2013

The Future of Public Funding

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I. INTRODUCTION

The title of my talk today is the "the future of public funding," and I am tempted to say "there's not much future" for public funding. The 2012 presidential election marked the first time since the presidential public funding law was enacted in 1974 that neither major party presidential candidate accepted public funding in the general election and the first time that no significant contender for a major party nomination accepted public funding in the primary phase. Congressional public funding appears dead in the water. In the last Congress, public funding proposals were referred to House and Senate committees, where they promptly died. In the current

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Congress, three bills were introduced in the House of Representatives, but there is little reason to expect action on them. The dramatic rise in independent spending through Super PACs and 501(c) organizations in the last two election cycles significantly undermines the prospect that public funding can achieve its traditional goals—ameliorating the burdens of fundraising, promoting fair competition among candidates, and reducing the role of private wealth on elections and governance. At the state and local level, a number of states and cities have adopted effective public funding programs. But many of these systems were impaired, and some scrapped outright, due to the Supreme Court's 2011 decision in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*[1] striking down the so-called "trigger" provision of Arizona's public funding law. Indeed, *Arizona Free Enterprise* is likely to be a barrier to the effectiveness of public funding laws and, as a result, a disincentive to the adoption of such laws.

On the other hand, the future of public funding may be considered bright—or relatively bright—because public funding is the only form of campaign finance reform that is both constitutionally available and likely to have any impact on how we fund our elections and on how our election funding affects governance. *Citizens United*[2] makes it absolutely clear—if it wasn't before—that expenditure limits are not constitutionally available—whether for candidates, corporations, or any other campaign participants. Although *Citizens United* also makes it clear that contribution limits and disclosure remain constitutionally available, they are not likely to have much impact. After *SpeechNow*[3] and similar court of appeals' decisions, not only is independent spending unlimitable, but also donations to committees engaged in independent spending are unlimitable. In the last election cycle we saw nominally independent committees formed to support a specific candidate, operated by individuals previously affiliated with the candidate and aided by candidates soliciting funds for those committees, air messages closely tracking those of the candidate. Under these circumstances, limits on contributions to candidates and even limits on contributions to groups that give to candidates seem increasingly beside the point. The Supreme Court has strongly endorsed disclosure, but the emergence of nominally

1. 131 S. Ct. 2806 (2011).
2. Citizens United v. FEC, 588 U.S. 310 (2010).
3. SpeechNow.org v. FEC, 599 F.3d 686 (2010).

nonelectoral committees not subject to disclosure laws as major campaign players undermines the effectiveness of existing disclosure requirements. Even if those laws can be strengthened, it is unclear whether and to what extent disclosure constrains the powerful influence of large donors on elections and governance, which has long been a driving concern behind campaign finance reform.

So, weakened as it is by *Arizona Free Enterprise*, public funding remains the only game in town. Indeed, after *Citizens United*, *SpeechNow*, and the rise of Super PACs and 501(c)'s, its importance is greater than ever. But what we can expect public funding to do and how we design our public funding laws will have to change. It is no longer possible—if it ever was—for public funding to take private funding out of elections, to limit campaign spending, or to equalize resources among candidates. It is not clear whether these were ever desirable or attainable goals within our political system. They are certainly not attainable now. But public funding can still be used to lower the barriers to political entry for challengers and political newcomers; to reduce, even if not eliminate, the burdens of fundraising; to reduce, even if not eliminate, unequal funding among candidates; to increase the role of small donors and diversify the donor base; and to reduce, although not eliminate, the role of big money in our politics. With scaled down expectations, public funding has a vital role to play in our campaign finance system.

In my comments today, I want to briefly trace the development of the law of public funding in the United States, assess the impact of the *Arizona Free Enterprise* decision on public funding, and discuss the options for public funding after *Arizona Free Enterprise*.

II. THE ORIGINS OF PUBLIC FUNDING

In his Seventh Annual Message to Congress on December 3, 1907, President Theodore Roosevelt proposed what he acknowledged was a "very radical measure"—public funding of election campaigns. Roosevelt had previously called for both a federal disclosure law and restrictions on corporate campaign contributions, and Congress had adopted a corporate contribution ban when it passed the Tillman Act earlier in 1907. But Roosevelt warned that merely imposing limits would not be enough to reform campaign finance. "[L]aws of this kind," that is, regulations of private campaign money, "from their very nature are difficult of enforcement," Roosevelt observed, and, thus, posed the "danger" that they would be "obeyed only by the

honest, and disobeyed by the unscrupulous, so as to act only as a penalty upon honest men." "Moreover," he continued, "no such law would hamper an unscrupulous man of unlimited means from buying his own way into office." Public financing would solve the problem of evasion of contribution limits and directly address the power of the wealthy. "The need for collecting large campaign funds would vanish," Roosevelt urged, "if Congress provided an appropriation for the proper and legitimate expenses" of political campaigns. Roosevelt was not seeking to cut back on campaign spending. Indeed, he urged that the appropriation be "ample enough to meet the necessity for thorough organization and machinery, which requires a large expenditure of money." But if an "ample" appropriation were made, public funding could provide a more effective reform than limiting large private contributions and requiring disclosure.[4]

Roosevelt conceded that "it will take some time for people so to familiarize themselves with such a proposal as to be willing to consider its adoption."[5] He was certainly right about that. The first bill proposing public funding of federal elections was not introduced into Congress until a half-century after his 1907 Message. It took another decade for the idea to be taken seriously by Congress, and when Congress acted, it limited public funding to presidential elections. Public funding has made more progress at the state and local level—some fifteen states have some form of public funding for candidates for some offices—with Arizona, Connecticut, Maine, and Minnesota providing public funding for legislative candidates as well as candidates for statewide office, and North Carolina and West Virginia targeting judicial elections.[6] An additional ten states provide funds to political parties, although these tend to be very modest sums.[7] In 2009, fourteen local governments, including New York City, Los Angeles, San Francisco, Austin, and Albuquerque, also operated public funding programs.[8]

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4. Theodore Roosevelt, *Seventh Annual Message, December 3, 1907*, *available at* http://www.presidency.ucsb.edu/ws/?pid=29548.

5. *Id.*

6. *Public Financing of Campaigns: An Overview*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/legislatures-elections/elections/public-financing-of-campaigns-overview.aspx (last updated Jan. 23, 2013). As this article was going to press, North Carolina was on the verge of repealing its public funding law. *See* Matthew Burns, *Senate backs sweeping elections bill*, WRAL.COM (July 24, 2013), http://www.wral.com/senate-backs-sweeping-elections-bill/12699232/.

7. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 6.

8. Jessica A. Levinson & Smith Long, *Mapping Public Financing in American*

III. WHAT EXACTLY IS PUBLIC FUNDING?

Public funding is a capacious concept. It could mean any use of public resources to provide funds to, or to reduce the campaign costs of, candidates or political parties. This could include tax credits or tax deductions for campaign contributions; public assumption of some of the costs of campaigning, such as voter registration; governmental publication and dissemination of voter pamphlets in which candidates or parties can insert campaign messages; and in-kind assistance, such as free postage for campaign mailings, free use of public rooms or schools for campaign meetings, free billboards for the display of campaign messages, and, most importantly, free or reduced cost access to radio and television for campaign advertisements. But in American campaign finance parlance, "public funding" refers to the direct provision of public funds—or as public funding opponents like to emphasize, tax dollars—to candidates or political parties to be used for campaign purposes. In all existing American public funding programs, payment is made by the government directly to qualifying candidates or political parties. Several academics have proposed plans in which the government would give the voters campaign vouchers—like food stamps—which they could send to the candidates of their choosing, who would redeem them at the Treasury for money.[9] No jurisdiction in the United States has adopted such a voucher plan.

Even when limited to cash payments to candidates or parties, public funding programs exhibit considerable variation. Indeed, every public funding program requires the resolution of multiple basic questions, including: Is the money paid to candidates or parties? Which elections are covered? Which candidates (or parties) are eligible to receive public funds? How much do they get, and how is that calculated? What conditions apply? Where does the money come from? With no two programs answering these questions in exactly the same way, the permutations are substantial. But a few generalizations can be made.

Elections, CTR. FOR GOVERNMENTAL STUDIES (Jan. 2009), http://policyarchive.org/handle/10207/bitstreams/95926.pdf.

9. *See, e.g.*, BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002); Richard Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1 (1996).

A. Candidates or Parties?

Most public funding programs in the United States involve payments to candidates, not parties. This distinguishes American programs from public funding around the world, which generally focuses on political parties. The American approach reflects the candidate-centered nature of our contemporary election campaigns. It is also consistent with the major role played by internal party elections—that is, party primaries—in selecting party nominees. It would be difficult for a party-centered public funding system to finance candidates in internal party primaries. At the federal level, the presidential public funding program provides the parties with funds to cover the costs of their national nominating conventions, but the parties are not given any money for campaign expenses.

B. Which Elections?

Public funding programs vary in the scope of their electoral coverage. At the federal level, the only election covered is the race for president. Similarly, some states also focus exclusively on the election for chief executive. Other states provide funds for candidates for other statewide elective offices. North Carolina's program initially provided funds only to judicial candidates;[10] judicial elections were also the focus of West Virginia's pilot public funding program. Arizona, Connecticut, Maine, and New York City provide public funds to candidates for legislative office as well as statewide office. A separate question is whether public funding should be available only in the general election or also in party primaries. Recognizing the central role that party primaries play in the American political process and the fact that in many one-party jurisdictions the party primary can be the only real election, most American public funding systems subsidize candidates in both primaries and general elections.

C. Who Qualifies?

In most elections, there are many candidates who qualify for a place on the ballot but who are unlikely to engage the attention of a significant portion of the electorate. To avoid wasting taxpayer dollars on such marginal or "frivolous" candidates, all public funding

10. As this article was going to press, North Carolina was on the verge of repealing its public funding program for judicial elections. *See supra* note 6.

laws apply tests for defining, and limiting funds to, serious contenders. Typically, candidates qualify either by (i) raising a threshold amount of money from a requisite number of donors with, typically, the size of the contribution that counts toward qualification capped at a relatively small amount; (ii) winning a party nomination; or (iii) winning a certain percentage of the vote in the election. The primary component of the presidential public funding system uses the first method—qualification by raising a certain number of small donations. This is also the dominant form of qualification in most state and local systems. The presidential general election public funding program combines the second and third criteria—major party nominees, and nominees of minor parties that received more than five percent of the vote in the preceding presidential election receive funds upon nomination; while new party, smaller minor party, and independent candidates qualify for post-election funding if they receive a threshold percentage of the vote.

D. Partial or Full Funding?

The presidential general election public funding program is unusual in that it is intended to provide participating candidates with full public funding, although that goal has been effectively undermined by the creative development and exploitation of loopholes in the law. State and local "clean money" programs, such as those in Maine and Arizona, are also aimed at eliminating any role for private funds once a candidate qualifies for public funds by raising a specified amount of small, private donations. A qualifying candidate is given a flat grant intended to cover the cost of the rest of the campaign, and the candidate agrees not to accept any private funds after taking the public grant. Other public funding programs provide only partial public funding. Under small-donor matching systems, candidates qualify for funding by raising a threshold amount of small donations and then receive public funds that match subsequent small private contributions. The match can be a multiple of the small private donation; New York City, for example, matches donations of up to $175 at a rate of six-to-one, up to a ceiling. In small-donor matching systems, candidates may also be able to accept larger, nonmatchable contributions, subject to the jurisdiction's general contribution limit.

Whether a program is partial or full applies only to an individual

candidate's campaign funds. Under *Buckley v. Valeo*,[11] there cannot be mandatory full public funding of an entire election campaign, nor can the decision of one candidate to take public funding affect the freedom of other campaign participants to use private funds. Individual candidates are always free to choose not to take public funding and instead rely on private contributions, or their own personal wealth. So, too, political parties and politically active organizations and individuals are free to fund independent spending that supports or opposes publicly-funded candidates.

E. Spending Limits

Spending limits are inherent in a full public funding program. If the public grant is intended to fully replace private funds, then the amount of the grant automatically becomes a spending limit. Spending limits are not logically entailed in partial public funding programs. The public grant could operate as a floor, with candidates permitted to raise and spend as much as they want in private donations (presumably with dollar limits on the size of the donations). But all American public funding programs that make payments to candidates, including those that provide only partial public funding, come with a spending limit. (The handful of programs that provide grants to political parties do not have spending limits, but these usually involve very small grants which are clearly supplementary to privately raised funds.) Indeed, for many people, part of public funding's appeal has been that it provides a means of getting candidates to agree to a spending limit. Again, of course, as much as a candidate's decision to take public funding cannot affect the use of private funds by other candidates, the spending limit does not apply to nonparticipating candidates or other campaign actors.

F. Source of Funds

A curious feature of many American public funding programs is that they rely on an unusual source of funds—the taxpayer checkoff. The presidential public funding program set the pattern. The money from the program is derived from taxes paid by those taxpayers who choose to dedicate a portion of their tax liability—initially one dollar for a single filer and two dollars for a couple, and now three dollars and six dollars—to the program. Many states similarly rely on the

11. 424 U.S. 1 (1976).

taxpayer checkoff. Other states, and nearly all the local governments that have adopted public funding, rely on general revenues or specific earmarked fees and fines, not the checkoff.

IV. PUBLIC FUNDING AND THE SUPREME COURT

Of all the forms of campaign finance regulation, public funding presents the least constitutional difficulty. In *Buckley v. Valeo*, the Supreme Court held that public financing of election campaigns falls within Congress's power under the General Welfare Clause.[12] The Court determined that Congress could find public financing advances three goals: reducing "the deleterious influence of large contributions on our political process," "facilitat[ing] communication by candidates with the electorate," and "free[ing] candidates from the rigors of fundraising."[13] As the Court further observed, "[i]t cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant government interest."[14] The Court also noted that public funding fitted well with a program of limiting private contributions. As contribution limits "necessarily increase the burden of fundraising," Congress could "properly regard[]" public financing as an appropriate means of relieving candidates from the "rigors of soliciting private contributions."[15] The Court summarily rejected the argument that giving public money to candidates and parties violates the First Amendment "by analogy" to the First Amendment's "no-establishment" clause for religion.[16] So, too, it dismissed the assertion that public funding would "lead to governmental control of the internal affairs of political parties, and thus to a significant loss of political freedom."[17] The Court found the public funding program did "not abridge, restrict or censor speech" but instead "use[d] public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."[18] In short, public funding advances First Amendment values.

Buckley also upheld two specific, and basic, components of the

12. *Id.* at 90–91.
13. *Id.* at 91.
14. *Id.* at 96.
15. *Id.*
16. *See id.* at 92.
17. *Id.* at 93 n.126.
18. *Id.* at 92–93.

presidential public funding program: conditioning the grant of public funds on a candidate's acceptance of a spending limit; and the statutory formulas for determining which candidates are eligible to receive public funds and how much they can receive. Although *Buckley* struck down spending limits on candidates and independent groups, it easily upheld the spending limits that accompany presidential public funding. In a two-sentence footnote, the Court simply asserted:

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.[19]

The Court gave more attention to the claim that the formulas for determining eligibility for, and the size of, the public grant discriminated against minor parties, independents, and, in the primaries, candidates with lesser fundraising abilities. But the Court rejected this constitutional challenge. The Court found that Congress could differentiate among candidates so as not to "fund[] hopeless candidacies with large sums of public money" or provide public assistance to "candidates without significant public support."[20]

The Supreme Court has considered public funding questions only three times since *Buckley*. The first two cases, decided in the first decade after *Buckley*, involved the presidential public funding law. In *Republican National Committee v. FEC* (*RNC*),[21] the Court summarily affirmed a three-judge court decision rejecting the claims that in practice—as evidenced in the 1976 campaign—candidates were coerced into accepting public funding so that the candidate spending limit was unconstitutional, and that the provision of the presidential public funding law restricting coordinated spending by a party whose candidate accepted public funding violated the party's First Amendment rights.[22] In *FEC v. National Conservative Political*

19. *Id.* at 57 n.65.
20. *Id.* at 96.
21. 445 U.S. 955 (1980).
22. *See* Republican Nat'l Comm. v. FEC, 487 F. Supp. 280, 283 (S.D.N.Y. 1980).

Action Committee (*NCPAC*),[23] the Court invalidated the provision of the presidential public funding law limiting independent expenditures in support of or in opposition to a publicly-funded presidential candidate to $1,000. *Buckley* had held unconstitutional the general limit on independent spending, but had not specifically addressed the independent spending limit in the presidential public funding law. Taking *Buckley*, *RNC*, and *NCPAC* together, a candidate's receipt of public funding can be conditioned on his acceptance of a spending limit and his party limiting its coordinated expenditures, but the provision of public funding—and a candidate's acceptance of public funding—has no impact on the rights of independent spenders.

The third major case—decided in 2011—is *Arizona Free Enterprise*,[24] which dealt with the so-called "trigger" provision of Arizona's public funding law. Although not part of the presidential public funding law, trigger provisions—also known as "fair fight" or "rescue" funds—became a common part of many state and local public funding laws, starting in the 1990s. Under a trigger law, spending by privately-funded candidates who have declined public funding or by independent committees concerning a publicly-funded candidate can "trigger" a change in the rules governing a publicly-funded candidate. If the nonparticipating candidate spends more than the spending limit for the publicly-funded candidate—or if the combination of nonparticipant spending and supportive independent spending rises above that ceiling—something happens. Either the state will provide the publicly-funded candidate with additional funds up to some new, higher limit, or the publicly-funded candidate would be free to solicit and spend additional private funds.

Trigger laws reflect two concerns that developed as experience with public funding increased. First, candidates may be reluctant to accept public funding with a spending limit because their opponents—with or without the support of independent committees—are not subject to limits and can, thus, outspend them. The extent of this concern may depend on the size of the public grant relative to the cost of an effective campaign, as well as the resources available to the candidate's opponent. From the perspective of the publicly-funded candidate, if the public funds are much less than the money being spent against her, the spending limit becomes a form of unilateral

23. 470 U.S. 480 (1985).

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

disarmament. The trigger funds—or even simply release from the spending limit with permission to raise additional private contributions—alleviate that concern and make public funding more attractive to candidates. Second, "it is exceedingly difficult to get the level of public subsidy right."[25] Although the standard public funding grant or match level may be adequate for most races in a jurisdiction, in any given year the election in a particular race or district may be especially hotly contested. It would be impossible to determine in advance which specific elections in a particular election year will be more competitive than others, and it would be wasteful to pump more public funds into all elections just to ensure that more money is available in those elections where it is most needed. On the other hand, too small a grant would discourage participation in the program. High levels of spending by other campaign actors—nonparticipating candidates and independent committees—are an excellent marker of which elections are especially competitive. Triggers provide desirable flexibility by allowing the level of public funding, or the mix of public and private funds, to respond to the conditions of specific elections.

Prior to 2010, all but one of the lower federal courts that had heard challenges to state trigger laws had sustained the trigger provisions, finding the laws promote rather than burden campaign speech and are justified by the state's interest in making public funding effective and attractive to candidates. On the first point, the United States Court of Appeals for the First Circuit explained, in upholding the trigger provision of Maine's clean money law in *Daggett v. Commission on Governmental Ethics and Practices*,[26] that nonparticipating candidates and committees "have no right to speak free from response."[27] Indeed, the court rejected the very idea "which equates responsive speech with an impairment to the initial speaker."[28] Similarly, the Fourth Circuit in *North Carolina Right to Life v. Leake*[29] agreed that responsive funds do not impinge on First Amendment rights, as nonparticipating candidates and independent

25. Stephen Ansolabehere, *Arizona Free Enterprise v Bennett and the Problem of Campaign Finance*, 2011 SUP. CT. REV. 39, 53–54.

26. 205 F.3d 445 (1st Cir. 2005) (upholding provision providing up to double the initial distribution of public funds).

27. *Id.* at 464.

28. *Id.* at 465.

29. 524 F.3d 427 (4th Cir. 2008) (upholding trigger funds equal to two times the trigger threshold).

committees "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 trigger amounts."[30] The distribution of additional public funds to their opponents triggered by their actions "'furthers, not abridges pertinent First Amendment values' by ensuring that the participating candidate will have an opportunity to engage in responsive speech."[31]

On the second point, these courts recognized that many candidates are unlikely to accept public funding with its spending limit unless there is some kind of escape hatch enabling them to respond to high levels of spending by nonparticipating opponents or independent committees. As the Eighth Circuit explained:

> [T]his provision removes the disincentive a candidate may have to participate in the public financing system because of the candidate's fear of being grossly outspent by a well-financed, privately funded opponent. Absent such a safeguard, the State could reasonably believe that far fewer candidates would enroll in its campaign-financing program, with its binding limitation on campaign expenditures, because of the candidates' concerns of placing their candidacy at an insurmountable disadvantage.[32]

Other courts agreed that "[t]he provision prevents the publicly-funded candidate from being penalized for deciding to accept public funds."[33]

In *Arizona Free Enterprise*, however, a five-justice majority of the Supreme Court rejected this reasoning. In an opinion by Chief Justice Roberts, the Court found that providing additional public funds to candidates as a response to high levels of spending by privately-funded candidates or independent committees does burden the speech of those candidates and committees by operating as a

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30. *Id.* at 437.

31. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 92–93 (1976)).

32. Rosenstiel v. Rodriguez, 101 F.3d 1544, 1554 (8th Cir. 1996).

33. Wilkinson v. Jones, 876 F. Supp. 916, 928 (W.D. Ky. 1995). Other decisions in this period upholding trigger fund laws include *Ass'n of American Physicians & Surgeons v. Brewer*, 363 F. Supp. 2d 1197 (D. Ariz. 2005) and *Green Party of Conn. v. Garfield*, 537 F. Supp. 2d 359 (D. Conn. 2008). The one case before 2010 that went the other way was *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), which struck down a Minnesota law that both raised the spending limit and increased the public funding allotment for a candidate targeted by opposing independent expenditures. *Day* was subsequently distinguished by the same court in *Rosenstiel*, 101 F.3d at 1555, and as a result was considered to be of dubious precedential value by other courts. *See Daggett,* 205 F.3d at 464 n.25; *Leake,* 524 F.3d at 438.

penalty for spending above the trigger threshold.[34]

> Once a privately financed candidate has raised or spent more than the State's initial grant to a publicly financed candidate, each personal dollar spent by the privately financed candidate results in an award of almost one additional dollar to his opponent. That plainly forces the privately financed candidate to 'shoulder a special and potentially significant burden' when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy.[35]

Similarly, for the independent committee,

> [j]ust as with the candidate the independent group supports, the more money spent on that candidate's behalf or in opposition to a publicly funded candidate, the more money the publicly funded candidate receives from the State . . . . [T]he effect of a dollar spent on election speech is a guaranteed financial payout to the publicly funded candidate the group opposes.[36]

Even if the trigger funds "result in more speech by publicly-funded candidates and more speech in general," that still burdens the speech of privately-funded candidates and independent groups.[37] For the Roberts Court, this smacked too much of the equalization of campaign speech that *Buckley* had rejected as a justification for spending limits.[38]

Having determined that trigger funds operate as a burden on speech, the Court found that burden could not be justified by the state's interest in promoting its public funding program. The Court emphasized that the core constitutional interest justifying campaign

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34. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2818–19 (2011). In so concluding, the Court relied heavily on its 2008 decision in *Davis v. FEC*, 554 U.S. 724 (2008), striking down the Millionaires' Amendment provision of the Bipartisan Campaign Reform Act of 2002. *See Ariz. Free Enter.*, 131 S. Ct. at 2817–24. Indeed, after *Davis,* two courts of appeals concluded that trigger laws were unconstitutional. *See* Green Party of Conn. v. Garfield, 616 F.3d 213 (2d Cir. 2010); Scott v. Roberts, 612 F.3d 1279 (11th Cir. 2010).

35. *Ariz. Free Enter.*, 131 S. Ct. at 2818.

36. *Id.* at 2819.

37. *Id.* at 2821.

38. *Id.* at 2820–21. Chief Justice Roberts's majority opinion was joined by Justices Scalia, Kennedy, Thomas, and Alito. Justice Kagan wrote the dissenting opinion joined by Justices Ginsburg, Breyer, and Sotomayor.

finance restrictions is the prevention of corruption and the appearance of corruption. While public funding can advance that interest, and trigger funds "might well promote participation in public funding," that served the state's anti-corruption interest only "indirectly" and was inadequate to justify the burden on political speech resulting from the provision of trigger funds.[39]

V. PUBLIC FUNDING AFTER *ARIZONA FREE ENTERPRISE*

Arizona Free Enterprise has had an immediate impact on state public funding laws. The trigger provisions in Maine's clean money law[40] and West Virginia's pilot public funding program for judicial elections[41] have already been invalidated, and, due to lack of severability, the entire Nebraska public funding law has been struck down because of its trigger provision.[42] The trigger fund provisions in the Connecticut and Florida public funding laws had already been invalidated as *Arizona Free Enterprise* was making its way to the Supreme Court.[43] Without the availability of the trigger fund mechanism, it will surely be more difficult to get public funding adopted or to persuade elected officials to take public funding when it is available. The inclusion of trigger mechanisms in many of the state public funding laws adopted in the past decade—including Arizona, Connecticut, Maine, and North Carolina—reflect the practical recognition that with nonparticipating candidates and independent committees potentially able to raise and spend funds without limit, a candidate who accepts limited public funds plus a spending limit risks putting herself at a competitive disadvantage.

Still, *Arizona Free Enterprise* need not and should not mean the end of public funding. First, it is not clear that *Arizona Free Enterprise* dooms all trigger mechanisms. Although states and local governments may not be able to provide more public funds in response to private spending, they might still be able to respond to high levels of private spending by lifting spending limits, and allowing publicly-funded candidates to raise and spend private funds. To be sure, that would be a response to spending by another candidate

39. *Id.* at 2826–28.

40. *See* Cushing v. McKee, 853 F. Supp. 2d 163 (D. Me. 2012).

41. State *ex rel* Loughry v. Tennant, 732 S.E.2d 507, 518 (W. Va. 2012).

42. State *ex rel* Bruning v. Gale, 817 N.W.2d 768, 784 (Neb. 2012).

43. *See* Green Party of Conn. v. Garfield, 616 F.3d 213 (2d Cir. 2010); Scott v. Roberts, 612 F.3d 1279 (11th Cir. 2010).

or a committee and so arguably a "penalty" for the other spender, but the response would not involve the provision of any public funds—which was a sore point in the Court's assessment of Arizona's law.[44] Nor would the state be discriminating against privately-funded candidates as long as the contribution limit for donations to the publicly-funded candidate is not higher than the limits on donations to privately-funded candidates.[45]

A second option, particularly for flat grant or clean money programs, would be to provide a much larger public grant to qualifying candidates. The larger grant, which might very well be a good idea in its own right—the presidential public grant is far, far less than the cost of contemporary presidential election campaigns—would provide candidates with an assurance of adequate funding. Indeed, unlike trigger funds, the larger grant would be both guaranteed and available to the publicly-funded candidate at the outset of the campaign, and thus far more useful to a candidate than trigger funds, which may come very late in the election cycle. Indeed, there is some evidence from Arizona of privately-funded candidates timing their expenditures so late in the election as to make it difficult for publicly-funded candidates to actually get the trigger funds in a timely way. But the availability of a very large grant also has the potential for wasting money unnecessarily in noncompetitive races. This could be addressed by conditioning the grant on the presence of well-funded opponents, or by requiring candidates to return unused funds at the end of the campaign—although it's not clear what incentive the candidate would have to be frugal. In any event, a more generous grant is likely to increase political resistance to the program and make public funding more difficult to attain.

VI. AN ARGUMENT FOR PUBLIC FUNDING WITHOUT SPENDING LIMITS

A third option is to eliminate spending limits from public funding programs altogether. The justifications for a spending limit are: (i) that it equalizes the resources available to competing candidates and, thus, promotes fair competition; and (ii) that it holds down the amount of money spent in an election. Moreover, in a full public funding system, like the presidential general election public

44. *Ariz. Free Enter.*, 131 S. Ct. at 2818–19.

45. That distinguishes this proposal from the law struck down in *Davis v. FEC*, 554 U.S. 728 (2008), which raised the contribution limit for a candidate whose opponent contributed a large amount of personal funds to his campaign.

funding program or state clean money systems, the spending limit is built into the idea of full public funding, as the candidate can only spend as much as the state provides him. Full public funding plus a spending limit is also intended to eliminate (iii) the burden of fund-raising on candidates and (iv) the special influence that large donors can obtain over elections and the behavior of elected officials grateful for or dependent on their donations. Without a spending limit, and with, after *Arizona Free Enterprise*, the additional sums necessarily raised by private contributions, these goals are arguably unattainable.

But the first of these goals—reduction of total spending—should not be a campaign finance reform objective at all, and the second goal—equalization of resources for candidates—is unattainable under current constitutional doctrine. The third and fourth goals—reduction of special interest influence and amelioration of the burdens of fundraising—are both desirable and constitutionally attainable, but they can be advanced without spending limits.

Although commentators regularly decry the cost of election campaigns, arguing for a reduction in total spending is a fundamentally mistaken objection to our current campaign finance system. Election expenditures consist of communications and voter mobilization activities—efforts to present facts, arguments, other information to the voters, and to facilitate their participation in elections. These efforts advance our democratic system. The problems with our campaign finance system relate to the uneven resources across candidates and the influence of large donors on elections and governance, not the level of spending per se.

With respect to the unequal resources of candidates, current constitutional doctrine makes equalization impossible. So long as spending limits on candidates and independent groups, limits on the use of candidate personal wealth, and trigger funds are unconstitutional, candidate equalization is unattainable. To be sure, public funding can promote some equalization by leveling up, that is, by providing public funds to qualifying candidates who have only limited access to private resources (particularly, challengers and political newcomers). The public grant can, thus, provide a measure of equality by enabling underfunded candidates to get their campaigns off the ground. In many elections, providing such public funding functions as a kind of seed money that may enable a candidate to run a competitive campaign against a better-funded opponent. But under current constitutional doctrine true equalization of campaign funding is impossible and, thus, needs to be dropped from the goals of

campaign finance reform.

That leaves reduction of special interest influence and the amelioration of the burdens of fundraising. Public funding, even without spending limits, can still advance those goals, even if their complete achievement is unattainable. The provision of some public funds will, to that extent, make the pursuit of large private donations less necessary and large donors less influential. The design of the public funding system can promote these goals, even without a spending limit. In a flat grant system, the larger the initial public grant, the less the need for and the less the dependence on private donations. In a matching grant system, the greater the match ratio—such as 4:1, 5:1, or 6:1 for small donations of, say, under $200—the less the dependence on large donations and the less the influence of large donors. Certainly, such a small donor leveraged-match system may be said to increase the time burden of fundraising. But small-donor fundraising differs in its form and its target from the "dialing for dollars" or big-ticket fundraising events central to the private fundraising system. With candidates having to reach out to, contact, and respond to a much larger number of smaller givers, small-donor fundraising resembles campaigning more than traditional fund-raising. Indeed, there is evidence that New York City, which has the most generous match and caps matchable donations at the relatively low level of $175, has not only many more small donors, but the donors to publicly-funded candidates are far more racially, economically, and socially diverse than donors to nonparticipating candidates.[46] To the extent that fundraising involves widespread contact with broader elements of the public, it approaches campaigning, and is no more objectionable than campaigning itself.

Of course, the elimination of spending limits means the end of the idea of full public funding. But full public funding was an illusion anyway. The system was never fully publicly funded as long as candidates are free to not participate, and independent committees and individuals can spend as much as they want in private funds in support of or in opposition to candidates—including publicly-funded candidates.

The future of public funding is likely to consist either of small donor matching programs, like New York City's, or so-called hybrid

46. *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 (2012).

systems in which candidates get a base amount in a flat grant but can participate in competitive races by raising additional, matchable, small donations. Pure flat grant systems are simply unable to respond to competitive elections without very large initial grants, and small donor matching programs have the additional appeal of providing an incentive to candidates to seek the participation of small donors. Still, as long as these programs include spending limits, there is the possibility that they will be inadequate to competitive races and disadvantage public-funding participants.

My suggestion would be to scrap spending limits completely. Public funding would still enable candidates without personal wealth, wealthy backers, or access to special interest financial support to mount campaigns. With small donor matches, the candidates who are better at raising small donations, which presumably reflects some popular appeal, would be able to mount increasingly well-funded campaigns. In theory, the state or city could keep on matching—presumably at a decreased ratio—as long as the candidate keeps raising funds. More likely, at some point, the jurisdiction could decide the public has helped the candidate enough, and stop providing the candidate with more money, but let him continue to raise (subject to standard contribution limits) and spend private money if he deems that necessary. Such a system of public funding without limits would lower barriers to entry and boost challengers, political outsiders, and candidates without personal wealth or wealthy backers—and reduce the role of large donors in the system—without curbing the ability of publicly supported candidates to respond to unlimited spending by other candidates or independent groups. Public funding under this system would also be available to incumbents and candidates with access to larger donors. But if they want to participate in this system—and be less dependent on large donors—so much the better.

Given our campaign finance jurisprudence, our system will inevitably be at least to some degree privately-funded. Public funding laws can supplement and complement private funds—by making it easier for candidates without personal wealth or support from large donors to run, and by encouraging candidates to pursue small donations—and in so doing these laws can promote fair competition among candidates, increase political speech and participation, and reduce the role of large private wealth. But public funding cannot replace private funds. That being the case, we need to think about the rules that promote the best combination of public and private funding. Spending limits handicap publicly-funded candidates without

advancing any of the attainable and desirable goals of public funding. For that reason, eliminating spending limits would make public funding more attractive to candidates and more effective at attaining the goals of campaign finance reform.