *House Votes to End Public Funding for Presidential Campaigns,* Post in 2chambers, WASH. POST (Dec. 1, 2011, 3:13 PM), http://www.washingtonpost.com/blogs/2chambers/post/house-votes-to-end-public-funding-for-presidential-campaigns/2011/12/01/gIQAc8SaHO_blog.html.

Representative Gregg Harper (R-Miss.) in November, sought to eliminate the Fund and the Primary Matching Account and to use the $200 million contained in those accounts to reduce the deficit.[168] In a press release following the House of Representatives passage of the bill, Rep. Harper stated that "[s]ince 1976, taxpayers have spent 1.5 billion dollars subsidizing a campaign finance program that hasn't worked."[169] Rep. Cole called the elimination of the program a "no brainer."[170]

Shortly after the House passed the bill in January of 2011, Senate Majority Leader Mitch McConnell (R-Ky.) introduced the bill into the Senate. Sen. McConnell called the presidential campaign system "an outdated, wasteful Washington program" and deemed it "welfare for politicians."[171] In opposition to the bill, Senator Charles Schumer (D-N.Y.) claimed that the Republicans were attempting to "finish the job that the Supreme Court started with the *Citizens United* decision."[172] Sen. Schumer went on to note that elimination of the program "would bust one of the last dams protecting our election system from an uncontrolled flood of special-interest money."[173] Although the bill was introduced in the Senate, it was never brought to the floor, ultimately leaving the future of the fund in limbo.[174]

So what exactly has happened to the system? How could a system that, prior to 2012, had been used by all presidential candidates, except Barack Obama in 2008, be on the chopping block? Commentators have attributed the decline of the viability of presidential public campaign finance to three main issues: (1) problems with the voluntary checkoff, (2) shortfalls in the Presidential Election Campaign Fund, and (3) the ever-changing demands of the campaign process.

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168. H.R. 359, 112th Cong. (2011); H.R. 3463, 112th Cong. (2011).

169. *House Moves Bill to End Public Financing of Presidential Campaigns*, CONGRESSMAN GREGG HARPER (Dec. 1, 2011), http://harper.house.gov/press-release/house-moves-bill-end-public-financing-presidential-campaigns-eac.

170. Kasperowicz, *supra* note 167.

171. Huma Khan, *Public Financing for Presidential Campaigns on Chopping Block*, ABC NEWS (Jan. 27, 2011), http://abcnews.go.com/Politics/public-financing-presidential-campaigns-chopping-block/story?id=12778579#.UG9oLsRYtmo. Senator McConnell has long been an opponent of campaign finance and is the named plaintiff in *McConnell v. FEC*. Gerard J. Clark & Steven B. Lichtman, *The Finger in the Dike: Campaign Finance Regulation After* McConnell, 39 SUFFOLK U. L. REV. 629, 640 (2006).

172. Jonathan D. Salant, *U.S. House Votes to End Campaign Finance System*, *Senate Unlikely to Agree*, BLOOMBERG (Jan. 26, 2011, 11:01 PM), http://www.bloomberg.com/news/2011-01-27/u-s-house-votes-to-end-campaign-finance-system-senate-unlikely-to-agree.html.

173. *Id.*

174. *See* Ben Pershing, *As White House Candidates Abandon Public Funding, Republicans Look to End System*, WASH. POST (Nov. 28, 2011), http://www.washingtonpost.com/politics/as-white-house-candidates-abandon-public-funding-republicans-look-to-end-system/2011/11/28/gIQA5doM6N_story.html.

1. Checkoff Lag and Misconceptions

The voluntary checkoff program is a vital aspect of the presidential campaign financing system for the simple reason that the checkoff is its sole source of funding. First appearing in 1972 tax returns, the checkoff enables a taxpayer to set aside either $3 (if filing individually) or $6 (if filing jointly) to the Presidential Election Campaign Fund.[175] Initially successful, participation in this program (i.e. taxpayers who check "yes" on their tax return) has steadily declined over the past thirty years.[176] This decline has partially been attributed to a misunderstanding among taxpayers about the program.[177] There is a common misconception among taxpayers that by checking off "yes" on their tax return, they are increasing their tax liability.[178] This is simply not true.[179]

When a taxpayer checks off "yes," the government sets aside $3 (or $6) for the Presidential Campaign Election Fund.[180] In other words, checking off "yes" does not increase a person's tax bill, but rather, it signals to the government that it needs to direct $3 (or $6) to the campaign fund. The FEC tried to dispel this misconception through an education program in 1991 and 1992.[181] The education program included, inter alia, television and radio announcements urging taxpayers to make an "informed choice" when deciding whether or not to check off "yes," brochures explaining the program, distribution of information to accountants and tax preparation services, and various announcements in magazines and newspapers.[182] Although the FEC claims that the program reached a potential audience of 206 million people, voter participation continued to decline.[183]

In addition to the checkoff misconception, the checkoff has been hindered by what Representative Moakley (D-Mass.) deemed a "cleri-

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175. JOSEPH E. CANTOR, CONG. RESEARCH SERV., RL32786, THE PRESIDENTIAL ELECTION CAMPAIGN FUND AND TAX CHECKOFF: BACKGROUND AND CURRENT ISSUES 2–3 (2005) *available at* http://fpc.state.gov/documents/organization/105185.pdf; Fed. Election Comm'n, *The $3 Checkoff*, FED. ELECTION COMMISSION (published Dec. 1993), http://www.fec.gov/info/checkoff.htm (last visited June 27, 2012).

176. Checkoff participation peaked at 28.7% in 1980. *Press Release, Presidential Fund Income Tax Check-Off Status, 1992-2012*, FED. ELECTION COMMISSION (Sept. 2012), available at http://www.fec.gov/press/bkgnd/pres_cf/PresidentialFundStatus_September2012.pdf [hereinafter *Press Release*]. In 2012, only 5.1% participated. *Id.*

177. CANTOR, *supra* note 175.

178. *Id.*

179. *Press Release*, *supra* note 176.

180. *Id.*

181. *Funding the Program: The $1 Tax Checkoff*, FED. ELECTION COMM'N, http://www.fec.gov/info/chfive.htm (last visited June 27, 2013) [hereinafter *Funding*].

182. *Id.*

183. *Press Release*, *supra* note 176.

cal problem" in 1989.[184] Testifying before the House of Representatives, Rep. Moakley expressed concern that the use of tax preparation services has contributed to the decline in checkoff participation. He noted, ". . . it is common practice in the [accounting] industry to leave the [checkoff] blank and begin the preparation procedure one space down."[185] Rep. Moakley further commented that "since leaving the item blank is the same as checking 'no,' these preparers are making a negative choice, on behalf of their clients, without affording them an opportunity to make an informed judgment."[186] Rep. Moakley attempted to introduce a bill that would make the checkoff automatic, "unless the taxpayer specifically designates that he does not want money to be paid into the fund."[187] The bill never made it out of the subcommittee, leaving "no" as the checkoff default.[188]

Ultimately, whether it is the misunderstanding about the checkoff or the "clerical problem" cited by Rep. Moakley, participation in the program is at an all-time low. As noted by FEC Commissioner Michael Toner,

> [a]ny system of public financing must have popular support to succeed. Today's low taxpayer checkoff rates cast serious doubt on whether the public financing system has this support . . . When only one in nine taxpayers are [sic] participating, it is very difficult to conclude that the public financing system has broad popular support.[189]

2. *Funding Shortfalls*

Over the past decade, the public campaign financing system has been plagued by chronic shortfalls.[190] The FEC had to delay payments to candidates in 1996 and 2000, and it narrowly scraped by in 2004 (thanks to George W. Bush and John Kerry opting out in the primaries) and 2008 (thanks largely to Obama opting out in the general election).[191] The FEC attributes the shortfalls to what it deems a "fatal flaw" in FECA—payments from the funds are indexed for inflation, but the tax checkoff is not.[192] As a result, disbursements are

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184. 135 Cong. Rec. H913 (daily ed. Apr. 4, 1989) (statement of Sen. Moakley).
185. *Id.*
186. *Id.*
187. *Id.*
188. H.R. 1671, 101st Cong. (1989); *Bill Summary & Status H.R. 1671*, LIBR. OF CONG., http://thomas.loc.gov/cgi-bin/bdquery/z?d101:h.r.01671 (last visited June 28, 2013).
189. John Samples, *The Failures of Taxpayer Financing of Presidential Campaigns*, CATO INST. POL'Y ANALYSIS No. 500, at 13 (Nov. 25, 2003), *available at* http://www.cato.org/publications/policy-analysis/failures-taxpayer-financing-presidential-campaigns.
190. *Fixing the Voluntary Tax Checkoff Program to Fund Presidential Elections*, PUB. CITIZEN, http://www.citizen.org/congress/article_redirect.cfm?ID=10642 (last visited June 28, 2013).
191. *Id.*
192. *Funding*, *supra* note 181.

consistently increasing, while revenue remains fixed. The shortfall problem generated by this fundamental flaw is exacerbated by the decreasing checkoff participation and the ever-increasing financial demands of campaigns. Even apart from the campaign demands discussed below, the lack of money flowing into the Fund is so pronounced that, in some respects, the Fund's existence has been "saved" only by the fact that candidates now routinely choose not to participate.[193] Effectively, it is a moribund circle spelling the demise of presidential public financing as the nation once knew it.

3. *Campaign Demands*

The presidential campaign financing system in place today has remained largely untouched since its inception in 1974.[194] While, in some cases, such permanent legislation may be an indication of sound policy, the fact that the system has not been updated has proven fatal. Today's campaign process is dramatically different than it was in 1974. The most notable difference is the sheer amount of money being pumped into and out of the campaigns. In 2000, then-Governor George W. Bush opted out of the program and raised a record $100 million in the Republican primary—twice the amount offered to candidates who opted for public funds.[195] Moreover, as of December 31, 2012, Mitt Romney and Barack Obama raised $447.6 million and $722.4 million respectively.[196] In fact, President Obama reportedly shattered campaign contribution records by raising more than $150

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193. Both President Obama and Mitt Romney opted not to take part in the public financing system in the 2012 election. Catalina Camia, *Obama, Romney Skip Taxpayer Money for Campaign*, USA TODAY ON POL. (Apr. 27, 2012, 2:03 PM), http://content.usatoday.com/communities/onpolitics/post/2012/04/mitt-romney-public-financing-presidential-campaign-/1#.URcM5aU0WSo.

194. The only significant change came in 2002 when Congress passed the Bipartisan Campaign Reform Act, which banned the use of "soft money" in campaigns and restricted the use of general treasury funds by corporations and unions for "electioneering communication." Bipartisan Campaign Reform Act, Pub. L. No. 107–155, 116 Stat. 81 (2002). As previously noted, the U.S. Supreme Court ruled the "electioneering communications" restriction unconstitutional in *Citizens United v. Fed. Election Comm'n*. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

195. Fred Wertheimer, Op-Ed., *Just Whose Presidency is This?*, WASH. POST (Jan. 15, 2003), *available at* www.democracy21.org/index.asp?Type=B_PR&SEC=%7BFD714569-5FB3-45D6-82D4-A3098EE124BA%7D&DE=%7BECA4CE0D-E59D-494B-9622-586F65F50529%7D.

196. *2012 Presidential Campaign Finance*, FED. ELECTION COMMISSION, http://www.fec.gov/disclosurep/pnational.do (last visited June 28, 2013). These totals are derived from reports submitted by the campaigns to the FEC and do not include the contributions collected, and ultimately spent, by the Super PACs supporting the candidates. *See id.*

million in September 2012 alone.[197] If the presidential nominees opted for public funds, they would each have been tied down by a spending limit of approximately $91 million.[198] The numbers ultimately do not match up. As noted by Anthony J. Corrado of the Brookings Institute, "the rising financial demands of a presidential campaign [have] rendered [the program's] spending limits obsolete."[199] Moreover, Corrado notes that "[n]ow [public funding] is generally considered a losing strategy. No candidate who hopes to compete meaningfully will accept it."[200] Senator John McCain (R-Ariz.) expressed a similar view of the system in 2004, as he noted that "there are considerable incentives for some candidates to opt out of public financing."[201] Despite this view, and perhaps in the hopes of salvaging the system, McCain accepted public funds in 2008.[202]

Congress enacted the presidential public campaign finance provisions under the assumption "that candidates for the presidency would better use their time on some task other than raising campaign funds."[203] Public financing proponents argue, "[t]he pursuit of money has become a campaign in and of itself. This comes with a price for democracy. Candidates could better spend their time meeting with voters, and incumbents could better use their time to perform their official duties."[204] However, as exhibited by Barack Obama's viral marketing campaign in 2008 and George W. Bush's fundraising network of "bundlers" in the 2000 primaries, fundraising is not necessarily *always* as distracting and burdensome as defenders of the public financing program claim.[205] Case in point: President Obama needed

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197. *See* Michael D. Shear, *September Is the Best Fundraising Month for Obama in 2012*, Post in *The Caucus Blog*, N.Y. TIMES (Oct. 4, 2012, 9:13 PM), http://thecaucus.blogs.nytimes.com/2012/10/04/september-is-the-best-fund-raising-month-for-obama-in-2012/.

198. *Campaign Fund*, *supra* note 151.

199. Anthony Corrado, *The Lost Hope for Campaign Reform, Room for Debate*, N.Y. TIMES (June 13, 2012), http://www.nytimes.com/roomfordebate/2012/06/13/did-any-good-come-of-watergate/the-promise-of-campaign-reform-has-largely-been-broken.

200. Brian C. Mooney, *Post-Watergate Campaign Funding Reforms Fade Away*, BOS. GLOBE (June 21, 2012), http://www.bostonglobe.com/news/politics/2012/06/21/publicfunding/PjLaAsVVb8kAU25MunSKaN/story.html.

201. John McCain, *Reclaiming Our Democracy: The Way Forward*, 3 ELECTION L.J. 115, 120 (2004).

202. *2012 Presidential Campaign Finance*, FED. ELECTION COMMISSION, http://www.fec.gov/disclosurep/pnational.do (last visited June 28, 2013).

203. Samples, *supra* note 189, at 13.

204. *Id.* (quoting Peter L. Francia & Paul S. Herrnson, *Begging for Bucks*, CAMPAIGNS & ELECTIONS, Apr. 2001, at 51).

205. Karen Tumulty, *Obama's Viral Marketing Campaign,* TIME, July 16, 2007, at 38, www.time.com/time/magazine/article/0,9171,1640402,00.html.

just sixty people to raise $2.4 million at a fundraiser in Manhattan in July of 2012.[206]

The campaign process is also procedurally different. The party nomination process has become "front-loaded" in the recent past.[207] As noted by Fred Wertheimer of Democracy21, "[s]tates have been playing leapfrog in a rush to move up the dates of their primaries and caucuses."[208] Consequently, the starting point of the nomination process has been moved up, but Election Day has remained the first Tuesday in November. This phenomenon has critically impacted the campaign process by creating "a prolonged process that [has] fatigued voters and candidates alike" and, more importantly for the presidential funding system, has made "today's presidential races increasingly expensive."[209] Front-loading thus creates a system in which only the rich candidates or those able to raise large amounts of money survive.[210] Candidates "that enter the race are often forced to exit prematurely because of an inability to raise the massive amounts needed to continue their candidacies."[211] The rich, or at least well-funded candidates, are ultimately the only ones who reach the finish line.

The 2012 election cycle was the most expensive cycle in the country's history, with more than $6 billion being spent on the federal level.[212] The sheer cost of campaigning for federal office has rendered the old model of publicly funding campaigns obsolete. The cost of campaigning for federal office has exploded, whether a candidate is running a local congressional race, a state-wide senate race, or the presidential race.

Beyond the effect of improved campaign solicitation and front-loaded primaries on the cost of elections, the Supreme Court's landmark decision in *Citizens United* pushed the 2012 election cycle to even greater spending heights. *Citizens United* led to an unprecedented level of independent spending in the 2012 election cycle.[213] As a result, candidates for office now must raise enough money not only to defeat their opponents but also to combat a new wave of outside spending. This new threat of well-funded independent groups puts

206. Kenneth P. Vogel, *The Myth of the Small Donor*, POLITICO (Aug. 7, 2012, 4:27 AM), http://www.politico.com/news/stories/0812/79421.html.
207. Wertheimer, *supra* note 195.
208. *Id.*
209. Matthew T. Sanderson, *Two Birds, One Stone: Reversing "Frontloading" by Fixing the Presidential Public Funding System*, 25 J.L. & POL. 279, 283-84 (2009) (footnote omitted).
210. *Id.* at 285.
211. *Id.* (footnote omitted).
212. *The Money Behind the Elections*, CENTER FOR RESPONSIVE POLS., www.opensecrets.org/bigpicture/ (last visited Nov. 14, 2013) (showing spending of $6.2 billion in 2012).
213. *Outside Spending*, CENTER FOR RESPONSIVE POLS., http://www.opensecrets.org/outsidespending/index.php (last visited June 29, 2013).

pressure on campaigns to raise as much money as possible and inevitably forgo the underfunded and antiquated public funding system.

The *Citizens United* groups' avalanche of new independent spending[214] has made it increasingly hard to publicly finance a campaign because of independent groups' ability to spend unlimited amounts in any race.[215] In the presidential race, over 25% of all spending was done, not by the candidates or political parties, but by independent groups.[216]

Independent groups supported President Obama with $131 million in the 2012 election.[217] This accounted for 12% of the spending on behalf of the President; despite the fact that more than $1 billion was spent in total for his reelection.[218] In comparison, independent groups supported Mitt Romney with $418 million, 34% of the total spending on the Republican side.[219] The Republican-minded independent expenditures were five times the amount of funding Mitt Romney would have received through the presidential matching fund (approximately $91 million). Clearly, no candidate can accept the financial limitations imposed by the presidential matching fund when independent groups can outspend a $91 million campaign by hundreds of millions of dollars.

Opting out of the public financing systems is not exclusive to the presidential race—Chris Christie opted out of the New Jersey state public financing system for the Governor's race because it would limit his fundraising.[220] While the 2008 election almost certainly marked the impending demise of publicly financed presidential campaigns, the 2012 election and the rise in outside spending put the final nails in the coffin of the presidential matching fund. The cost of running a national presidential campaign simply dwarfs the $91 million that a

214. Reity O'Brien & Andrea Fuller, *Court Opened Door to $933 Million in New Election Spending*, CENTER FOR PUB. INTEGRITY (Jan. 16, 2013, 6:00 AM), http://www.publicintegrity.org/2013/01/16/12027/court-opened-door-933-million-new-election-spending.

215. *Outside Spending*, *supra* note 213.

216. *2012 Presidential Race*, CENTER FOR RESPONSIVE POLS., http://www.opensecrets.org/pres12 /index.php (last visited June 30, 2013).

217. *Id.*

218. *Id.*; Paul Blumenthal, *Barack Obama, Mitt Romney Fundraising: Obama Reaches Milestone of $1 Billion Raised*, HUFFINGTON POST (Oct. 26, 2012, 8:58 AM), http://www.huffingtonpost.com/2012/10/26/barack-obama-mitt-romney-fundraising-capaigns_n_2021029.html.

219. *2012 Presidential Race*, *supra* note 216.

220. Melissa Hayes, *Christie Won't Seek State Matching Funds for Primary Election*, Post in *The Political State*, N. JERSEY (Jan. 15, 2013, 11:28 AM), http://blog.northjersey.com/thepoliticalstate/6257/christie-wont-seek-state-matching-funds-for-primary-election/.

publicly financed campaign has available and makes the system obsolete.[221]

Neither has the presidential funding system been altered to reflect the reality of an early primary calendar. The FEC does not disburse the public funds until January 1 of the election year. However, due to the early primaries, candidates have to start their campaign months earlier, ultimately leaving them without the aid of public funds.[222] The 108th Congress (2003–2005) introduced legislation to remedy this problem by moving the starting date for primary fund payments from January 1 of the election year to July 1 of the prior year.[223] Congress never voted on the bill, however, leaving FECA untouched.[224]

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221. Presidential Election Campaign Fund, FED. ELECTION COMMISSION, http://www.fec.gov/press/bkgnd/fund.shtml.

222. JOSEPH E. CANTOR, CONG. RESEARCH SERV., RL32786, THE PRESIDENTIAL ELECTION CAMPAIGN FUND AND TAX CHECKOFF: BACKGROUND AND CURRENT ISSUES 9 (2005).

223. *Id.* at 11–12.

224. *Id.* In addition to the solution proposed to Congress to have public funds disbursed at an earlier date, proposals have been made to do the exact opposite—push the disbursements to a later date in order to combat the consequences of front-loading. Sanderson, *supra* note 209, at 307–08. Under such a plan, proposed by Matthew T. Sanderson, former counsel for John McCain's presidential campaign committee and former chief of staff and general counsel for Governor Jon Huntsman Jr.'s Commission on Strengthening Utah's Democracy, primary "matching funds" disbursements would be pushed to October 1 of the year before the election and general election disbursements would be pushed to April 1 of the election year. *Id.* According to Sanderson, such changes would serve as "countervailing force[s]," encouraging candidates to enter into the race at a later date. *Id.* at 308. Candidates could, of course, use private contributions to fund their participation in the earlier contests, but the government would not match these contributions. *Id.* Candidates, therefore, would be "leav[ing government] money on the table." *Id.* at 307.

Furthermore, in addition to altering the timetable for the disbursement of public funds, Sanderson's plan calls for, inter alia, an increase in the personal spending limit, the elimination of state-by-state spending limits, an increase in the ratio of primary matching funds to four-to-one for the first $100 contributed prior to October 1, and a switch from a grant to matching funds for the general election to infuse private contributions and encourage citizen participation. *Id.* at 311–24. Sanderson also suggests eliminating any limit on the total amount of public funds a candidate can receive. *Id.* at 316. Such a change would establish a "free-for-all" program in which a candidate "actively seek[ing] matching funds [could] simultaneously enlarge his share while shrinking his opponents'." *Id.* at 316–17. For example, if this policy were in place in 2008 when President Obama opted out of the program, Senator McCain would have received the entire presidential fund—i.e. $168.2 million. *Id.* at 317. Senator McCain would have doubled what he actually received in 2008, which totaled approximately $84.1 million. *Id.* at 323. Sanderson argues that creating a "free-for-all" system incentivizes the acceptance of public funding, as candidates would be reluctant to "open the door for [their] opponents to receive a greater infusion of public dollars." *Id.* at 317.

The future of the presidential campaign financing system is bleak. Calls for reform have been heard, but none of them have been answered. Policy proposals have been made to "fix" the system, but none of them have translated into legislation.[225] Finding the right solution to the campaign finance conundrum has proven to be a near impossible task. As one commentator frames the matter:

> On the one hand, it's imperative to make the system sufficiently attractive to candidates, including and perhaps especially, the top-tier candidates, so that they will voluntarily choose to opt into the system . . . . On the other hand, you can't make the system so attractive that it either becomes insupportably expensive as a practical matter, or it imposes so few constraints on the candidates that it fails to achieve its core public policy goals, such as encouraging small contributions or restraining the overall cost of the presidential campaigns.[226]

Until the above-described optimal balance is reached, candidates, like Governor Mitt Romney, will almost certainly continue to follow President Obama's lead and opt out of public campaign financing in future elections. The benefits of using public funds are simply no longer worth the drawbacks. Ultimately, so long as checkoff participation remains low, participant spending limits remain static, and candidates continue to raise exorbitant amounts of money through private donations, the system will continue to be rendered obsolete. As the foregoing demonstrates, however, most of that obsolescence is attributable to fiscal, practical, and political (as opposed to legal) constraints.

4. *Beware the Ides of the Millionaire's Amendment*

To the extent that jurisprudence within the realm of campaign finance—but outside the realm of public financing—foreshadowed the impending legal demise of systems other than those that track the pragmatically hamstrung fixed-sum model of the presidential system, the seeds of doubt were most evidently sown in the wake of the so-called Millionaire's Amendment to BCRA. The Millionaire's Amendment of the Bipartisan Campaign Reform Act of 2002 was a trigger provision that activated when a congressional candidate spent more than $350,000 in personal funds.[227] This threshold spending of a "self-financing" candidate triggered a trebling of an opponent's indi-

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225. Another example is the proposal put forth by the Campaign Finance Institute, which would increase the checkoff to $5, institute a 3:1 ratio for matching funds, make public funds available earlier, increase primary spending limits, and create an "escape hatch" for participating candidates in the event that their opponent opts out of the system. THE CAMPAIGN FINANCE INSTITUTE, SO THE VOTERS MAY CHOOSE . . . REVIVING THE PRESIDENTIAL MATCHING FUND SYSTEM (2005).

226. Sanderson, *supra* note 209, at 302 (quoting CAMPAIGN LEGAL CTR. & DEMOCRACY 21, PRESIDENTIAL PUBLIC FINANCING SYSTEM: REPAIRING THE SYSTEM CONFERENCE REPORT 35 (2005)).

227. Davis v. Fed. Election Comm'n, 554 U.S. 724, 729 (2008).

vidual contribution limits (from $2300 to $6900) and allowed for the acceptance of unlimited coordinated party expenditures.[228] Once a "non-self-financing" candidate's spending reached $350,000 through the new regulatory scheme, the original contribution limits would be re-instated.[229]

The Supreme Court addressed the constitutionality of the Millionaire's Amendment in *Davis v. Federal Election Commission*.[230] The Court held that the asymmetrical spending limits unconstitutionally burdened a self-financing candidate's First Amendment right to spend his or her own funds for campaign speech.[231] Quoting *Buckley*, the Court reasoned that a "candidate . . . has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and . . . a cap on personal expenditures imposes a substantial, clea[r] and direc[t] restraint on that right."[232] According to the *Davis* Court, the *Buckley* Court's assertion that anticorruption interests are in fact promoted by unlimited personal spending still rings true.[233] The use of personal funds reduces reliance on "outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which . . . contribution limitations are directed."[234] Consistent with prior rejections of the equalization and deliberative democracy rationales,[235] the Court rejected the notion that leveling the playing field as between a well-resourced self-funded candidate and the candidate's opponents likewise failed to justify limits representing an "infringement of fundamental First Amendment rights."[236] One of the more notable parentheticals the

228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at 736–44.
232. *Id.* (internal quotation marks omitted); Buckley v. Valeo, 424 U.S. 1, 52–53 (1976) (per curiam).
233. *See Davis*, 554 U.S. at 738.
234. *Id.* (quoting *Buckley*, 424 U.S. at 53).
235. *See, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting) ([P]reventing 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) (internal quotation marks omitted); Randall v. Sorrell, 548 U.S. 230, 268 (2006) (Thomas, J., concurring) ([T]he interests the Court has recognized as compelling, *i.e.*, the prevention of corruption or the appearance thereof."). *Buckley* itself was an outright denial of equalization as a compelling state interest: "[E]qualizing the financial resources of candidates" does not provide a justification for limiting campaign resources, especially since equalization might "handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." *Buckley*, 424 U.S. at 56–57. The *Buckley* Court concluded "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 48–49.
236. *Davis*, 554 U.S. at 738 (2008) (quoting *Buckley*, 424 U.S. at 54).

Court puts forward in support of its anti-equalization position quotes Justice Kennedy, although in dissent: "[T]he notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections is antithetical to the First Amendment."[237]

Of critical moment to the *Davis* Court was the decision a self-financed candidate faced when approaching the $350,000.00 threshold: refrain from further speech, which keeps the contribution playing field level, or continue spending and potentially expand the speech capacity of the opponent.[238] The Court considered the elimination of a non-self-financed candidate's spending limits as a result of opponent threshold spending a "penalty on any candidate who robustly exercises [his or her] First Amendment right."[239] The Eight Circuit's decision in *Day v. Holahan* was cited favorably in support of this conclusion.[240] The *Day* court held that a Minnesota law increasing a candidate's spending limits in response to independent expenditures in favor of the opponent "impaired" the speech of those making the independent expenditures.[241]

Moreover, "[l]eveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election."[242] Article I, § 2 of the Constitution confers upon the voters the power to choose members of the House of Representatives, and it is a dangerous precedent to allow Congress to influence that choice by allowing Congress to limit the ways in which challengers can fund their campaign.[243]

Atmospherically at least, that concern may have been sourced in part with overlapping concerns that the Millionaire's Amendment represented a form of incumbent-protection. Professor Joel Gora of Brooklyn Law School posits that although the Millionaire's Amendment was facially neutral with respect to incumbents and challengers, on a practical level, it could be seen to serve incumbents.[244] Incumbents almost never have to rely on their own funds, because they can raise copious amounts of private funding.[245] Professor Richard Briffault of

237. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 705 (1990) (Kennedy, J., dissenting).
238. *See Davis*, 554 U.S. at 739.
239. *Id.*
240. *Id.*
241. Day v. Holohan, 34 F.3d 1356, 1360 (8th Cir. 1994) (noting the statute "infringes on. . .protected speech because of the chilling effect the statute has on the political speech of the person or group making the independent expenditure.").
242. *Davis*, 554 U.S. at 742.
243. *Id.*; *see* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 792 n.31 (1977) (The "[g]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves.").
244. Gora, *supra* note 143, at 105.
245. *Id.* at 105–06.

Columbia Law School noted that reformers viewed the complete elimination of spending limits for non-self-financed candidates as self-serving for the same reason.[246]

D. The Supreme Court Pulls the Trigger on Trigger-Matching Funds

Since *Buckley*, legally speaking, the risk-averse route for states or smaller jurisdictions seeking to implement public financing has been to track the fixed "lump" sum model in *Buckley* itself, along with similar commensurate limits for the candidates who choose to participate in the systems. These systems mirror either the presidential primary system of matching small donations up to a certain level or the presidential general election system of a single lump sum for the entire election. Little need be said regarding such a model except to note that a state model of this type shares the presidential system's de jure constitutional status but also shares its de facto moribundity. It is, therefore, unsurprising that states interested in adopting public financing for campaigns for state office sought a means of balancing the facilitation aspects of deliberative democracy and equalization with the desire to protect the state treasury from unnecessary spending.

The key manner through which states attempted to forge that balance was via the mechanism of so-called "trigger" matching funds. Such funds were long seen as "crucial to persuading candidates to accept public funding and the spending limit that always accompanies public subsidies [because] [w]ithout the option of raising and spending above the public funding spending limit when running against a high-spending candidate, few serious candidates would accept public funding."[247]

Although the Court was not presented with questions involving public financing, *Davis*'s citation with approval to the Eighth Circuit's decision in *Day* for the proposition that, in the Supreme Court's words, a statute that "increased a candidate's expenditure limits and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures,"[248] foreshadowed *Arizona Free Enterprise*, and the rationale that would prove to undo matching funds.

The Court adopted the idea that, despite not being a spending restriction per se, spending limits that trigger matching funds place a burden on free speech. By presenting a candidate with the choice of either limiting his or her own privately funded campaign or benefiting

246. Richard Briffault, Davis v. FEC*: The Roberts Court's Continuing Attack on Campaign Finance Reform*, 44 TULSA L. REV. 475, 479 (2009).
247. *Id.* at 476.
248. Davis v. Fed. Election Comm'n,, 554 U.S. 724, 739 (2008).

the opponent and losing the benefit of not being subject to spending limits like a publicly financed opponent would be, the privately funded candidate is less likely to exercise his or her right to speech and faces a burden. Still, many public-financing proponents didn't realize it at the time. Richard Briffault, writing shortly after *Davis*, and prior to *Arizona Free Enterprise*, was a notable exception:

> Nearly all of the lower federal courts that, prior to *Davis*, had heard challenges to state laws triggering a release from the spending limit or the provision of additional public funds in response to high levels of opposition funding upheld those laws. But *Davis*, which cited the one lower federal court that went the other way, suggests that these state laws may now be in serious constitutional difficulty.[249]

Prior to *Davis*, as Professor Briffault intimates, the majority of courts that had addressed First Amendment challenges to trigger-matching funds had upheld them,[250] noting, in particular, the facilitation role that the matching funds play in promoting rather than constraining speech. The First Circuit, for example, found that the arguments of those challenging trigger-matching funds could be summarized as follows: "Essentially, their argument boils down to a claim of a First Amendment right to outraise and outspend an opponent, a right that they complain is burdened by the matching funds clause."[251] Further, the *Daggett* court found that such a challenge fundamentally "misconstrue[s] the meaning of the First Amendment's protection of their speech. They have no right to speak free from response—the purpose of the First Amendment is to secure the widest possible dissemination of information from diverse and antagonistic sources."[252]

Daggett and the decisions akin to it are thus entirely consistent with Justice Kagan's dissent in *Arizona Free Enterprise* in which she asserts, inter alia, that the challenge in that case involved the challengers' "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."[253] On the contrary, *Daggett* rejected the reasoning in *Day* as "equat[ing] responsive speech with an impairment to the initial

249. Briffault, *supra* note 246, at 479.

250. *See, e.g.*, Daggett v. Comm'n. on Gov'tl. Ethics & Elec. Pracs., 205 F.3d 445, 450 (1st Cir. 2000); N.C. Right to Life Comm. v. Leake, 524 F.3d 427, 432 (4th Cir. 2008); Gable v. Patton, 142 F.3d 940, 943 (6th Cir. 1998); Rosenstiel v. Rodriguez, 101 F.3d 1544, 1546 (8th Cir. 1996); Ass'n. of Am. Phys. & Surgeons v. Brewer, 363 F. Supp. 2d 1197, 1202–03 (D. Ariz. 2005); Green Party of Conn. v. Garfield, 537 F. Supp. 2d 359, 391–92 (D. Conn. 2008).

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

252. *Id.* (quoting Buckley v. Valco, 424 U.S. 1, 49 (1976) (per curiam)) (internal quotation marks omitted).

253. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2835 (2011) (Kagan, J., dissenting).

speaker."[254] Similarly, the Fourth Circuit, in upholding a challenge to the trigger-matching funds at the heart of North Carolina's public financing system for judicial elections, found that:

> [P]laintiffs remain free to raise and spend as much money, and engage in as much political speech, as they desire. They will not be jailed, fined, or censured if they exceed the trigger amounts. The only (arguably) adverse consequence that will occur is the distribution of matching funds to [participants]. But this does not impinge on the plaintiffs' First Amendment rights. To the contrary, the distribution of these funds "furthers, not abridges, pertinent First Amendment values" by ensuring that the participating candidate will have an opportunity to engage in responsive speech.[255]

The 180-degree difference as between the perspectives in the circuits regarding trigger-matching funds, along with the *Davis* Court's approving citation of *Day*, made it only a matter of time before the Supreme Court would take up the matter directly. *Arizona Free Enterprise*, a case that had gone through several rounds of trial and circuit review and remands,[256] presented the issue squarely.

One year after *Citizens United*, the Supreme Court again weighed in on a matter of campaign finance law, albeit in a case that, at least nationally, had a much lower profile. The challenge to the Arizona public financing system mirrored the challenges considered in cases described above, such as *Daggett*, *Day*, and *Leake*, insofar as the challenge focused on the trigger-matching funds (Arizona called them "rescue funds") provided to participating candidates.

Under the Arizona statute, any eligible candidate running for Governor, secretary of state, attorney general, treasurer, superintendent of public instruction, the corporation commission, mine inspector, and state legislature (House and Senate) could choose to participate in the public financing system, with eligibility contingent only on a modest threshold number of contributions from Arizona voters, and the participants' agreement to certain campaign finance restrictions (e.g., limiting personal expenditures to $500).[257] As with other matching funds-based programs, and in contrast to the fixed-sum presidential model, Arizona provided participating candidates an initial allotment

254. *Daggett*, 205 F.3d at 465.
255. *N.C. Right to Life Comm.*, 524 F.3d at 437 (quoting *Buckley*, 424 U.S. at 92–93).
256. Petitioners, plaintiffs in the original action, were past and future candidates of Arizona state office, as well as independent expenditure groups that participate in Arizona state elections. *Ariz. Free Enter.*, 131 S. Ct. at 2816. The Petitioners challenged the constitutionality of the Arizona public campaign finance provision providing for rescue funds in federal district court, which granted an injunction against further implementation of the provision on the merits but stayed implementation of the injunction pending appeal. *Id.* The Ninth Circuit stayed the district court's injunction pending appeal and subsequently reversed the district court's decision on the merits. *Id.* The Supreme Court stayed the Ninth Circuit's decision, vacated the stay of the district court's injunction, and subsequently granted certiorari. *Id.*
257. *Id.* at 2814–15.

of public campaign funds, and then, when certain conditions were obtained, the state granted these candidates additional "equalizing" or rescue funds.[258]

A group of political candidates and Political Action Committees challenged the Act's matching-fund program, contending that the program burdened their First Amendment right of free speech.[259] The petitioners claimed that as privately financed candidates, their speech was chilled by the looming threat of triggering matching funds for their publicly financed opponents.[260] The plaintiffs argued that, by providing matching funds when a privately financed candidate raises more money, it unconstitutionally restricts the privately financed candidate's speech by discouraging them from raising additional funds. The district court, applying strict scrutiny, and after analyzing Supreme Court precedent including *Buckley* and *Davis*, decided that the matching-funds program of the Act did not serve a compelling state interest, was not narrowly tailored, was not the least restrictive means of "achiev[ing] the anticorruption goal," and was therefore unconstitutional.[261] The district court was reversed by the Ninth Circuit, which held, after applying intermediate scrutiny, that the matching-funds program of the Act was not unconstitutional.[262] Citing *Citizens United* and *Buckley*, the Ninth Circuit reasoned:

> The State has a sufficiently important interest in preventing corruption and the appearance of corruption. The record demonstrates that Arizona has a long history of quid pro quo corruption. . . . As the Supreme Court has recognized, the State's interest in eradicating the appearance of quid pro quo corruption to restore the electorate's confidence in its system of government is not "illusory," it is substantial and compelling.[263]

Further, the court noted the additional State interest in promoting participation in the public financing program through matching funds.[264] Arizona's victory was short-lived.

A 5–4 Supreme Court majority held the matching-fund program unconstitutional because it based the receipt of matching funds on the additional spending or fundraising of the privately funded candidate. The Court reasoned that this choice that the privately funded candidate could stop raising or spending money once he reached the match-

258. *Id.* at 2814.
259. *Id.* at 2816.
260. *Id.*; McComish v. Brewer, No. CV-08-1550-PHX-ROS, 2010 WL 2292213, at *7 (D. Ariz.), *rev'd and remanded sub nom.* McComish v. Bennett, 605 F.3d 720, *opinion amended and superseded,* 611 F.3d 510 (9th Cir. 2010), *rev'd sub nom. Ariz. Free Enter.*, 131 S. Ct. 2806, and *aff'd,* 653 F.3d 1106 (9th Cir. 2011) ("Plaintiffs allege they will refrain from raising funds or spending their personal monies to prevent participating candidates from receiving matching funds.").
261. *McComish*, 2010 WL 2292213, at *7–8.
262. *McComish*, 611 F.3d at 525.
263. *Id.* (citation omitted).
264. *Id.* at 526.

ing limit or continue to raise and spend money but benefit his opponent restricted the privately financed candidate's right to free speech by restricting his political speech. The Court identified three reasons why the matching-funds program of the Act unconstitutionally burdened the privately funded candidates' free speech.[265] First, privately funded speech or campaign financing was the trigger for automatic-matching public funds thereby discouraging privately funded candidates from raising money beyond the initial public financing amount.[266] Second, the matching-funds program put the wealthy candidate who does not choose to participate in the public option in a position where each spent dollar could generate multiple dollars for his opposition, given the potential for more than one publicly financed opponent.[267] Third, the public candidate could continue to benefit from matching funds even if the privately funded candidate has stopped spending because the spending of independent political action groups also triggered rescue funds.[268]

The privately financed candidate would benefit his opponent not only if he spent more money, but also if an independent group spent funds supporting the privately financed candidate.[269] The very notion that in order to not help his opponent a privately funded candidate has to limit his own fundraising and campaign spending while also hoping that independent groups, which the candidate cannot coordinate with, stay out of the race as well, burdens the privately funded candidate's speech.[270] The privately financed candidate's speech is burdened because the state has limited, albeit not with a hard spending limit, the amount of money he can use for his campaign which places a "substantial restraints on the quantity of political speech."[271] The *Arizona Free Enterprise* Court emphasized the private candidate's lack of control over independent political group spending, which also allowed the publicly financed candidate to realize the benefit of rescue funds.[272] Chief Justice Roberts, writing for the majority and relying on *Buckley*, reasoned "[a]ny increase in speech resulting from the Arizona law is of one kind and one kind only—that of publicly financed candidates. The burden imposed on privately financed candidates and independent expenditure groups reduces their speech."[273] However,

265. Steven J. André, *Government Election Advocacy: Implications of Recent Supreme Court Analysis*, 64 ADMIN. L. REV. 835, 894 (2012).
266. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2818–19 (2011).
267. *Id.* at 2819.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.* at 2820. Buckley v. Valeo, 424 U.S. 1, 39 (1976).
272. *Id.*
273. *Id.* at 2820.

this ostensible reduction in speech for which the matching funds are apparently responsible involves not only one, but two, entirely voluntary choices made solely by the "burdened" parties—first, the candidate's choice not to participate in the public financing scheme and, second, the choice by the candidate or independent groups not to speak merely because their competitor might be able to respond. In the Chief Justice's view, however:

> [E]ven if the matching funds provision did result in more speech by publicly financed candidates and more speech in general, it would do so at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups. This sort of "beggar thy neighbor" approach to free speech—"restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others"—is "wholly foreign to the First Amendment."[274]

The Chief Justice is framing the issue as one where, rather than leveling the playing field for publicly financed candidates, privately financed candidates face restrictions. The Chief notes that the Court has "rejected government efforts to increase the speech of some at the expense of others outside the campaign finance context."[275] In *Miami Herald Publishing Co. v. Tornillo*, Justice Kagan, with a nod to the deliberative democracy and equalization of public discourse which the Chief Justice found unjustified, found the trigger-matching funds scheme promoted "responsive speech, competitive speech, the kind of speech that drives public debate."[276]

IV. PUBLIC FINANCING AFTER *FREE ENTERPRISE* AND *CITIZENS UNITED*?

A. Non-Presidential Campaign Economics

For all the attention paid by the public to presidential contests relative to other campaigns, in many respects, major presidential candidates have massive economies of scale working in their favor relative to down-ballot candidates. Major moneyed interest groups, individuals, and organizations recognize that, dollar-for-dollar, their greatest impact is in close campaigns for non-presidential offices that nonetheless play a major role in state and federal policy and governance. Accordingly, the recent upward surge in spending is far from limited to presidential campaigns. The costs of running a Senate or House race have also vastly increased in the era of independent spending.

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274. *Id.* at 2821 (quoting Buckley v. Valeo, 424 U.S. 1, 48–49 (1976)).
275. *Id.* at 2821. The example provided is a decision holding a statute that required newspapers assailing a candidate to print a response from the candidate was unconstitutional. *Id.* (citing Miami Herald Publ'g Co. v. Tonillo, 418 U.S. 241, 258 (1974)). This law was held unconstitutional despite the fact that, like the statute in *Free Enterprise,* it might have increased total speech but its effect was to deter speech in the first place. *Id.*
276. *Id.* at 2837 (Kagan, J., dissenting).

In the 2008 elections, the last presidential election cycle before *Citizens United*, the most expensive Senate race had total spending of $46 million while the most expensive House races totaled $12 million.[277] Only four short years later there were ten House races that exceeded $15 million dollars each.[278] Indeed, there were five congressional races in which *candidate spending alone*—excluding independent spending—totaled more than $11 million, with the most expensive exceeding $25 million.[279]

The Senate increases are strikingly similar. The four most expensive Senate races of 2012 matched or exceeded the $46 million spent by the most expensive race in 2008.[280] The Massachusetts Senate race between incumbent Scott Brown and challenger (and eventual winner) Elizabeth Warren cost a combined $90 million.[281] The magnitude of the expenses entailed in Senate elections, even more than in House elections, becomes staggering when including outside spending. In four races, outside spending exceeded the spending by the campaigns themselves.[282] The U.S. Senate race in Virginia alone saw more than $52 million in outside spending—dwarfing the candidates' own spending of $34 million.[283] The only competitive race that did not face large amounts of outside spending was the Massachusetts Senate race. This race saw less than $8 million in outside spending compared to the $83 million spent by the candidates.[284] This relatively small amount (in comparison to other 2012 races) was a direct result of both candidates reaching an agreement in an attempt to limit the influence of independent groups on the election.[285] The agreement was largely successful, with only about $3.5 million in outside spending occurring in the ten months between reaching the agreement and the election.[286] On the other hand, with $83 million in expenditures by the

277. *Most Expensive Races 2008*, CENTER FOR RESPONSIVE POLS., http://www.opensecrets.org/bigpicture/topraces.php?cycle=2008&display=currcands (last visited Feb. 9, 2013) (click on "All candidates in race").
278. *Most Expensive Races 2012*, CENTER FOR RESPONSIVE POLS., http://www.opensecrets.org/overview/topraces.php (last visited Feb. 9, 2013) (click on "Candidate + Outside group spending: all candidates").
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. Manu Raju, *Scott Brown, Elizabeth Warren Call for Super PAC Cease-Fire*, POLITICO (Jan. 16, 2012, 1:42 PM), http://www.politico.com/news/stories/0112/71484.html.
286. The candidates agreed to limit outside spending in January of 2012 after $3.5 million had already been spent. *Id.* The post-agreement $3.5 million was spent in the last ten months of the campaign with about $1.4 million coming in the final week. *2012 Race: Massachusetts Senate Outside Spending*, CENTER FOR RESPON-

candidates' campaigns, it was hardly as if the agreement decreased the critical role of big money in the contest.

In many respects, the current prominence of independent expenditures in political campaigns is a direct result of *Buckley*,[287] and as such, is surprising only in the sense that the dynamic took as long to develop as it did. *Buckley* upheld contribution limits but granted "independent" groups the right to limitless spending. Large independent expenditures, many of which are, from the perspective of the electorate, barely distinguishable from the campaigns themselves, are positioned to have major impacts on elections.

Beyond the issue of disproportionate power for the wealthy, the "independent" expenditures mean that noncitizens can influence elections, violating basic principles of Federalism and local government. Contributors to independent groups often represent influences that are sometimes geographically and otherwise disconnected from the electorate of particular jurisdictions.[288]

Further, and particularly in races that formally represent a small population—say a U.S. Senate seat representing a relatively rural state—there simply aren't enough citizens of a state, much less citizens of a state who are in a position to spend on elections, to spend meaningfully in the face of independent expenditure groups. Major independent expenditures inevitably influence the campaigns to a disproportionate extent measured in terms of population. This system concentrates power, in the electoral sense, in an extraordinary stratum of wealthy individuals and groups who can outspend entire campaigns.

B. Outside Spending and the Infamous Super PAC

Only a very small percentage of the American population contributes *any* money to political campaigns.[289] Americans who contribute, in total, more than $200 to federal elections are a much smaller per-

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SIVE POLS., http://www.opensecrets.org/races/indexp.php?cycle=2012&id=MAS1 (last visited Jan. 27, 2013).

287. *See* Buckley v. Valeo, 424 U.S. 1 (1976) (striking down limits on candidate and independent groups spending while upholding limits on direct contributions).

288. DAVID B. MAGLEBY, DICTUM WITHOUT DATA: THE MYTH OF ISSUE ADVOCACY AND PARTY BUILDING 7–11 (Ctr. for the Study of Elections & Democracy, Brigham Young Univ., 2000) (discussing the results of an experiment in which advertisements funded through soft money and issue advocacy were indistinguishable from those that were funded by the candidates—an overwhelming amount of voters perceived the soft money/issue advocacy ads as those funded by the candidates).

289. *Donor Demographics*, CENTER FOR RESPONSIVE POLS., http://www.opensecrets.org/overview /donordemographics.php (last visited Jan. 26. 2012).

centage still, representing just .4% of the population.[290] However, this tiny sliver of the population gives more than two-thirds of all money given to candidates, parties, and independent groups in federal elections.[291] Candidates are overwhelmingly dependent upon large contributors who still fund the majority of political spending even at the higher profile federal level. Candidates, political parties, and outside groups rely on the same small segment of the population to fund the majority of their spending. Privately financed campaigns have led to a system where .4% of the population provides almost all of the monetary support that candidates need to win elections.[292] As Larry Lessig eloquently puts it: "No more than .05 percent give the maximum in any Congressional campaign. A career focused on the 1 percent—or, worse, the .05 percent—will never earn them the confidence of the 99 percent."[293]

The .05% has the ability to disproportionally influence election by being able to "speak" louder, longer, and to a much larger audience, through the use of independent groups, than does the public as a whole. The wealthy donors that make up such a small percentage of the population nevertheless exert an incredible amount of influence over politics simply because they can afford more speech than the average voter. The single top contributor to independent groups gave $93 million in the 2012 election.[294] To put that in stark perspective: this single person's contributions to independent groups exceed the presidential matching-fund limit.[295] The top 100 donors gave a total of $350 million to support independent groups.[296] The groups these donors supported spent over $1.4 billion on federal elections during the 2012 election cycle—a 400% increase from the outside spending during the 2010 and 2008 elections.[297]

The explosion in independent spending is a direct result of the structure of the campaign finance system. As is extensively detailed

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290. *Id.* For further discussion of the limited influence of small donors see Part III.C. *infra*.
291. *Id.*
292. *Id.*
293. Lawrence Lessig, Op-Ed., *More Money Can Beat Big Money*, N.Y. TIMES, Nov. 16, 2011, at A31, *available at* http://www.nytimes.com/2011/11/17/opinion/in-campaign-financing-more-money-can-beat-big-money.html?_r=0.
294. *2012 Top Donors to Outside Spending Groups*, CENTER FOR RESPONSIVE POLS., http://www.opensecrets.org/outsidespending/summ.php?disp=D (last visited Jan. 26, 2013).
295. *Presidential Election Campaign Fund*, FED. ELECTION COMMISSION, http://www.fec.gov/press/bkgnd/fund.shtml (last visited Jan. 26, 2013).
296. *2012 Top Donors to Outside Spending Groups*, *supra* note 294.
297. *Total Outside Spending by Election Cycle, Excluding Party Committees*, CENTER FOR RESPONSIVE POLS., http://www.opensecrets.org/outsidespending/cycle_tots.php, (last visited Jan. 25, 2013). Total outside spending was $338 million in 2008, $304 million in 2010, and $1.4 billion in 2012. *Id.*

by numerous commentators,[298] *Citizens United*, along with lower court and FEC decisions, has led to the creation of so-called super PACs.[299] Outside groups spent over $1.4 billion of the $6 billion spent in the 2012 election cycle.[300] This influx of unregulated money is similar to the influx that was—temporarily—addressed by the 2002 Bipartisan Campaign Reform Act.[301] As discussed earlier, BCRA was passed in 2002 and then later upheld almost in its entirety in *McConnell v. FEC*.[302] BCRA attempted to address the use of "soft money" in federal elections.[303] The threat of large unregulated contributions to political parties led to the banning of soft money because of the risk of corruption and abuse of the system. Contribution limits ultimately fail to serve a purpose if the limits can be easily avoided by contributing money directly to a party.[304]

A similar problem now exists with the development of super PACs that exist solely to support an individual candidate in a single race.[305] Mitt Romney was able to use "his"[306] super PAC, Restore Our Future, to have an additional $161 million spent on his behalf that he would have been prohibited from spending under the contribution limits applicable to candidates.[307]

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298. *See, e.g.*, Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1685-86 (2012); John Dunbar, *The* 'Citizens United' *Decision and Why It Matters*, CENTER FOR PUB. INTEGRITY (Oct. 18, 2012, 6:12 PM), http://www.publicintegrity.org/2012/10/18/11527/citizens-united-decision-and-why-it-matters.

299. Briffault, *supra* note 298, at 1645. The phrase "super PAC" does not appear in any regulation or FEC rule; it is the common name for any independent expenditure-only group created under FEC advisory opinions following *Citizens United*. *Id*.

300. *Outside Spending*, *supra* note 213.

301. Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002); Bauer, *supra* note 120, at 507.

302. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

303. *Id*. at 132. Soft money refers to, at least in the context of BCRA, money contributed to political parties that does not fall within the scope of FECA and other campaign finance regulations. Meredith Johnston, *Stopping "Winks and Nods": Limits on Coordination as a Means of Regulating 527 Organizations*, 81 N.Y.U. L. REV. 1166, 1171 n.19 (2006).

304. *McConnell*, 540 U.S. at 114.

305. *See* Briffault, *supra* note 298, at 1679.

306. Independent groups are not allowed to coordinate their expenditures or activities with candidates, but, because of the loose standards that now exist, many such groups have done so regardless. *See* Peter R. Barbieri, *Putting the "Independent" Back Into "Independent Expenditure," The Need for Stronger Coordination Rules in the Post-Citizens United Era* (May 1, 2013) (unpublished law review Note, Hofstra University) (on file with author); Briffault, *supra* note 298, at 1680–82.

307. *See, e.g.*, *Restore Our Future Recipients, 2012*, OPEN SECRETS, http://www.opensecrets.org/outsidespending/recips.php?cmte=Restore+Our+Future&cycle=2012 (last visited Jan. 20, 2013) (showing how all the money spent by Restore Our Future was spent supporting Mitt Romney or used against one of his opponents).

Candidates in a competitive race now must prepare to face opponents backed by well-financed independent groups. This has led candidate campaigns, via surrogates who are dubiously disconnected from the campaigns, to create independent groups to support their candidate by raising money and spending it on advocacy.[308] Independent groups are already frequently used to circumvent contribution limits and practically as a wing of the campaign. Such groups are often started by former staffers or even family members and have messages that, for the average voter, are almost indistinguishable from the campaign's. For purposes of this article, the elephant in the room, however, is this: for any publicly funded system to even be seriously considered as an option by serious candidates, it must take into account the new realities, numbers, and magnitude of the system in which independent groups are playing a more important role than ever.

C. The Third Way of Public Campaign Finance: Small-Donor Matching

One strictly fiscal consequence of the new normal in political expenditures is that fixed-sum public financing systems akin to the presidential model cannot conceivably come close to keeping pace with spiraling campaign costs.[309] To offer participating candidates a sum that would allow them to effectively respond to privately and independently financed opponents would require enormous outlays of public resources. Even if such outlays were not disqualifying in themselves, they would entail significant wasted expense on noncompetitive races because the sums would have to be determined *ex ante*, i.e., long in advance of knowing whether any particular campaign would actually be competitive.

One potential rejoinder to the above reasoning is the notion that a fixed-sum public financing scheme need not keep pace with independent expenditures at all. At least as a matter of formalism, given the lack of coordination, public money might be spent on behalf of participating candidates who nonetheless received major independent expen-

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308. T.W. Farnam, *Romney-Rove Get-Together Again Raises Super PAC/Candidate Coordination Issue*, WASH. POST (June 22, 2012), http://www.washingtonpost.com/blogs/election-2012/post/romney-rove-get-togther-again-raises-super-pac-candidate-coordination-issue/2012/06/22/gJQAvSYSvV_blog.html (discussing how Mitt Romney has raised money "several times" for the Restore Our Future PAC); *see also* Briffault, *supra* note 298, at 1677 (discussing how the congressional leadership of each party organized and then solicited funds for Super PACs).

309. The presidential matching fund has clearly failed to keep up with the cost of current campaigns, which now reach nearly $1 billion for each candidate. *2012 Presidential Race*, CENTER FOR RESPONSIVE POLS., http://www.opensecrets.org/pres12/index.php (last visited Jan. 19, 2013).

diture support. However, this fails to address the issue that, without keeping pace with independent groups, taxpayers would be funding campaigns despite the fact that candidates would still be reliant on the same sliver of moneyed individuals who fund independent groups. Further, imagine the political prospects of pitching such a system to the taxpayers, especially when any sums that would incentivize participation would often be wasted on noncompetitive races.

Matching funds mitigate the practical problem by reducing the *ex ante* financial outlay and reserving the additional public expenditures for the races in which expenditures on behalf of a nonparticipant exceed the thresholds. Post-*Free Enterprise*, however, this option is now unconstitutional despite the fact that it is both fiscally responsible and politically viable.[310]

Many scholars[311] and advocates[312] favor a constitutional amendment. Given the difficulty of that route, the question is whether there is a viable third way to replace the pragmatically hamstrung fixed-sum model, and the legally hamstrung matching funds model.

The most promising "third way" for public financing systems may be those that operate to amplify the role of small donors. Within that genre, New York City's small-donor matching funds program is a widely praised model.[313] Enacted in the late 1980s and revised again in 2001 and 2005,[314] New York City's is the longest running small donor-matching program in the United States.[315] Currently, the program matches, on a six-to-one basis, the first $175 of a campaign donation.[316] The small donor program appears to have had some success in serving the equalization interest that animates a modicum

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310. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2826–28 (2011).

311. *See generally* LAWRENCE LESSIG, REPUBLIC LOST 290–304 (2011) (arguing that the campaign finance needs substantial reform, suggesting a constitutional amendment).

312. *The Solution: The People's Rights Amendment*, FREE SPEECH FOR PEOPLE, http://freespeechforpeople.org/the-solution (last visited Feb. 7, 2013). Free Speech for People was started by John Bonifaz, an advocate for election and campaign finance reform. *See, e.g.*, Raskin & Bonifaz, *supra* note 60; John Bonifaz & Jamin Raskin, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273 (1993).

313. *See* Michael J. Malbin, Peter W. Brusoe & Brendan Glavin, *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States,* 11 ELECTION L.J. 3, 3 (2012).

314. *Id.* at 5.

315. *Id.*

316. *Id.* at 4; *see also* Spencer Overton, *Matching Political Contributions*, 96 MINN. L. REV. 1696, 1697 (2012) (explaining that New York City is the only American jurisdiction with a six-to-one matching ratio). For every small donor that gives a $175 contribution, the candidate receives the value of the original contribution plus $1,050 in matching funds for a total of $1,225. Malbin, Brusoe & Glavin, *supra* note 313, at 4.

of equalization (even if formally only *sub silentio*) insofar as it has increased the ratio of small-to-large donors.[317] Accordingly, many proponents advocate for its replication in state and federal elections.[318]

In 2012, Michael Malbin and Peter Brusoe studied the New York City model with a particular eye on its potential for effective replication in other jurisdictions.[319] Malbin and Brusoe first compared campaign-financing disclosures from participating and nonparticipating New York City candidates. Generally, the study found that in 2009, city council candidates that participated in the donor-matching program had a much larger percentage of their funds raised by donors who gave $250 or less (64%) than candidates who chose not to participate in the donor-matching program (37%).[320] Using data from 1997–2009,[321] Malbin and Brusoe found, however, that across the board, candidates of all types increased the amount of money they received from small donors, as reforms made reaching out to small donors more lucrative: incumbents increased funds raised by small donors by 27% from 2001 to 2009,[322] and candidates in competitive races increased this percentage by more than 50%.[323] The New York City small-donor matching system also avoids basing its trigger on a privately funded candidate's fundraising, the restriction that led to the *Free Enterprise* decision.

Extrapolating, Malbin and Brusoe recommend that the New York City system be expanded to the state level.[324] They chart the average make up of a state candidate's campaign dollars based on their source.[325] The amount of money raised from small donors (giving $250 or less) varies dramatically by state.[326] As a percentage of total campaign contributions, contributions from small donors range from a dismal 4% in Alabama (which also has an astonishing 73% from nonparty organizations) to a 16% median in Tennessee to a 60% high in

317. Adam Skaggs & Fred Wertheimer, *Empowering Small Donors in Federal Elections*, BRENNAN CTR. FOR JUSTICE AT NYU SCH. OF LAW AND DEMOCRACY 21, 14 (2012) http://brennan.3cdn.net/b71b1ef6391b3a4813_5jm6bwz6j.pdf.

318. *Id.*; *see, e.g.*, Overton, *supra* note 316, at 1696–97.

319. Malbin, Brusoe & Glavin, *supra* note 313, at 3.

320. *Id.*; *see also* Angela Migally & Susan Liss, SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE 15 (2010). On average, the New York City Council candidate who participated in the program had twice the contributors and three times the small contributors as the typical nonparticipating candidate. *Id.*

321. Though New York City's donor-matching program goes back to the late 1980s, statistics regarding nonparticipating candidates are only available starting at the 2000s' reforms, as city officials only began keeping track of privately funded candidates after these reforms took place. Malbin, Brusoe & Glavin, *supra* note 313, at 3.

322. Malbin, Brusoe & Glavin, *supra* note 313, at 9.

323. *Id.*

324. *Id.* at 15–16.

325. *Id.* at 14.

326. *Id.*

Minnesota[327] (which has a small-donor incentive program), with NYC elections even higher at 63%.[328] Overlaying a five-to-one matching program on the existing state data, Malbin and Brusoe posit that the program would significantly increase the percentage of funds represented by small donors.[329]

Aspects of the New York City model have been implemented in other parts of the country and have had modest success coaxing more small donors participation.[330] Nathaniel Gleicher notes that "[s]tate candidates from Minnesota, for instance, raised forty-five percent of their funds from donations of less than $100. Similarly, state candidates from Vermont raised twenty-six percent of their funds from small donors."[331] Both these states have a small-donor matching program. Gleicher asserts that "[i]n each case, regulation seems to have successfully refocused campaign fundraising on small donations. This is especially true for low-profile candidates whose counterparts in other states without such regulation relied mainly on large donors."[332]

Small-donor matching programs, like the one in New York City, increase the power of small donors to try to keep up with the influence wielded by large donors. Ever since Barack Obama's 2008 presidential campaign touted its reliance on small donors, there has been much talk about the new importance of small donors in elections.[333] Small donors are individuals who give less than $200, and the average contribution from a small donor is about $62.[334] Even with the so-called small donor revolution and the influx of new small donors, especially in support of President Obama, campaign finance is still dominated by large donors. However, the majority of money in federal elections does not come from small donors, and candidates still rely on large donors to make up the majority of their funding. Money pro-

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327. Graham P. Ramsden & Patrick D. Donnay, *The Impact of Minnesota's Political Contribution Refund Program on Small-Donor Behavior in State House Races*, 33 ST. & LOC. GOV'T REV. 32, 33 (2001).

328. Malbin, Brusoe & Glavin, *supra* note 313, at 14.

329. Ramsden & Donnay, *supra* note 327, at 22; *see also* David Donnelly, *We Need More Citizen Participation*, BOS. REV., (Sept. 10, 2010) http://www.bostonreview.net/donnelly-citizen-participation (suggesting Congress implement a nationwide Matching Funds program as a vehicle for increased voter participation).

330. *See* Nathaniel J. Gleicher, *Moneybombs and Democratic Participation: Regulating Fundraising by Online Intermediaries*, 70 MD. L. REV. 750, 813 (2011); Ramsden & Donnay, *supra* note 327, at 39.

331. Gleicher, *supra* note 330, at 813.

332. *Id.*

333. *See* Molly J. Walker Wilson, *The New Role of the Small Donor in Political Campaigns and the Demise of Public Funding*, 25 J.L. & POL. 257 (2009).

334. Press Release, The Campaign Finance Institute, Reality Check: Obama Received About the Same Percentage from Small Donors in 2008 as Bush in 2004 (Nov. 24, 2008), http://www.cfinst.org/press/preleases/08-11-24/Realty_Check_-_Obama_Small_Donors.aspx.

vided by small donors, in federal elections, is outweighed by large contributions by a margin of two-to-one.[335]

The power of small donors, without the aid of matching funds, is insufficient to counteract the influence of large donors. As of the end of June 2012 more than 2.5 million small donors had contributed less than $200 to the presidential campaigns (or the committees that supported them) of Barack Obama and Mitt Romney.[336] Those 2.5 million small donors contributed about $148 million in total but only account for 18% of all money contributed.[337] In fact, a group of only 2100 donors who gave at least $50,000 contributed about $200 million, far surpassing the collective amount given by small donors.[338] For the 2012 campaign, small donations accounted for 32%[339] of Barack Obama's total contributions and only 18%[340] of Mitt Romney's. Even for Barack Obama's campaign, which has been very successful at attracting small donors, more than two-thirds of all the money raised comes from donors giving more than $200. The reliance on larger donors and the limited influence of small donors are more drastic in races for other federal offices. However, small-donor matching programs would help alleviate the reliance on large donors by both increasing the power of current small donors and increasing the number of small donors. As seen in New York, more small donors will contrib-

335. Very few people give money to political campaigns, even including the recent increase in small donors. More than $3.3 billion was contributed by individuals to political parties, campaigns, and PACs during the 2012 election. *Donor Demographics 2012*, CENTER FOR RESPONSIVE POLS., http://www.opensecrets.org/overview/donordemographics.php?cycle=2012&filter=A (last visited May 22, 2012).
However, the majority of this money comes not from small donors giving money but from the .4% of the population who gave more than $200 during the 2012 election cycle. *Id.* This group provided more than two-thirds of all the money contributed by individuals. *Id.*; *see supra* Part III-B. Even within this smaller group of active political contributors, the majority of total contributions come from individuals who contributed more than $2,500 in total to federal candidates, parties, and PACs. *Id.* This group consists of about .08% of the population or about 241,000 people total who contribute just over half of all individual contributions. *Id.* To illustrate yet further, expanding the definition of "small donors" up to an unrealistic level to include people who gave anything less than $2,500 in total political contributions, the majority of all political contributions to federal candidates, parties, and PACs in the 2012 election came from large donors. *Id.* As the system stands today, without a viable public-financing system, candidates simply cannot rely solely on small donors alone and must be able to raise money from the few large donors who make up the majority of political spending to have a viable candidacy.

336. Vogel, *supra* note 206.

337. *Id.*

338. *Id.*

339. Small contributions accounted for $233 million out of $715 million total. *2012 Presidential Race,* CENTER FOR RESPONSIVE POLS., http://www.opensecrets.org/pres12/index.php#out (last visited May 22, 2012).

340. Small contributions accounted for $79 million out of $443 million total. *Id.*

ute if a matching program exists, and their contributions will be more effective.[341]

Large donors provide the majority of the money in politics.[342] Without the support of the small group of people who supply the majority of political contributions, a candidate simply cannot finance his campaign for office. Even then-candidate Obama's campaign in 2008 raised 74% of its funds from people giving more than $200, which was only 1% lower than the 75% raised by President Bush in the 2004 election.[343] President Obama even received almost half (47%) of his funds from contributions of $1,000 or more, which is historically low, but still represents more money than his opponent John McCain raised in the entire election.[344] Without some form of public financing that increases the power of small donors, like New York City's small-donor matching program, federal politics will continue to be dominated by those with the means and motives to make large contributions to candidates.[345] Small donors' influence in elections and, therefore, over candidates will not increase until there is a system that increases the influence and effect of small contributions and small donors to match that of large donors.

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341. The influence of large donors is even more prevalent outside of presidential elections and in off-cycle elections. In 2010, donors giving more than $200 made up just .26% of the population. *Donor Demographics 2010*, CENTER FOR RESPONSIVE POLS., http://www.opensecrets.org/bigpicture/donordemographics.php?cycle=2010 (last visited May 22, 2012). The number of donors giving $2,400 or more (the maximum limit to any one candidate) again gave the majority of all money to candidates, parties, and PACs. This group included only .05% of the population but still contributed more than the remaining 99.95% of the population combined. *Id.* In 2012, all Senate candidates raised more than 64% of their total contributions from just .04% of the population. Bob Herbert, *Small Donors Could Change Imbalance of Power*, POLITICO (Apr. 30, 2013), http://www.politico.com/story/2013/04/small-donors-offer-fix-to-imbalance-of-power-90782.html. Clearly small donors cannot match the ability of a few large donors in terms of total contributions. The numbers are even more staggering when looking at contributions to Super PACs and other independent groups. In the 2012 election cycle, one person, Sheldon Adelson, contributed $90 million, almost exclusively to independent groups. *2012 Top Donors to Outside Spending Groups*, CENTER FOR RESPONSIVE POLS., http://www.opensecrets.org/outsidespending/summ.php?disp=D (last visited May 22, 2013). This means that it would take over 1.4 million small donors giving the average contribution of $62 to equal the amount given by Sheldon Adelson alone. Press Release, the Campaign Finance Institute, Reality Check: Obama Received About the Same Percentage from Small Donors in 2008 as Bush in 2004 (Nov. 24, 2008), http://www.cfinst.org/press/preleases/08-11-24/Realty_Check_-_Obama_Small_Donors.aspx.

342. *Donor Demographics 2012*, CENTER FOR RESPONSIVE POLS., http://www.opensecrets.org/overview/donordemographics.php?cycle=2012&filter=A (last visited May 22, 2012) (showing how just over half of all political contributions came from donors who give, in aggregate, at least $2,500 per election cycle).

343. Press Release, *supra* note 334.

344. *Id.*

345. *See* Herbert, *supra* note 341.

To the extent that proposals exist to extend the small donor model to the congressional level, the proposal that has garnered the most—which, to be clear is not much—traction is known as the Fair Elections Now Act (FENA).[346] The intention of FENA is to force candidates to "seek support from their communities"—not special interests, big money bundlers, lobbyists, and big donors.[347] FENA seeks to increase the influence of small donors as a check on the current influence of large donors and lobbyists by reducing their control over campaign funding. Whether, in the current campaign expenditure climate, especially given the prevalence of independent groups, that normative goal is achievable under the terms of the Act is, at the very least, a reasonable question. Under the Act, qualifying congressional candidates would receive an initial public grant, plus subsequent grants in the form of multiple matching funds, four-to-one, of small donor contributions collected during the election cycle.[348] House of Representatives candidates qualify for public financing under the scheme by raising $50,000 in their home states from at least 1500 people.[349] U.S. Senate candidates would have to raise 10% of the initial public grant from 2000 people, plus 500 people for each congressional district in the state.[350] Small donor contributions are limited to $100.[351]

Qualified candidates would receive primary election funding and, upon victory, additional funding for the general election at a level to be competitive.[352] House candidates would receive $900,000 in initial public funding, split 40/60 between the primary and general elections.[353] Senatorial candidates would receive $1,250,000 plus an additional $250,000 per congressional district in the state, also split 40/60 between the primary and general elections.[354]

The additional matching funds are available throughout the election cycle on a four-to-one matching basis for every $100 or lower donation raised, not to exceed three times the initial primary or general election grant.[355] Although a nonparticipating opponent's spending does not trigger the matching funds, the small-donor matching funds theoretically provide an ongoing mechanism for participating candi-

346. *Fair Elections Now*, FAIR ELECTIONS NOW COALITION, http://action.fairelectionsnow.org/fairelections (last visited Oct. 29, 2012).
347. *Id.*
348. *Id.*
349. *Id.*
350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.*
354. *Id.*
355. *Id.*

dates to respond to a well-financed opponent.[356] Additionally, FENA provides participating candidates with a 20% discount on the lowest broadcast media rates.[357] Senatorial candidates would receive $100,000 in media vouchers per congressional district in the state.[358] House of Representatives candidates would receive a single $100,000 media voucher.[359] Both Senate and House candidates may, rather than using the voucher, turn the voucher in to their national party committee for cash.[360]

If adopted, the funding for FENA would come from a small percentage of large government contractor contracts in the case of senatorial races and 10% of revenues generated from auctioning unused broadcast spectrum in the case of House races.[361] Supporters of the proposal predict that the scheme will cost between $700 and $850 million.[362] Although the legislation has been previously introduced,[363] and is expected to be introduced again in 2013,[364] there is little reason to believe that FENA will be adopted any time soon.

Legally, FENA does not implicate *Davis* and *Arizona Free Enterprise* because the matching funds under the Act are not triggered by opponent spending or outside expenditure support, but instead by small donor contributions.[365] Practically, however, FENA is constrained both by a lack of political will to pass it and by very real concerns about its efficacy given the post-*Citizens United* spending dynamics detailed earlier in this article. Those challenges are exacerbated in campaigns for important offices that nonetheless represent small populations—where, at least if the small donors are truly the citizens of the jurisdiction, the pool of potential small donors is, well, exceedingly small. One consequence is that while the small-donor matching model may work exceptionally well for candidates seeking one of fifty-one city council seats in eight-million person New York

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356. *See id.*
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.*
361. *Id.*
362. *Id.*
363. *H.R. 1404 (112th): Fair Elections Now Act*, Govtrack.us, http://www.govtrack.us/congress/bills/112/hr1404, (last visited Oct. 29, 2012); *Fair Elections Now Act,* PUB. CAMPAIGN, www.publicampaign.org/fair-elections-now-act (last visited Feb. 8, 2013). The Bill was introduced into the 112th Congress and gathered 102 cosponsors (101 Democrats and one Republican) but failed to make it out of committee., *H.R. 1404 (112th): Fair Elections Now Act*, GOVTRACK.US, http://www.gov track.us/congress/bills/112/hr1404, (last visited Oct. 29, 2012).
364. *Fair Elections Now*, COMMON CAUSE, http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4773857 (last visited Feb. 9, 2013).
365. *Fair Elections Now*, *supra* note 346.

City,[366] it does not particularly fit for candidates for one of the two U.S. Senate seats representing North Dakota, population 699,628.[367] As such, for a serious candidate, not knowing, *ex ante*, the magnitude of directly adversarial and independent financial opposition he or she will face, participation represents an extraordinary gamble. Participation in FENA, or any other publicly financed program that limits spending, may very well act as a signal to wealthy independent groups to target the participating candidate.

Others suggest a more aggressive approach to federalizing a version of small-donor-based public financing. Larry Lessig, for example, suggests a $6 billion proposal in which every voter was allocated a $50 "democracy voucher" that could be, in turn, allocated to "any candidate for Congress who agreed to one simple condition: the only money that candidate would accept to finance his or her campaign would be either 'democracy vouchers' or contributions from citizens capped at $100. No PAC money. No $2,500 checks. Small contributions only."[368]

Lessig's program avoids the trigger mechanism found unconstitutional in *Free Enterprise* but would still face serious constitutional challenges. The "democracy voucher" program could not be made mandatory because it limits contributions and spending so it would face the problem of being effective even in the current big money system. The program would have to present candidates with a chance at not being outspent despite the fact that many current private contributions made directly to candidates would likely shift to independent groups. The program would serve the anticorruption rationale as it would eliminate big money contributions that can give rise to quid pro quo corruption. It also does not limit spending more than any other public financing system, and the ability to raise additional contributions of less than $100 provides theoretically unlimited spending power. The Lessig voucher program, based on its voluntary nature, could very well provide an interesting, albeit untested in both a constitutional and practical sense, alternative to a small-donor matching system.

While creating a viable campaign finance system in the given the current system—including hostile precedent, political opposition, and large independent expenditures—may seem impossible, some com-

366. *About the Council,* NEW YORK CITY COUNCIL, http://council.nyc.gov/html/about/about.shtml (last visited Feb. 9, 2013); *State & County QuickFacts: New York (City), New York*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/36/3651000.html (last visited Feb. 9, 2013) (estimating the population of New York City at 8.2 million people in 2011).

367. *North Dakota*, *supra* note 24 (estimating the population of North Dakota at 699,628 people in 2012).

368. Lessig, *supra* note 293, at A31 (discussing the democracy voucher program as a solution to combating large contributions and independent expenditures).

mentators believe that all hope is, in fact, not lost. Richard L. Hasen notes that campaign financing may, as hard as it is to believe, be saved by the very institution that has seemingly spelled its demise—the Supreme Court.[369] The campaign financing decisions have all been 5–4 in favor of the conservatives. The liberal-moderate Justices—Ginsburg, Breyer, Sotomayor, and Kagan—have all indicated that they are in favor of limiting campaign contributions. Two conservative justices—Kennedy and Scalia—are in their seventies and one, if not both, may leave the bench over the next decade. Hasen suggests that if there is a Democratic president in office at the time of either Scalia's or Kennedy's retirement, there is a good chance the court will do a "180." Future campaign finance decisions may still be 5–4, however, this time in favor of the liberals.[370]

V. CONCLUSION

The problems—both precedential and political—facing publicly financed campaigns are serious. Any publicly financed system must be able to simultaneously address current realities ranging from unlimited independent expenditures to hostile courts, precedent, and political resistance. Absent a constitutional amendment, and given the *Buckley* independent expenditure dynamics now being fully realized in the aftermath of *Citizens United,* a serious candidate cannot afford not to wonder: would their slice of that (or another) $6 billion—or some other pie in a different jurisdiction—be enough, not necessarily to win, but to stand a competitive chance? If not, then the absence of matching funds, post-*Arizona Free Enterprise*, means that, in such a scenario, the people's interests are inevitably thwarted in precisely the manner described at the outset of this article, in which the rhetoric of financial responsibility provides the vehicle for both sides to indulge another $500 million in unnecessary cost to the actual, and sadly underrepresented, citizens of the republic.[371]

369. Richard L. Hasen, *After Scalia: Don't Give Up on Campaign Finance Reform, However Hopeless It Seems Now*, SLATE (Feb. 21, 2013. 11:49 A.M.), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/02/campaign_finance_reform_when_scalia_leaves_the_supreme_court.html.

370. *Id.*

371. *See supra* Introduction.