

# University of Michigan Journal of Law Reform

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Volume 48

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2015

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### Recommended Citation

Andrew V. Moshirnia & Aaron T. Dozeman, *In All Fairness: Using Political Broadcast Access Doctrine to Tailor Public Campaign Fund Matching*, 48 U. MICH. J. L. REFORM 641 (2015).

Available at: <https://repository.law.umich.edu/mjlr/vol48/iss3/2>

<https://doi.org/10.36646/mjlr.48.3.in>

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## IN ALL FAIRNESS: USING POLITICAL BROADCAST ACCESS DOCTRINE TO TAILOR PUBLIC CAMPAIGN FUND MATCHING

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Andrew V. Moshirnia\* & Aaron T. Dozeman\*\*

*Recent United States Supreme Court decisions have undermined the viability of campaign public financing systems, a vital tool for fighting political corruption. First, Citizens United v. FEC allowed privately financed candidates and independent groups to spend unlimited amounts of money on campaigning. Publicly financed candidates now risk being vastly outspent. Second, Arizona Free Enterprise Club's Freedom PAC v. Bennett invalidated a proportional fund matching system whereby privately financed candidates' or independent groups' spending triggered funds to publicly funded candidates. These decisions effectuate a libertarian speech doctrine: all speakers, individual or corporate, must be absolutely unburdened.*

*To comply with this approach, public financing must be tailored to reduce its monetary correlation with, and corresponding burden on, privately funded speech. This Article proposes matching broadcast advertising access costs as a measured solution. The proposed system does not burden privately funded speech, and it increases media availability: if a privately financed candidate or independent group purchases advertising time, the publicly financed candidate is provided funds to purchase equivalent time. Matching access costs reduces any burden on speakers while importing First Amendment jurisprudence and telecommunications law to support the constitutionality of this system. These laws recognize the First Amendment rights of the electorate, the problem of political advertising market saturation, and the values of an informed citizenry. Essential for democracy is an informed, engaged, and participating citizenry. Matching broadcast access costs increases available information, comports with the Court's jurisprudence, and mitigates the damaging effects of Citizens United.*

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## INTRODUCTION

Political campaign regulations have primarily targeted corruption in the traditional sense, through quid pro quo donations: money from donors in exchange for political favors.<sup>1</sup> The legislative process has responded with regulations criminalizing these types of exchanges and limiting certain donations and disclosure requirements.<sup>2</sup> In addition, legislatures have weakened the possible corrupting influence or even the appearance of donor corruption by implementing public financing for candidates, whereby candidates agree to run their campaigns solely with public funding. Under these funding schemes, candidates are less likely to be corrupted, and the electorate perceives less corruption.

Reducing the risk of corruption inherently risks violating a constitutional right, for campaign money is intertwined with protected speech. First announced in *Buckley v. Valeo*, the United States Supreme Court held that money is speech and, therefore, subject to “exacting scrutiny” under the First Amendment.<sup>3</sup> Since *Buckley*, attempts to control the flow of money in elections have met constitutional challenges under a stringent standard.

Yet not every monetary regulation in elections burdens speech equally. Therefore, the Court has attempted to distinguish between types of election finance regulations. Though this line has been blurred in some contexts, the Court has adhered to the basic principle that the government may limit contributions to individual candidates or to political action committees that support candidates.<sup>4</sup> But the government may not limit individuals’ or

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1. See *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (per curiam).

2. Generally regarded as the first major federal campaign finance law, the Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2006)), prohibited federal contributions from nationally chartered banks and corporations. The Federal Corrupt Practices Act of 1925, Pub. L. No. 68-506 Sec. 301, was arguably the first federal statute combining multiple campaign finance provisions, particularly disclosure requirements first enacted in 1910, Pub. L. No. 61-274 36 Stat. 822 and Pub. L. No. 62-82 37 Stat. 25. An 1867 statute, Act of March 2, 1867, 14 Stat. 489, barred requiring political contributions from naval yard workers.

3. *Buckley*, 424 U.S. at 44–45. Exacting scrutiny or strict scrutiny requires that content-based restrictions be narrowly tailored to serve a compelling governmental interest.

4. During the writing of this Article, *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012) was on appeal to the Supreme Court. The Court issued its decision on April 2, 2014. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). In a 5-to-4 decision, the Court struck down aggregate limits on amounts individuals may contribute during a two-year period to all federal candidates, parties, and political action committees. *Id.* at 1461–62. *McCutcheon* applies to contribution limits one may give to multiple candidates.

candidates' independent expenditures from their own funds.<sup>5</sup> Due to this principle, campaign finance laws even remotely connected to expenditures have run the risk of invalidation.<sup>6</sup>

At the same time that the Court has steadfastly protected speech through political expenditures, it has also liberally expanded the class of eligible speakers. In 2010, the Court held in *Citizens United v. Federal Elections Commission* that corporate entities were protected speakers, and thus their independent expenditures could not be limited.<sup>7</sup> Before *Citizens United*, only political action committees ("PACs"), which corporations and unions funded, could generally finance this type of political spending on advertising.<sup>8</sup>

The advent of super political action committees ("Super PACs") has further advanced this type of corporate and union speech. Super PACs are independent expenditure-only groups: they do not make contributions to candidates and are exempt from contribution limits.<sup>9</sup> It is well-settled that *Citizens United* triggered a flood of potentially corrupting corporate money into elections. Recognizing the dangers *Citizens United* posed, the Montana Supreme Court attempted to carve out exceptions for its campaign finance laws, only to have the United States Supreme Court summarily reverse it.<sup>10</sup>

The Court has also limited state efforts to address the fallout of *Citizens United* through directly proportional public fund matching schemes in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*. In *Arizona Free Enterprise*, the Court invalidated the Arizona Clean

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5. *Buckley*, 424 U.S. at 52–54 (invalidating expenditure limits); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 256–65 (1986) (invalidating independent expenditures applied to express advocacy groups); *Colorado Republican Fed. Campaign Comm'n v. FEC*, 518 U.S. 604, 626 (1996) (*Colorado I*) (invalidating limits on uncoordinated political party expenditures); *Citizens United v. FEC*, 558 U.S. 310, 371–72 (2010) (invalidating regulations barring unions and corporations from making independent expenditures for electioneering communication).

6. *See supra* note 5.

7. *Citizens United*, 558 U.S. at 319 ("The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.").

8. *See McConnell v. FEC*, 540 U.S. 93 (2003); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). However, *Citizens United* explicitly overruled *Austin*. *Citizens United*, 558 U.S. at 319 ("[S]tare decisis does not compel the continued acceptance of *Austin*.").

9. *See SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. App. Ct. 2010) (holding independent expenditures do not corrupt candidates or politicians, and contributions to them may not be limited).

10. *See American Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam) ("The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does. *See* U.S. Const., Art. VI, cl. 2 [Supremacy Clause]. Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case."). *See infra* Part I.D.

Elections Act's "matching funds" scheme for publicly funded candidates.<sup>11</sup> The scheme released additional funds to publicly funded candidates when privately funded candidates or independent groups spent money in opposition to the publicly funded candidate or candidates.<sup>12</sup> The Court found that forcing a privately funded candidate to choose between spending money, knowing that such expenditure would trigger more funds to his or her opponent, and not spending money was a "special and potentially significant burden."<sup>13</sup> Neither the proffered interest of combating corruption nor what the Court surmised was the preeminent purposes in "leveling the playing field" could justify this burden.<sup>14</sup> With political campaign speech enjoying something akin to absolute protection, the indirect regulation of independent expenditures stands on shaky ground.

*Arizona Free Enterprise* leaves few options for public funding regulations that correlate with privately spent campaign dollars on a directly proportional basis. This is especially damaging because, without proportionality fund-matching, programs are likely ineffective or wasteful. Once a candidate commits to taking such funding, he or she cannot gather more funds in the face of a privately-funded media blitz. Of course, access to money is a critical factor for potential candidates, and thus candidates will reject public funding if it carries such an obvious handicap. As a result, candidates either do not run or are required to rely on private funding; either scenario may distort the electorate's access to information. Ultimately, the electorate is deprived of information necessary to make informed decisions and of the opportunity to hear competing ideas.

This Article's thesis stems from the premise that competitive financing systems promote the First Amendment's role in the democratic election process because privately-funded candidates and independent expenditure groups can saturate the political advertising market. The ability to control access to the electorate via broadcast advertising distorts and diminishes the electorate's choices and undermines an informed public's role in a democracy.<sup>15</sup> Competitive public financing systems increase the public's access to information, thereby promoting the democratic ideal of

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11. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813 (2011).

12. *Id.* at 2814.

13. *Id.* at 2818 (quoting *Davis v. FEC*, 554 U.S. 724, 739 (2008)) (internal quotations omitted).

14. *Id.* at 2825–26.

15. *See infra* Part III.A.

self-governance. But under the Court's current application of the First Amendment to election laws, regulations must be narrowly tailored to lower the burden less than a one dollar-to-one dollar fund matching. Instead of simply hoping for the Court to abandon or limit *Citizens United* or *Arizona Free Enterprise*, state legislatures should draft tailored fund matching schemes that enable publicly financed candidates to access broadcast media by providing matching funds for advertisement placements over broadcast media, *i.e.*, television or radio. This Article proposes a method to tailor the burden in disbursing public funds, while at the same time increasing the efficiency of proportional fund matching by pegging the amount of dispersed public funds to the access cost to broadcast media, which would not be a proportional one-to-one dollar matching.<sup>16</sup> This system would allow publicly financed candidates to retain access to the electorate, keep public financing a competitive option, and provide a way to reduce a matching system's burden on privately funded candidates and independent expenditure groups.

The constitutionality of this proposed system draws from existing First Amendment jurisprudence concerning telecommunications law and policy: the Fairness Doctrine and equal access provisions.<sup>17</sup> The Fairness Doctrine requires that broadcast licenses holders operate in the public interest.<sup>18</sup> In the political sphere, courts have applied the doctrine to require broadcast stations to cover opposing viewpoints during campaigns.<sup>19</sup> While the Federal Communications Commission ("FCC") has abandoned the doctrine, the Court has never overruled it. In fact, Fairness Doctrine principles seem to continue to shape recent FCC decisions.<sup>20</sup> More importantly, under the Communications Act of 1934, provisions involving "equal opportunity" for political candidates in responding to opponents and "reasonable access" requirements for political campaigns provide a justification for the possible burden on speech arising from equalized media access.<sup>21</sup> These policies and provisions have already survived First Amendment challenges, providing courts with the ability to uphold the constitutionality of public financing systems based on identical principles. A system that makes public financing more competitive through broadcast advertising can mitigate harms of corruption and disproportionate influence,

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16. *See infra* Part III.B.

17. *See infra* Part III.C.

18. *See infra* Part III.C.1.

19. *Id.*

20. *See infra* Part III.C.2.

21. *See infra* Part III.C.1.

consistent with the role of speech in self-governance.<sup>22</sup> The Court has long held that elections for political office should “secure the widest possible dissemination of information from diverse and antagonistic sources.”<sup>23</sup>

This Article illustrates the problem and proposes a solution in four parts. Part I provides a brief background of campaign finance jurisprudence.<sup>24</sup> It lays out the legal analysis established in *Buckley*, the aftermath of *Citizens United*, and current campaign finance jurisprudence. Part II describes the frustrated attempts of state courts and legislatures to lessen the dangers inherent in the corporate flood *Citizens United* unleashed, paying special attention to direct fund matching and *Arizona Free Enterprise*.<sup>25</sup> Part III proposes a tailored fund matching system, inspired by telecommunications law and policy, and explains why case law, as well as maintaining the integrity of elections and self-governance, show that this system does not run afoul to *Arizona Free Enterprise*.<sup>26</sup> The conclusion briefly considers the future implications of the proposed system.

## I. MONEY AND POLITICAL ELECTIONS: THE DISRUPTIVE *CITIZENS UNITED*

*Citizens United* marked a pivotal moment in First Amendment campaign jurisprudence: it shifted campaign finance law analysis, changed the nature of financing political campaigns, and altered the popular perception of campaigns.<sup>27</sup> This Part first provides a brief overview of early campaign finance law with *Buckley v. Valeo*.

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22. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788–89 (1978) *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010) (quoting *United States v. UAW-CIO*, 352 U.S. 567, 575 (1957) (“Preserving the integrity of the electoral process, preventing corruption, and ‘sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government’ are interests of the highest importance.”)).

23. *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Roth v. United States*, 354 U.S. 476, 484 (1957)).

24. See *infra* Part I.

25. See *infra* Part II.

26. See *infra* Part III.

27. See Matt Bai, *How Did Political Money Get This Loud?*, N.Y. TIMES, July 22, 2012, at MM14, available at [http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html?pagewanted=all&_r=0) (“The oft-repeated narrative of 2012 goes like this: *Citizens United* unleashed a torrent of money from businesses and the multimillionaires who run them, and as a result we are now seeing the corporate takeover of American politics.”). For a brief discussion of three side effects of *Citizens United*—fear, donor power, and accountability—see Mike Lux, *The Hidden Effects of Citizens United and Super PACs*, HUFFINGTON POST (Sept. 6, 2012), [http://www.huffingtonpost.com/mike-lux/2012-election-super-pacs\\_b\\_1830326.html](http://www.huffingtonpost.com/mike-lux/2012-election-super-pacs_b_1830326.html) (“Big money has always been a huge factor in politics . . . [b]ut in the two election cycles since the *Citizens United* ruling, the power dynamic has shifted

*Buckley* established the doctrinal framework for all campaign finance law challenges under the First Amendment. Next, this Part examines *Citizens United*'s effect on the Court's fundamental role in reviewing campaign finance legislation in light of recent judicial interpretations and the advent of the Super PAC. Finally, this Part looks at Montana's attempt to work around *Citizens United* based on unique considerations of its history of political corruption.

### A. Pre-*Citizens United*

*Buckley v. Valeo* is the starting point for analyzing all campaign finance cases. In *Buckley*, the Court examined four provisions of the 1974 amendments to the Federal Election Campaign Act of 1971 ("FECA"): (1) limits on campaign contributions, (2) limits on political expenditures, (3) disclosure requirements, and (4) public financing of elections.<sup>28</sup> The Court's *per curiam* decision sustained the disclosure requirements, public financing of elections, and contribution limits, but found limits on expenditures unconstitutional.<sup>29</sup>

While disclosure requirements and public financing are not particularly controversial, numerous challenges to expenditures and contributions have developed a significant body of law.<sup>30</sup> Campaign

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dramatically in three different ways, all of which are terrible for the future of our democratic system.").

28. *Buckley*, 424 U.S. at 7.

29. *See id.* at 58–59 (upholding contribution limits and invalidating expenditure limits). This case created a conceptual divide between "contributions" and "expenditures" and in doing so, opened the door for those who could "expend" the most to dominate the political process. *See also* Adam Lioz & Liz Kennedy, *Democracy at Stake: Political Equality in the Super PAC Era*, 39 HUMAN RIGHTS 15, 17 (2012), available at [http://www.demos.org/sites/default/files/publications/HumanRightsMag\\_DemocracyAtStake\\_Lioz-Kennedy.pdf](http://www.demos.org/sites/default/files/publications/HumanRightsMag_DemocracyAtStake_Lioz-Kennedy.pdf):

*Buckley* is what allowed Michael Bloomberg to spend as much of his billions as he desired to become mayor of New York city. *Buckley* is what protects Adelson's 'right' to spend unlimited sums on 'independent expenditures' (though before Super PACs he would have had to spend his money directly). *Buckley* is what prevents Congress and the states from limiting total campaign spending and, in more recent applications, from enforcing contribution limits set at levels that average Americans can afford to give. But the case left Congress, states, and future justices with some flexibility to regulate the role and impact of money in politics. The *Buckley* decision embraced rules on disclosure; left undisturbed the longstanding ban on corporate treasury spending in elections; did not definitively close the door on rationales other than corruption; did not conclusively shut down the notion that so-called independent spending could lead to corruption or its appearance; and did not impose a final and narrow definition of corruption.

30. *See infra* notes 44–46 and accompanying text.



regulations primarily target expenditures and contributions because the flow of money may signal quid pro quo corruption. But the line between permissible contribution and expenditure regulations begins to blur when the regulations indirectly affect one or the other.

### 1. Contribution Limits

Contributions are payments made to a political candidate or campaign fund, or when independent groups coordinate spending with a candidate's campaign organization.<sup>31</sup> The Court in *Buckley* found that contributions were potentially far more dangerous to the integrity of the political process than expenditures, and that limits on contributions were significantly less restrictive on free expression and association than expenditure limits.<sup>32</sup> Contribution limits were therefore necessary "to limit the actuality and appearance of corruption resulting from" large donations.<sup>33</sup>

To the extent that large contributions are given to secure political quid pro quos from current and potential office holders, the integrity of our system of representative democracy is undermined . . . . Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse in a regime of large individual financial contributions.<sup>34</sup>

Bribery laws and disclosure requirements were simply inadequate to combat this kind of corruption.<sup>35</sup>

### 2. Expenditure Limits

Expenditures are sums spent directly in support of a political cause.<sup>36</sup> In *Buckley*, the Court found that expenditure limits imposed "direct and substantial restraints on the quantity of political speech" and limited political expression "at the core . . . of First

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31. 2 U.S.C. § 431(8)(A)–(B) (2012).

32. *Buckley*, 424 U.S. at 26–29, 39.

33. *Id.* at 26.

34. *Id.* at 26–27.

35. *Id.* at 27–28.

36. 2 U.S.C. § 431(9)(A)–(B) (2012); *see also id.* § 431(17) (defining "Independent Expenditure").

Amendment freedoms.” Because money is speech, limiting money is limiting speech.<sup>37</sup>

Under “exacting scrutiny,” the governmental interest in combating corruption did not justify the limit. First, not all apparent or actual quid pro quo deals were eliminated because the limits applied only to expenditures “advocating the election or defeat” of a “clearly identified candidate.”<sup>38</sup> Advertisements supporting a candidate’s views, even as part of a quid pro quo agreement, could still run.<sup>39</sup> Second, the expenditure limits only applied where the expenditures were made independently of the candidate and his campaign; spending that the campaign controlled or coordinated was treated as a contribution.<sup>40</sup> Where such independence existed, quid pro quo corruption was less likely.<sup>41</sup>

The Court also rejected the interest in “equalizing the relative ability of individuals and groups to influence the outcome of elections” to justify limits on individuals’ expenditures.<sup>42</sup> The First Amendment does not permit government to “restrict the speech of some elements of our society in order to enhance the relative voices of others.”<sup>43</sup>

### 3. *Buckley* and Its Progeny

In a series of fractured opinions, the Court has continued to apply the contribution/expenditure distinction to federal and state campaign reform efforts.<sup>44</sup>

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37. *Buckley*, 424 U.S. at 39. The Court analogized the restrictions to “being free to drive an automobile as far and as often as one desires on a single tank of gasoline.” *Id.* at 19 & n.18. In support of the “money is speech” analogy, see Geoffrey R. Stone, *Is Money Speech?* HUFFINGTON POST, (Feb. 5, 2012), [http://www.huffingtonpost.com/geoffrey-r-stone/is-money-speech\\_b\\_1255787.html](http://www.huffingtonpost.com/geoffrey-r-stone/is-money-speech_b_1255787.html):

Of course, money is not ‘speech.’ Money is money, a car is a car, and a ribbon is a ribbon . . . . But all of these objects, and many more besides, can be used to facilitate free speech . . . . Thus, a law that prohibits political candidates to spend money to pay for the cost of [communicating], directly implicates the First Amendment. Such laws raise First Amendment questions, not because money is speech, but because the purpose of the expenditure or contribution is to facilitate expression.

38. *Buckley*, 424 U.S. at 41–43.

39. *See id.* at 45.

40. *Id.* at 46.

41. *Id.* at 47.

42. *Id.* at 48.

43. *Id.* at 48–49.

44. *See Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 381–82 (2000) (establishing contribution limit amounts); *California Med. Ass’n v. FEC*, 453 U.S. 182, 184–85 (1981) (limiting individual contributions to political action committees); *Citizens Against Rent Control*

Contribution limits have, for the most part, remained intact; however, expenditure limits of any kind have not survived “exacting scrutiny” under *Buckley*.<sup>45</sup> The recent trend has been to strike down campaign finance regulations of any expenditure, direct or indirect, for any speaker.<sup>46</sup>

### B. Citizens United and Unlimited Corporate Speech.

In 2010, the Supreme Court held in *Citizens United* that corporate entities were protected speakers and, thus, that Congress could not limit their independent expenditures.<sup>47</sup> In a five-to-four ruling, the Court invalidated two provisions of the Federal Election Campaign Act (FECA).<sup>48</sup> It invalidated the long-standing prohibition against corporations using their general treasury funds to make independent expenditures<sup>49</sup> and the prohibition against corporations using their general treasury funds for “electioneering communications.”<sup>50</sup> These prohibitions constitute a “ban on speech” that violated the First Amendment.<sup>51</sup> In this decision, the Court overruled its holding in *Austin v. Michigan Chamber of Commerce*,<sup>52</sup> thus returning to the principle that the [g]overnment may not suppress political speech on the basis of the speaker’s corporate identity,” and no sufficient governmental interest justifies limiting corporate speech.<sup>53</sup>

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v. Berkeley, 454 U.S. 290, 298–99 (1981) (limiting contributions in connection with ballot initiatives). *But see* Randall v. Sorrell, 548 U.S. 230, 232–33 (2006) (finding contribution limits unconstitutional because they were disproportionate to the public purpose).

45. *See* Colorado Republican Campaign v. FCC, 518 U.S. 604, 608 (1996) (*Colorado I*) (limits on individual expenditures); Citizens United v. FEC, 558 U.S. 310, 318–19 (2010) (limits on corporate expenditures).

46. *See* *Citizens United*, 130 S. Ct. at 886 (holding that corporations have the right to engage in political expenditures); Davis v. FEC, 554 U.S. 724, 726–27 (2007) (holding an asymmetrical regulation scheme unconstitutional whereby contribution limits for public financed candidates increased when privately financed candidates spent a certain amount); *but see* FEC v. Colorado Republican Campaign Comm., 533 U.S. 431, 465 (2001) (*Colorado II*) (finding regulation of coordinated expenditures were functionally equivalent to contributions and survived constitutional challenge).

47. *Citizens United*, 558 U.S. at 318–19.

48. *See id.* (invalidating 2 U.S.C. § 441b (2002)).

49. *Id.* at 365. (BCRA § 203 amended FECA).

50. *Id.*

51. *Id.* at 339 (holding that § 441b’s prohibition on corporate independent expenditures is thus a ban on speech).

52. *See* *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 654–55 (1990).

53. *Citizens United*, 558 U.S. at 365 (quoting *Marbury v. Madison*, 2 L.Ed. 60 (1803))

Here, though, parties have been prevented from acting—corporations have been banned from making independent expenditures. Legislatures may have enacted bans on corporate expenditures believing that those bans were constitutional. This is not a

*Citizens United* also partially overruled *McConnell v. FEC*,<sup>54</sup> which had upheld the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), by finding that the *McConnell* Court relied on *Austin*. Before *Citizens United*, only political action committees (“PACs”), which accept voluntary contributions from corporations and unions, could finance this type of political advertising.<sup>55</sup> After *Citizens United*, corporate entities could directly spend any amount of money on political advertisements and avoid speaking through PACs. The advent of Super PACs has further advanced the dominance of this type of corporate and union speech.<sup>56</sup> These entities are independent expenditure-only groups; they do not make contributions to candidates and are exempt from any contribution limits.<sup>57</sup>

*Citizens United*, consequently, allows corporations and unions to use their treasury funds for political advertisements either explicitly calling for the election or defeat of federal or state candidates (independent expenditures) or referring to those candidates during pre-election periods but not necessarily calling for their election or defeat (electioneering communications).<sup>58</sup> Previously, voluntary contributions raised by PACs affiliated with unions or corporations were the only way to finance such advertising.

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compelling interest for *stare decisis*. If it were, legislative acts could prevent us from overruling our own precedents, thereby interfering with our duty “to say what the law is.”

54. 540 U.S. 93 (2003).

55. See *id.*; *Austin*, 494 U.S. at 665–66.

56. See Anthony J. Gaughan, *The Futility of Contribution Limits in the Age of Super PACs*, 60 DRAKE L. REV. 755, 759–60 (2012):

Thus, by [*Citizens United*] holding that independent expenditures could not give rise to the actuality or appearance of corruption, the Supreme Court in *Citizens United* implicitly invalidated all state and federal contribution limits on independent expenditure-only committees (IECs) as an impermissible violation of the First Amendment right to free speech. IECs consist of independent political action committees—colloquially known as “Super PACs”—or other independent political advocacy groups that engage in campaign advertising but do not coordinate their expenditures with candidates or political parties. Hence, IECs are “independent” of candidate and party committees.

57. See *id.* at 760, 766; see also *SpeechNow.org v. FEC*, 599 F.3d 686, 693–96 (D.C. Cir. 2010) (holding that independent expenditures do not corrupt candidates or politicians, and contributions to them may not be limited).

58. Corporations and unions cannot donate treasury funds to a PAC, but a corporation or union can create its own PAC and then use treasury funds to pay for its administrative costs. It can also use treasury funds to solicit individual contributions to the PAC from people affiliated with the corporation or union. See 2 U.S.C. § 441b. There are no prohibitions on the contribution of corporate or union treasury funds to Super PACs. See R. SAM GARRETT, CONG. RESEARCH SERV., R42042, SUPER PACS IN FEDERAL ELECTIONS: OVERVIEW AND ISSUES FOR CONGRESS 6 (2011).

C. Citizens United's *Aftermath: Unlimited Contributions to Super PACs*

In 2010, the United States Court of Appeals for the District of Columbia held in *SpeechNow.org v. Federal Election Commission*<sup>59</sup> that contributions to PACs that make only independent expenditures—but not contributions—could not be constitutionally limited. SpeechNow, an “independent expenditure-only group,”<sup>60</sup> was formed to promote the First Amendment rights of free speech and freedom to assemble by advocating for the election of candidates who supported those rights.<sup>61</sup> SpeechNow requested that the Federal Election Commission (FEC) issue an advisory opinion, concerning whether or not the association must register as a political committee and whether donations it received qualified as contributions limited by sections 441a(a)(1)(C) and (a)(3) of FECA.<sup>62</sup> In a draft advisory opinion, the FEC concluded that SpeechNow would have to register as a political committee and that contributions it received would be subject to sections 441a(a)(1)(C) and (a)(3) limits.<sup>63</sup> SpeechNow and five individuals sought a declaratory judgment that subjecting SpeechNow to the same restrictions imposed on political committees was unconstitutional.<sup>64</sup> The district court certified the constitutional questions to the court of appeals.<sup>65</sup>

While the appeal was pending, the Supreme Court issued *Citizens United*. In accordance with that decision, the court found that the contribution limits sections 441a(a)(1)(C) and (a)(3) imposed were unconstitutional as applied to individuals' contributions to SpeechNow.<sup>66</sup> Because the Supreme Court held “that there is no corrupting ‘quid’ for which a candidate might in exchange offer a corrupt ‘quo,’ ” the court concluded that the government had no anti-corruption interest in limiting contributions to SpeechNow, an independent expenditure association.<sup>67</sup>

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59. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

60. *Id.* at 696.

61. *Id.* at 689.

62. *Id.* at 690.

63. *Id.*

64. *See SpeechNow.org*, 599 F.3d at 690.

65. *Id.* at 690.

66. *Id.* at 698.

67. *Id.* at 694–95. The court also held, however, that the FEC could apply the reporting requirements of 2 U.S.C. §§ 432, 433, and 434(a) and the organizational requirements of 2 U.S.C. § 431(4) and (8) to SpeechNow.org. *Id.* at 698. The court reasoned that the public has an interest in knowing who is funding that speech, regardless of whether the contributions were made toward administrative expenses or independent expenditures. *Id.* Furthermore, disclosure aids in deterring and exposing violations of other campaign finance restrictions. *Id.*

As a result of *SpeechNow.org*, Super PACs may accept funding in previously prohibited amounts and from previously prohibited sources. This includes corporate, union, or individual contributions used to advocate for or against federal candidates. As a political committee, however, a Super PAC must register with the FEC and be subject to the federal registration and reporting requirements that apply to other political committees.<sup>68</sup> In general, a Super PAC makes independent expenditures specifically supporting or opposing a candidate for federal office but does not make any contributions directly to other candidates.<sup>69</sup> Although Super PACs cannot contribute to individuals as ordinary PACs do, the rules limiting PACs' contribution amounts do not apply to Super PACs.<sup>70</sup>

When the Super PAC emerged, the campaign finance arena was transformed. Without contribution limits, a Super PAC can "raise vastly greater funds in a far shorter period of time than candidates, parties, or regular political action committees (PACs)."<sup>71</sup> For instance, FECA caps a donor's direct contribution to a federal candidate at \$2,500, but the same donor may write a check for any amount to the candidate's Super PACs, thereby circumventing the donation limits and giving the chosen candidate unlimited financial support.<sup>72</sup> In the 2012 presidential primary, outside political groups, rather than candidates, saturated the South Carolina airways with their television advertisements.<sup>73</sup> The Super PACs supporting Republican candidates accounted for \$3.1 million spent on political television advertising, which is roughly sixty percent of

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68. 2 U.S.C. §§ 432–434 (2012) (codifying "political committee"). Federal law does not define the terms "political action committee" or "PAC." The law recognizes "political committees," which include any committee, association, or group that receives contributions in excess of \$1,000 in a calendar year or makes expenditures in excess of \$1,000 in a calendar year, in order to influence elections for federal office. 2 U.S.C. § 431(4)(A). The term "PAC" originates from the first committee a labor union created to avoid the restriction on direct union support for federal candidates: the Political Action Committee. See Anthony Corrado, *Money and Politics: A History of Campaign Finance Law*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 27 (Anthony Corrado et al. eds., 2005).

69. See GARRETT, *supra* note 58, at 3. Super PACs are often referred to as "independent expenditure-only committees." *Id.*

70. See *id.*

71. Gaughan, *supra* note 56, at 760 (citing GARRETT, *supra* note 58, at 3).

72. See *id.* at 761–62. See also ARIZ. REV. STAT. §§ 16-905(A)(1)–(2), (B)(1) (limiting individual's contribution to a candidate); §§ 16-905(A)(3)–(4), (B)(3) (limiting political committee's contribution to a candidate); §§ 16-905(G), (A)(5), (B)(3) (limiting Super PAC's contributions to a candidate); § 16-905(C) (limiting combined total from all political committees other than political parties); § 16-905(D) (limiting nominee's total from political party and all political organizations combined); § 16-905(E) (limiting an individual's total contribution to candidates and committees who give to candidates).

73. Greg Giroux, *Super-PACs Dominate Airwaves with Flood of Negative Commercials*, BLOOMBERG (Jan. 17, 2012), <http://www.bloomberg.com/news/2012-01-18/super-pacs-dominate-airwaves-with-flood-of-negative-commercials.html>.

the \$5.1 million spent on television advertising in South Carolina.<sup>74</sup> Restore Our Future, a Super PAC supporting Mitt Romney's Republican Primary campaign, spent about \$14 million on his behalf in the states that held early primaries and caucuses.<sup>75</sup> Another Super PAC funded Newt Gingrich's campaign with \$11 million in donations; about \$10 million of that total came from one donor, a casino magnate.<sup>76</sup>

The high contributions from Super PACs underscore the extent to which a small, ultra-wealthy group can dominate campaign finance spending and influence the direction of a campaign.<sup>77</sup> Consequently, candidate campaign committees that rely solely on contributions subject to fundraising caps are at a severe disadvantage. Recognizing this financial obstacle, President Barack Obama recanted his public opposition to Super PACs, and his 2012 campaign manager Jim Messina explained their new stance: "[w]e're not going to fight this fight with one hand tied behind our back. . . . With so much at stake, we can't allow for two sets of rules. Democrats can't be unilaterally disarmed."<sup>78</sup>

Clearly, Super PACs have the ability to raise unlimited sums from corporations and wealthy individuals. In turn, they can influence the political debate by crowding out candidate communications and driving up media costs.<sup>79</sup> But these associations are also influential due to their connections: of the forty-nine super PACs that spent more than \$1 million in the 2012 Presidential election, thirty-

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74. *Id.* (according to data from New York-based Kantar Media's CMAG, which tracks political advertising).

75. Dan Eggen, *Super PACs Dominating Republican Presidential Race*, THE WASH. POST, Feb. 20, 2012, [http://articles.washingtonpost.com/2012-02-20/politics/35445239\\_1\\_super-pacs-blue-fund-mitt-romney](http://articles.washingtonpost.com/2012-02-20/politics/35445239_1_super-pacs-blue-fund-mitt-romney).

76. *Id.* The identities of Gingrich's donors came from the group's Federal Election Commission filings. *Id.*

77. See Bill Allison, *Inside Spending: Super PACs, Dark Money Groups Dominated by Political Insiders*, SUNLIGHT FOUNDATION REPORTING GROUP (Jan. 23, 2013), <http://reporting.sunlightfoundation.com/2013/inside-spending-super-pacs-dark-money-groups-dominated-political/>:

The five largest super PACs in terms of expenditures are Restore Our Future, American Crossroads, Priorities USA, the Majority PAC and the House Majority PAC. All are staffed by former officials from all six major party campaign committees: the Republican National Committee, the National Republican Senatorial Committee, the National Republican Congressional Committee, the Democratic National Committee, the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee.

78. Gaughan, *supra* note 56, at 762 (citing Jeff Zeleny & Jim Rutenberg, *Obama Yields in Marshaling of "Super PAC,"* N.Y. TIMES, Feb. 7, 2012, at A1, available at <http://www.nytimes.com/2012/02/07/us/politics/with-a-signal-to-donors-obama-yields-on-super-pacs.html?page-wanted=all&r=0>).

79. Giroux, *supra* note 73.

four of them had connections to former party, campaign, congressional, or executive branch insiders.<sup>80</sup> That is, those now working for Super PACs are former party insiders who served as board members, political directors, fundraisers, or other strategic roles.<sup>81</sup> Furthermore, eleven of the sixteen largest-spending “dark money groups”<sup>82</sup> also enlisted former party insiders.<sup>83</sup> The “dark monies,” which are untraceable funds from anonymous donors, are particularly worrisome as a source of corruption in campaign financing because, unlike Super PACs, the “social welfare nonprofit” recipients are not required to disclose their donors.<sup>84</sup> In an effort to combat the inherent dangers of Super PACs and dark money dollars, states sought to distinguish *Citizens United*.

*D. Montana Attempts to Work Around Citizens United in  
American Tradition Partnership v. Bullock*

The bulk of campaign finance jurisprudence has dealt with federal law. State and local governments, though, also have election regulations, which mainly track federal law. The Montana Supreme Court in *American Tradition Partnership v. Bullock*<sup>85</sup> attempted to distinguish *Citizens United* to save its campaign finance regulation.

During the early 20th Century a number of wealthy, powerful “Copper Barons” controlled most of Montana’s politics through quid pro quo financial transactions with public officials.<sup>86</sup> Montana first passed campaign finance regulations in 1912, known as the Corrupt Practices Act, to break the hold Copper Barons had on the

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80. Allison, *supra* note 77.

81. *Id.*

82. “Dark money groups” are Social Welfare Nonprofit groups that do not disclose their donors. *Id.*

83. *Id.*

84. See Sarah Tory, *Judge Reveals “Dark Money” Donors*, SLATE (Nov. 5, 2012, 3:51 PM), [http://www.slate.com/blogs/the\\_slatest/2012/11/05/western\\_tradition\\_partnership\\_montana\\_judge\\_reveals\\_dark\\_money\\_donors\\_at\\_request.html](http://www.slate.com/blogs/the_slatest/2012/11/05/western_tradition_partnership_montana_judge_reveals_dark_money_donors_at_request.html) (“[T]he bank records illustrate how the cash transferred between dark money groups obscures the original source of the funds. . . . [S]uch groups have been able to exploit gaps between election authorities and the IRS, which effectively enabled social welfare nonprofits to spend millions of anonymous dollars on political campaigns.”).

85. 132 S. Ct. 2490 (2012) (per curiam). When the case was before the Montana Supreme Court, the challenging party’s name was “Western Tradition Partnership.”

86. See Mike Sacks, *‘Citizens United’ Backlash: Montana Supreme Court Upholds State’s Corporate Campaign Spending Ban*, HUFFINGTON POST (Jan. 4, 2012, 11:27 AM), [http://www.huffingtonpost.com/2012/01/04/citizens-united-montana-supreme-court-corporate-spending\\_n\\_1182168.html](http://www.huffingtonpost.com/2012/01/04/citizens-united-montana-supreme-court-corporate-spending_n_1182168.html).



State's legislature.<sup>87</sup> The Act aimed to restrict the amount that corporations and individuals could donate to campaigns by prohibiting corporations from spending general treasury funds to influence the outcome of state elections.<sup>88</sup> In effect, the Montana law was a state-level equivalent to the federal law that *Citizens United's* invalidated.<sup>89</sup> The law still allowed PACs that were separate and segregated from the corporation to contribute to candidates directly or to make independent expenditures, which only contributions from shareholders, employees, or members of a corporation could fund.<sup>90</sup>

After *Citizens United*, American Tradition Partnership, Champion Painting, and the Montana Shooting Sports Association challenged the Montana Act, seeking a declaration that the Act's prohibition of corporate political expenditures violated their speech rights.<sup>91</sup> The Montana state district court ruled that the Montana law was unconstitutional because "*Citizens United* is unequivocal: the government may not prohibit independent and indirect corporate expenditures on political speech."<sup>92</sup>

Defending the law in the Montana Supreme Court, Montana took issue with *Citizens United's* assumption that independent expenditures, unlike contributions to candidates, cannot corrupt elected officials. The Montana Supreme Court noted that the United States Supreme Court invalidated the federal ban on corporate independent expenditures because of a lack of a factual record that independent spending leads to corruption at the federal level.<sup>93</sup> By detailing Montana's checkered political past favoring mining interests, the state sought to distinguish its state law from the federal equivalent.<sup>94</sup> The Montana Supreme Court agreed, noting that Montana voters adopted the Corrupt Practices Act because of the corrupting influence of corporate spending and concluded

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87. See MONT. CODE ANN. § 13-35-227 (2011); *W. Tradition P'ship, Inc. v. Attorney Gen. of State*, 271 P.3d 1, 17 (Mont. 2011) (discussing Montana's history involving the "Copper Kings"—their bribery of public officials, manipulation of state government, and control over local judges in the late 1800s and early 1900s).

88. MONT. CODE ANN. § 13-35-227(1) (2011) ("[A] corporation may not make . . . an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party.")

89. In *Citizens United v. Federal Election Commission*, this Court invalidated a similar federal law, holding that "political speech does not lose First Amendment protection simply because its source is a corporation." 558 U.S. 310, 342 (2010) (internal quotation marks omitted).

90. MONT. CODE ANN. § 13-35-227(3) (2011).

91. *W. Tradition P'ship*, 271 P.3d at 3.

92. *Id.* at 4 ("[T]he district court did not conduct a detailed analysis of the compelling interest question.")

93. *Id.* at 6.

94. *Id.* at 9–11.

that the threat of corruption remains salient.<sup>95</sup> In other words, the court found that the facts of the case mattered. Even if the facts in *Citizens United* were insufficient to show that corporate spending in campaigns corrupts, the facts in this case illustrate that a history of undue political influence amply justified the state's compelling interest in preventing further corruption.

In a five-to-four decision, the Supreme Court issued an unsigned order reversing the Montana Supreme Court's decision.<sup>96</sup> Many commentators assumed that the case would overturn *Citizens United*, and others posited that the "main question" would be "how the court will reverse the Montana decision."<sup>97</sup> The Court briefly reasoned that " 'political speech does not lose First Amendment protection simply because its source is a corporation.' "<sup>98</sup> There could be "no serious doubt" that *Citizens United* applies to the Montana state law.<sup>99</sup> Critics saw the Court's refusal to use *American Tradition Partnership* to overturn *Citizens United* as "disappointing"<sup>100</sup> and a "mistake."<sup>101</sup>

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95. See *id.* at 11–12.

96. See *American Tradition P'ship v. Bullock*, 132 S. Ct. 2490, 2490–91 (2012) (per curiam).

97. Adam Liptak, *Mystery of Citizens United Sequel Is Format, Not Ending*, N.Y. TIMES, June 12, 2012, at A14, available at <http://www.nytimes.com/2012/06/12/us/in-citizens-united-ii-how-justices-rule-may-be-an-issue-itself.html>. See also Eliza Newlin Carney, *Montana Case Could Challenge Citizens United Ruling*, ROLL CALL (Jan. 4, 2012, 10:09 AM), [http://www.rollcall.com/news/montana\\_case\\_could\\_challenge\\_citizens\\_united\\_ruling-211323-1.html](http://www.rollcall.com/news/montana_case_could_challenge_citizens_united_ruling-211323-1.html) ("The Montana ruling gives the Supreme Court justices who voted with the majority in *Citizens United* the opportunity to 'beat a tactical retreat,' election lawyer Trevor Potter said, in the wake of the public outcry and campaign finance controversies that the ruling triggered."); *The Court and Citizens United II*, N.Y. TIMES, Feb. 22, 2012, at A22, available at <http://www.nytimes.com/2012/02/22/opinion/the-supreme-court-and-citizens-united-take-2.html>; David Welna, *'Citizens United' Case Gets Renewed Scrutiny*, NPR (June 18, 2012, 3:04 AM), <http://www.npr.org/2012/06/18/155148102/citizens-united-gets-renewed-scrutiny>; Editorial, *The Court and Citizens United II*, N.Y. TIMES, Feb. 21, 2012, [http://www.nytimes.com/2012/02/22/opinion/the-supreme-court-and-citizens-united-take-2.html?\\_r=0](http://www.nytimes.com/2012/02/22/opinion/the-supreme-court-and-citizens-united-take-2.html?_r=0) ("The Supreme Court has an opportunity to reconsider its disastrous *Citizens United* decision. The justices should take it. The damaging effects of unlimited spending by corporations and unions on elections—honestly examined—should cause the court to overturn or, at the very least, limit that ruling.")

98. *Bullock*, 132 S. Ct. at 2491 (citing *Citizens United*, 558 U.S. at 342) (internal quotation marks omitted).

99. *Id.*

100. Press Release, Rep. Nancy Pelosi (June 25, 2012), <http://www.democraticleader.gov/news/press/pelosi-statement-supreme-court-ruling-upholding-citizens-united> ("[The Court's] disappointing decision to uphold *Citizens United* deals yet another blow to a fundamental American value: that the voices of the people determine the outcome of our elections, not the checkbooks of the few.")

101. Press Release, Brennan Ctr. for Justice, NYU Sch. of Law, *Supreme Court Lets Unlimited Money Stand, Ignores Extensive Record of Corruption* (June 25, 2012), <http://www.brennancenter.org/press-release/supreme-court-lets-unlimited-money-stand-ignores-extensive-record-corruption>.

The *American Tradition Partnership* dissent found that context is relevant: “Given the history and political landscape in Montana, [the Montana Supreme Court] concluded that the State had a compelling interest in limiting independent expenditures by corporations. Montana’s experience . . . casts grave doubt on the Court’s supposition that independent expenditures do not corrupt or appear to do so.”<sup>102</sup>

## II. ARIZONA FREE ENTERPRISE AND PUBLIC FINANCING MATCHING SYSTEMS

*Citizens United* changed the face of election law. But whether a more nuanced or tailored approach that indirectly regulates expenditures might survive under *Citizens United* remains unclear. *Arizona Free Enterprise* answered that question in the negative when the Court struck down a proportional fund-matching system and called into doubt any regulation on expenditures during a campaign.<sup>103</sup> This Part illustrates the goals of proportional fund-matching systems, describes and analyzes the Court’s decision in *Arizona Free Enterprise*, points out the uncertainty of the opinion and its unanswered questions, and, lastly, projects the flawed solutions it invites.

### A. The Need for Proportional Matching

Although public financing is still constitutional, the schemes’ effectiveness is at risk in the face of the floodgate of private money injected into campaigns.<sup>104</sup> One of the primary problems with administering a public financing system is setting the right amount of

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102. 132 S. Ct. at 2491–92 (Breyer, J., dissenting) (internal citations omitted).

103. See *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813 (2011).

104. See Andrew McCarthy, *Just How Much More Money is Being Spent Because of Citizens United? A Lot.*, SLATE (Sept. 25, 2012, 11:57 AM), [http://www.slate.com/blogs/the\\_slatest/2012/09/25/citizens\\_united\\_sunlight\\_foundation\\_78\\_percent\\_of\\_outside\\_spending\\_tied\\_to\\_supreme\\_court\\_ruling\\_according\\_to\\_report.html](http://www.slate.com/blogs/the_slatest/2012/09/25/citizens_united_sunlight_foundation_78_percent_of_outside_spending_tied_to_supreme_court_ruling_according_to_report.html) (“According to the [nonpartisan Sunlight Foundation], super PACs—which came into being following the high court’s decision—have accounted for \$272 million in campaign spending this cycle, while corporations, trade groups, and nonprofits have spent almost \$93 million. Combined, that’s about \$365 million, or nearly double those group’s 2010 totals . . . .”); Kathy Kiely, *Gross Political Product: Outside campaign spending tops 2010 total*, SUNLIGHT FOUNDATION REPORTING GROUP (Sept. 23, 2012, 9:09 PM), <http://reporting.sunlightfoundation.com/2012/gross-political-product-outside-campaign-spending-tops-2010-tota/> (discussing the effects of independent expenditures and the ability of outside groups to run shadow campaigns).

funding for each candidate. If the amount is too little, no candidate will take public funds; it would simply be too large of a handicap. If the amount is excessive, the State risks creating an expensive, wasteful, and politically unpopular program. Fund matching, however, can find the “Goldilocks” amount.<sup>105</sup>

### B. Arizona Free Enterprise *Blocks Direct Matching*

Arizona voters passed the Arizona Citizens Clean Election Act through a ballot initiative.<sup>106</sup> The Act created a voluntary public financing scheme for primary and general elections for state office.<sup>107</sup> Eligibility for public funds was contingent upon raising an initial amount of contributions and accepting a set of restrictions and obligations.<sup>108</sup> If these conditions were met, the candidate was granted an initial allotment of funds.<sup>109</sup> And if a privately financed candidate’s expenditures, combined with the expenditures of independent groups supporting or opposing the privately financed

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105. *Arizona Free Enter.*, 131 S. Ct. at 2832 (Kagan, J., dissenting) (“The difficulty, then, is in finding the Goldilocks solution—not too large, not too small, but just right. And this in a world of countless variables—where the amount of money needed to run a viable campaign against a privately funded candidate depends on, among other things, the district, the office, and the election cycle.”). See generally Andrew Spencer, *Finding “Goldilocks” After Arizona Free Enterprise*, 48 ARIZ. ATT’Y 24, 25 (2012):

Without the matching funds provision, drafters believed, the amount provided to participating candidates may be too low to garner significant participation. Arizona could raise the amount of the public funds given to participating candidates, but doing so risks bankrupting the Clean Elections fund. The solution decided on was matching funds, which allowed Arizona to subsidize at the “Goldilocks” amount: neither too much nor too little to accomplish the goals of public financing. This article explains that Arizona still has options available to find this ‘Goldilocks solution’—even without matching funds.

106. See ARIZ. REV. STAT. ANN. § 16-940 *et seq.* (West 2006 & Supp. 2010). Arizona enacted the Clean Election Act in response to years of corruption surrounding Arizona elections. See Spencer, *supra* note 105, at 26:

From 1988 to 1998, Arizona suffered a national humiliation in the form of one wave of corruption scandals after the next, including “AzScam,” the ethics investigation into the “Keating Five,” and capped by the untimely expulsion of two governors. Newspaper headlines at the time included such sensational lines as “How Much Can Arizona Stand?” and “Baseball Fans Boo Politicians.” It was in the wake of that torrent that Arizona voters enacted the Citizens Clean Elections Act.

107. See ARIZ. REV. STAT. ANN. § 16-940 (2006).

108. See *id.* § 16-946(B) (2012) (requiring the collection of five-dollar qualifying donations); § 16-950 (2006); see also *id.* § 16-941(A)(2) (limiting a candidate’s expenditure of personal funds to \$500); §§ 16-941(A)(3), (4) (requiring adherence to an overall expenditure cap); § 16-953 (requiring the return all unspent public moneys to the State); § 16-956(A)(2) (requiring participation in at least one public debate).

109. See *id.* §§ 16-951(A)(2)–(3), (D) (2006).

candidate, exceeded the initial allotment of state funds to the publicly financed candidate, “equalizing” or matching funds were triggered.<sup>110</sup>

Under the matching funds provision, each additional dollar that a privately financed candidate spends during the primary or raises during a general election results in roughly one dollar in additional state funding to each publicly financed opponent.<sup>111</sup> Once the public financing cap is exceeded, independent groups’ additional expenditures on behalf of a privately funded candidate, or in opposition to a publicly funded candidate, can also trigger dollar-for-dollar matching funds.<sup>112</sup> Matching funds max out at three times the initial authorized grant of public funding to the publicly financed candidate.<sup>113</sup>

Five past and future candidates for Arizona state office challenged the constitutionality of the matching funds provision on First Amendment grounds.<sup>114</sup> The federal district court permanently enjoined the enforcement of the matching funds provision.<sup>115</sup> The Ninth Circuit reversed, finding that the provision imposed only a minimal burden on First Amendment rights because it did not “actually prevent anyone from speaking in the first place or cap campaign expenditures.”<sup>116</sup> The Supreme Court stayed the Court of Appeals’ decision and then reversed.<sup>117</sup>

The Court held that the matching funds scheme “substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment.”<sup>118</sup> The First Amendment “ ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.”<sup>119</sup> Accordingly, laws that burden political speech are subject to strict scrutiny

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110. *Id.* §§ 16-952(A), (B), and (C)(4)–(5) (providing for “[e]qual funding of candidates”).

111. *Id.* § 16-952(A). Less a six percent reduction meant to account for fundraising expenses, so approximately \$0.94 for every dollar the opponent spent. *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2814 (2011) (citing *ARIZ. REV. STAT. ANN.* § 16-952(A) (2006)).

112. *ARIZ. REV. STAT. ANN.* § 16-952(A)–(C).

113. *Id.* § 16-952(E).

114. *See Arizona Free Enter.*, 131 S. Ct. at 2816. Petitioners were Arizona political candidates and two independent expenditure groups that spent money to support and oppose Arizona candidates. *Id.* at 2809. Petitioners challenged the constitutionality of the matching funds provision, arguing that it unconstitutionally penalized their free speech and consequently burdened their ability to exercise their First Amendment rights. *Id.*

115. *Id.* at 2816.

116. *Id.* (quoting *McCormish v. Bennett*, 611 F.3d 510, 513, 525 (9th Cir. 2010)).

117. *Id.* at 2829.

118. *Id.* at 2813.

119. *Arizona Free Enter.*, 131 S. Ct. at 2817 (quoting *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265,

and will only be upheld if the Government can prove the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.<sup>120</sup>

The Court concluded that the Arizona matching funds provision “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.”<sup>121</sup> Even though the provision did not impose a direct cap, it indirectly forced candidates “ ‘to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.’ ”<sup>122</sup> The matching funds provision therefore allows the candidate’s opponents to gain advantages through the direct and automatic release of funds.<sup>123</sup> Moreover, if there were more than one publicly financed candidate, contributions to a privately funded candidate’s campaign would result in a “multiplier effect.”<sup>124</sup> Much of this spending was entirely out of the privately funded candidate’s control because independent expenditure groups could trigger matching funding, which only compounded the problem.<sup>125</sup>

The matching funds provision similarly burdened independent expenditure groups. Each dollar independent groups spent also resulted in one opposition dollar.<sup>126</sup> Even worse, independent expenditure groups did not have the option of opting into a voluntary public financing system.<sup>127</sup> Thus, independent expenditure groups did not have complete autonomy in choosing their message.<sup>128</sup>

The Court rejected arguments that the provision only created more speech.<sup>129</sup> Subsidizing the speech of a publicly funded rival candidate only increases speech in opposition to privately funded

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272 (1971)). “ ‘Discussion of public issues and debate on the qualifications of candidates are integral to the operation’ of our system of government.” *Id.* at 2816–17 (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)).

120. *Id.* at 2817 (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010)).

121. *Id.* at 2817 (2011) (quoting *Davis v. FEC*, 554 U.S. 724, 739 (2008)).

122. *Id.* at 2817 (quoting *Davis*, 554 U.S. at 739).

123. *Id.* at 2819 (quoting *Davis*, 554 U.S. at 739).

124. *Arizona Free Enter.*, 131 S. Ct. at 2819 (the Court later characterizes this problem as a “political hydra of sorts”).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 2820 (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995) (stating that forcing choice contravenes “the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”)).

129. *Arizona Free Entr.*, 131 S. Ct. 2806 at 2820.

candidates, which is a direct consequence of the expenditure group's (or the candidate's) own speech.<sup>130</sup> Burdening the speech of some to increase the speech of others is a concept "wholly foreign to the First Amendment."<sup>131</sup> Nor is this burden analogous to disclosure requirements, which have been upheld,<sup>132</sup> because they do not trigger payouts to rival candidates. The candidate is forced to choose whether or not to speak when speech triggers counter-speech, and that choice is constitutionally problematic.

Nor did the Court find a compelling interest to justify the burden that choice generated.<sup>133</sup> Despite Arizona's purported interest in combating corruption, the Court found that the preeminent purpose was to "level the playing field."<sup>134</sup> The Court has repeatedly rejected this as a legitimate interest.<sup>135</sup> The Court reasoned that the state's purpose could not have been to combat corruption because self-funding in political campaigns actually reduces corruption.<sup>136</sup> Moreover, independent spending is not coordinated with a candidate and also does not encourage corruption.<sup>137</sup> Though public financing is within the government's power to provide, the Court found that this Act went too far.<sup>138</sup> The First Amendment protects speaker sovereignty, and unjustified government restriction on speech cannot overcome the majority's will.<sup>139</sup>

The four dissenting Justices characterized the provision as a subsidy, not a penalty.<sup>140</sup> Because the Act subsidizes speech, the majority's denial of matching funds essentially quashed the publicly funded candidates' speech.<sup>141</sup>

According to the dissent, the primary function of the triggering mechanism is to disburse the appropriate amount of funds to keep publicly funded candidates competitive: too little dissuades candidates from participating and too much wastes taxpayer money.<sup>142</sup> The operation of the matching funds does not burden speech; it

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130. *Id.*

131. *Id.* at 2810 (citing *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)); *cf.* *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244, 258 (1974)).

132. *See* *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010).

133. *Arizona Free Enter.*, 131 S. Ct. at 2825.

134. *Id.* at 2825-26 (citing *Citizens United v. FEC*, 558 U.S. 310, 349-51 (2010); *Davis v. FEC*, 554 U.S. 724, 741 (2008); *Buckley*, 424 U.S. at 56)).

135. *Id.*

136. *Id.* at 2826 (citing *ARIZ. REV. STAT. ANN.* § 16-952 (2010)).

137. *Id.* (quoting *Citizens United*, 130 S. Ct. 876 at 909). The Court accepted that proposition at face value. *Id.*

138. *Arizona Free Enter.*, 131 S. Ct. at 2828.

139. *Id.*

140. *See id.* at 2833 (Kagan, J., dissenting).

141. *Id.* at 2835.

142. *Id.* at 2842. *See also* *Spencer supra* note 105, at 28.

facilitates more speech.<sup>143</sup> The public subsidy, therefore, cannot constitute a burden any more than the lump-sum disbursements upheld in *Buckley v. Valeo*.<sup>144</sup> The dissent also found that a matching funds scheme does not burden speech any more than disclosure rules or contribution limits do, both of which have been upheld.<sup>145</sup>

The dissent also accepted that the Act's purpose was to combat corruption.<sup>146</sup> The Act's text and context (it was passed in response to a political corruption scandal) supported this conclusion.<sup>147</sup> Even if Arizona had an interest in leveling the playing field, nothing says that a law restricting speech demands two compelling interests; it is enough to stand on the corruption interest.<sup>148</sup>

### 1. Comparing the Court's Divide: Libertarian and Egalitarian Views

Both the majority and dissent agree on one thing: more speech is better. Yet they diverge on what constitutionally facilitates more speech. This Part explains the two schools of thought behind the majority's and dissent's reasoning and how public financing either furthers or inhibits speech. This analysis argues that a majority of justices on the Court would support broadcast access cost matching.

The majority adopts a libertarian ideal that absolutely protects speaker sovereignty from government regulation.<sup>149</sup> In support of this approach, the majority adheres to a formalist interpretation of the First Amendment free speech clause.<sup>150</sup> Like a bright-line rule, the majority would likely invalidate legislation that abridges the free exercise of speech without some irrefutable countervailing interest that combats corruption.<sup>151</sup> Despite any well-intentioned purpose for abridging speech or negative consequences from striking down regulations, this approach favors speech in all its forms. This kind

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143. See *Arizona Free Enter.*, 131 S. Ct. at 2833 (Kagan, J., dissenting).

144. *Id.* at 2836–37.

145. *Id.* at 2838.

146. *Id.* at 2841.

147. *Id.* at 2841–42 (citing § 16-940(A) (2006)).

148. *Arizona Free Enter.*, 131 S. Ct. at 2845 (Kagan, J., dissenting).

149. See *id.* at 2828 (majority opinion).

150. For a general analysis of formalist reasoning, see Lawrence B. Solum, *Legal Theory Lexicon 043: Formalism & Instrumentalism*, LEGAL THEORY BLOG [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2005/05/legal\\_theory\\_le\\_1.html](http://lsolum.typepad.com/legal_theory_lexicon/2005/05/legal_theory_le_1.html) (last visited Nov. 9, 2014); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 36 (1992).

151. See generally BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 48–49 (2006); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155 (2006).



of reasoning is skeptical of the imperfect nature of regulations, and campaign finance regulations have been known for their loopholes.

The dissent takes an egalitarian approach.<sup>152</sup> In its view, speech funded through a subsidizing scheme creates more speech overall.<sup>153</sup> Functionalist reasoning, which considers the practical implications of the regulation and the surrounding circumstances, supports this approach.<sup>154</sup> The dissent finds Arizona's solution necessary for the government to respond to the people, *i.e.*, to protect state sovereignty.<sup>155</sup>

## 2. The Majority: Liberated Speech

The majority's every-speaker-for-himself view of the First Amendment is fairly simple: government regulations that affect a speaker's choice to speak or the message of the speech are a burden—they impinge on the freedom to engage in unfettered speech.<sup>156</sup> Absent a direct connection to combating corruption, the regulation is unconstitutional.<sup>157</sup> Accordingly, matching funds runs contrary to “our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open” because the effect indirectly abridges speech.<sup>158</sup>

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152. The dissent applies an egalitarian conception that economic disparities affect the ability of meritorious ideas to receive appropriate reception in the market. *See* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 145 (2010) (“The outcome of *Citizens United* is best explained as representing a triumph of the libertarian over the egalitarian vision of free speech.”).

153. *See Arizona Free Enter.*, 131 S. Ct. at 2834 (Kagan, J., dissenting).

154. For a general analysis of formalist reasoning, *see generally* Lawrence B. Solum, *Legal Theory Lexicon 040: Functional Explanation in Legal Theory*, LEGAL THEORY BLOG, [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2004/06/legal\\_theory\\_le\\_1.html](http://lsolum.typepad.com/legal_theory_lexicon/2004/06/legal_theory_le_1.html) (last visited Nov. 12, 2014).

155. *Arizona Free Enter.*, 131 S. Ct. at 2830, 2846 (Kagan, J., dissenting).

156. *See id.* at 2817 (majority opinion).

157. *See id.* at 2827. This absolutist view is consistent with a literal reading of the First Amendment free speech clause's rule-like language: “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I.

158. *Id.* at 2828–29 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)) (internal quotations omitted). *But see* Conor M. Dowling, Ryan D. Enos, Anthony Fowler, & Costas Panagopoulos, *Does Public Financing Chill Political Speech? Exploiting a Court Injunction as a Natural Experiment*, 11.3 ELECT. L. J. 1 (2012), available at <http://ryanenos.com/papers/DowlingEnosFowlerPanagopoulos.pdf> (“Contrary to the view of the Court, we find no empirical evidence that campaign finance laws chill private political speech. More generally, our analysis demonstrates the value of exploiting court injunctions as natural experiments to assess the causal effects of laws.”).

*i. The Majority's Focus on Choice as a Burden on Complete Autonomy*

The majority focused on the choice of whether or not to speak as a burden on complete speaker autonomy. The majority compared the Arizona law to a law it invalidated in *Davis v. FEC*.<sup>159</sup> *Davis* involved an asymmetrical regulatory scheme that was triggered when an opposing candidate contributed a certain amount of personal funds to his or her campaign.<sup>160</sup> The challenged provision was dubbed the “Millionaire’s Amendment” and was designed to assist candidates who were running against wealthy, self-financed candidates.<sup>161</sup> When the opposing candidate exceeded the limit, the other candidate’s contribution limits were raised to three times the original contribution cap, operating as an indirect cap on personal expenditures.<sup>162</sup> This constituted an “unprecedented penalty,” forcing the wealthy candidate to choose between spending his or her own money to finance his speech and being subjected to discriminatory fundraising limits.<sup>163</sup>

Notably, *Davis* did not involve a public-funding scheme, but the majority nevertheless applied the logic of *Davis* to the matching funds scheme.<sup>164</sup> That the matching funds provision involved public financing for state elections and that *Davis* involved contribution regulations for the United States House of Representatives is apparently immaterial.

Evaluating burdens under public financing schemes and asymmetrical contribution limits should be treated differently, however, because they serve different goals. An asymmetrical regulatory scheme seeks only to ballast an election where one candidate can afford to self-finance, giving him or her a financial advantage. Public financing systems have a broader goal: reducing corruption.<sup>165</sup>

Despite these differences, the majority found that the matching funds scheme is more burdensome because, unlike asymmetrical regulations, the publicly funded candidate or candidates receive a direct release of public money.<sup>166</sup> If there is more than one publicly funded candidate, the amount of money released as a consequence

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159. *Arizona Free Enter.*, 131 S. Ct. at 2818 (stating that “[t]he logic of *Davis* largely controls our approach to this case”).

160. *Davis v. FEC*, 554 U.S. 724, 729 (2008).

161. *See id.* The “Millionaire’s Amendment” was part of the Bipartisan Campaign Reform Act of 2002 (BCRA), 2 U.S.C. § 441a–1(a) (2002).

162. *See Davis*, 554 U.S. 724 at 729.

163. *Id.* at 739–40.

164. *Arizona Free Enter.*, 131 S. Ct. at 2818.

165. *See id.* at 2829–31 (Kagan, J., dissenting). Triggered funds, at most, impose an indirect burden with a choice on the privately funded speaker.

166. *Id.* at 2818–19 (majority opinion).

of his speech is multiplied by the number of publicly funded candidates in the race.<sup>167</sup>

Independent expenditure groups' ability to trigger matching funds was even more troublesome. The matching funds provision makes no distinction between a privately funded candidate's spending and independent expenditure groups.<sup>168</sup> So, even though a privately funded candidate wants to stay below the public cap to prevent matching dollars, an independent expenditure group could trigger the matching funds scheme.<sup>169</sup> In addition, independent expenditure groups do not have the option of public financing, so they must either change their message to not implicate opposing candidates or refrain from speaking to avoid triggering matching funds.<sup>170</sup> This choice abridges speaker autonomy.<sup>171</sup>

This leaves the absolutist logic of *Davis*. Despite context, any regulation affecting expenditures is a substantial burden for privately funded candidates and independent expenditure groups.

No argument can change the theoretical choice for privately-funded candidates and independent expenditure groups.<sup>172</sup> This approach found support in prior precedent involving laws that compel access for others' speech. For instance, in *Miami Herald Publishing Co. v. Tornillo*, the Court invalidated a "right of reply" law that required any newspaper attacking a political candidate's character to allow that candidate to print a reply in that newspaper.<sup>173</sup> Even though the law sought to advance discussion, it deterred newspapers from printing in the first instance because publication

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167. See *id.* at 2819.

168. See *id.*

169. *Arizona Free Enter.*, 131 S. Ct. at 2819.

170. *Id.* at 2819–20.

171. See *id.* "[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 558 (1995). The majority rejected the characterization of the dissent's view that the plan was as a subsidy, only increasing speech. See *Arizona Free Enter.*, 131 S. Ct. at 2820 n. 6:

The dissent sees 'chutzpah' in candidates exercising their right not to participate in the public financing scheme, while objecting that the system violates their First Amendment rights. . . . The charge is unjustified, but, in any event, it certainly cannot be leveled against the independent expenditure groups. The dissent barely mentions such groups in its analysis, and fails to address not only the distinctive burdens imposed on these groups—as set forth above—but also the way in which privately financed candidates are particularly burdened when matching funds are triggered by independent group speech.

172. See *Arizona Free Enter.*, 131 S. Ct. at 2820.

173. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244, 258 (1974).

operated as a penalty.<sup>174</sup> Similarly, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, the Court invalidated a law that required a utility company to include views the company opposed on its mailings; in effect, the law compelled the speaker to disseminate hostile views.<sup>175</sup> The common theme among these invalidated laws is that they impinged on speaker autonomy.

Finding a burden on speaker autonomy did not require substantiated evidence. The majority simply pointed to the privately financed politicians' briefs for claims that matching funds burdens their speech.<sup>176</sup> Citing the challengers' claims that they were burdened by requiring evidence of a burden is seemingly circular and self-serving, but the majority found it sufficient. It stated the burden is "evident and inherent in the choice that confronts privately financed candidates and independent expenditure groups"<sup>177</sup>; indeed, "it is never easy to prove a negative."<sup>178</sup> Therefore, *Davis* does not require evidence of a burden.<sup>179</sup>

Under this analysis, the Court seems willing to find a substantial burden for any regulation that has an indirect effect on expenditures. Of course, any speaker makes a choice when assessing whether or not to speak because taking a stance on an issue invites public comment and critique.

*ii. The Burden Must Have a Direct Connection  
to Combating Corruption*

The majority also did not find a compelling state interest to justify the burden.<sup>180</sup> The burden imposed on candidates expending

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174. *Id.* at 256–57.

175. *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 12–13 (1986).

176. *See Arizona Free Enter.*, 131 S. Ct. at 2822 (citing App. 567 (Rick Murphy), 578 (Dean Martin); App to Pet. for Cert. in No. 10-239, at 329 (John McCormish), 300 (Tony Bouie)). It is not surprising that each of the parties challenging the law claimed that they were burdened or injured because they decided not to speak in opposition to a candidate or they changed their campaign strategy.

177. *Id.* at 2823; *cf. Davis v. FEC*, 554 U.S. 724, 738–40 (2008).

178. *Arizona Free Enter.*, 131 S. Ct. at 2823 (citing *Elkins v. United States*, 364 U.S. 206, 218 (1960)). While that language is certainly helpful, the dicta comes from a 1960 Supreme Court case involving the interception and divulging of telephone communications. *See Elkins*, 364 U.S. 218.

179. *See Arizona Free Enter.*, 131 S. Ct. at 2823 (citing *Davis*, 554 U.S. at 738–40).

180. *Id.* at 2824–28. The majority was unwilling to accept the proffered anti-corruption rationale when the Act itself stated an interest in "[e]qual funding of candidates." *Id.* at 2825. *See ARIZ. REV. STAT. ANN.* § 16-952 (2010) (providing for "[e]qual funding of candidates"); *id.* § 16-952(C)(4), (5) (characterizing matching funds as "equalizing funds"). The majority noted, however, that there was debate between the parties as to what the actual compelling interest was. *See Arizona Free Enter.*, 131 S. Ct. at 2824.

their own funds could not legitimately further anti-corruption interests.<sup>181</sup> Like in *Davis*, relying on personal funds reduces the need to seek contributions and, thus, reduces any risk of quid pro quos.<sup>182</sup> But public financing is a viable method to prevent quid pro quos; privately financed candidates rely on contributions, unless their campaign is entirely self-funded. The majority addresses this issue narrowly, looking only at the connection between the indirect burden and the spending of the candidate's funds. Further, if campaigns for public office favor wealthy, self-funded candidates, campaign finance law would appear to favor the wealthy minority and disconnect the general public from its government. This favoritism is equatable with the appearance of corruption: if the relationship between a candidate and the issues of the people is altered due to contributions or personal wealth gained in the corporate marketplace, the relationship is corrupted.<sup>183</sup>

The majority also found that independent group expenditures could give rise neither to corruption nor to the appearance of corruption.<sup>184</sup> Independent expenditures are exactly that: *independent* and uncoordinated. Therefore, they do not generate quid pro quo arrangements.<sup>185</sup> This view fails to address the influence that an independent expenditure group may have on public debate through market saturation and, consequently, through what issues dominate political debate. While not corruption per se, influence can certainly give rise to the appearance of corruption.<sup>186</sup>

The majority relies on contribution limits, disclosure requirements, and the availability of public funding in general to show that

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181. *Id.* at 2826.

182. *Id.* at 2826–27. *See Davis*, 554 U.S. at 740–41 (stating that “reliance on personal funds reduces the threat of corruption”).

183. *Cf.* LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 16 (2011) (providing the illustrative analogy that “[i]t is perfectly accurate to say that if the relationship between the doctor and the drug company affected the objectivity of the doctor, then the relationship ‘corrupted’ the doctor”).

184. *See Arizona Free Enter.*, 131 S. Ct. at 2826–27 (citing *Citizens United v. FEC*, 130 S. Ct. 876, 909–11 (2010)).

185. *Id.* at 2826–27 (citing *Citizens United*, 130 S. Ct. at 876, 910).

186. *See* Steven J. Andre, *Government Election Advocacy: Implications of Recent Supreme Court Analysis*, 64 ADMIN. L. REV. 835, 894 n. 291 (2012):

The corruption basis for the Arizona legislation was framed two different ways by the Court: as a means of maintaining a level playing field and as a device for preventing situations where campaign capital can purchase political fealty. . . . The dissent in *Arizona Free Enterprise* observed that even where actual quid pro quo does not result from large private contributions, the public's confidence in the process is undermined by the perception that corrupt bargains are the product of such monetary assistance to a faction in the election contest.

sufficient anti-corruption measures are in place.<sup>187</sup> While contribution limits and disclosure requirements support anti-corruption efforts, the availability of public financing directly furthers those efforts. Notably, contribution limits and disclosure requirements alone did nothing to prevent the worst political scandal in Arizona's history, hence Arizona's effort to improve the public financing scheme.<sup>188</sup>

### 3. The Dissent: Battling Corruption through Subsidy

The dissent found that when privately and publicly funded candidates are equal, more speech is produced.<sup>189</sup> In addition to creating more speech, equality provides an incentive for candidates to opt into public funding, further reducing the risk of corruption.<sup>190</sup> Under this view, the success of the matching funds system promotes the First Amendment's core purpose: self-governance and " 'uninhibited, robust, and wide-open' debate on public issues."<sup>191</sup>

The dissent took a holistic view of matching fund provisions.<sup>192</sup> Corruption goes beyond quid pro quo to "bundl[ing] campaign contributions" to escape contribution limits and "special interest" influence on elected officials.<sup>193</sup> In addition, while eradicating these types of corruption, the matching funds system promotes democratic self-governance, "foster[s] a healthy, vibrant political system full of robust . . . debate," and enhances the " 'opportunity for free political discussion to the end that government may be responsive to the will of the people.' "<sup>194</sup> The First Amendment should not prevent the State from achieving a clean government, a goal fully

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187. *Arizona Free Enter.*, 131 S. Ct. at 2828.

188. See generally Dan Nowicki, *Arizona political scandals back in focus with investigations: Recent probes hurt state's image, stir public distrust*, ARIZONA REPUBLIC (May 19, 2012), <http://www.azcentral.com/arizonarepublic/news/articles/20120519arizona-political-scandals.html> (giving an overview of AzScam's bribes-for-votes scandal in the early 1990's and Arizona's other political controversies).

189. *Arizona Free Enter.*, 131 S. Ct. at 2829 (Kagan, J., dissenting).

190. *Id.*

191. *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). The dissent described a scenario in which there are two states with widespread corruption. One State enacts existing campaign regulations through campaign contribution limits, disclosure requirements, and a fixed-amount public campaign financing scheme. The other State realizes that the existing campaign mechanisms do not work, so they enact a system similar to that of the Arizona Clean Elections Act. Not surprisingly, the second State becomes corruption-free.

192. See *id.* at 2829–30.

193. *Id.* at 2829–30.

194. See *Arizona Free Enter.*, 131 S. Ct. at 2830 (Kagan, J., dissenting).

consistent with the First Amendment's core values. This view advocates for a system that prevents a monopolization of means to communicate with the electorate.

*i. The Dissent's Contextual Analysis of the Purpose of Public Financing in Arizona*

Public financing's overarching goal is to "prevent massive pools of private money from corrupting our political system."<sup>195</sup> Public financing is also the most effective means of preventing corruption because publicly funded candidates are "beholden [to] no person and, if elected, should feel no post-election obligation toward any contributor."<sup>196</sup> The dissent wanted to support this goal by upholding campaign finance subsidies, which "almost one-third of the States . . . [and] the Federal Government for presidential elections" have adopted.<sup>197</sup>

But lump-sum grants of public money are inefficient.<sup>198</sup> They do not provide an adequate incentive to opt in while conserving public resources at the same time.<sup>199</sup> A public financing scheme with no participants is worthless.<sup>200</sup> The dissent found that the matching funds scheme was the "Goldilocks solution"<sup>201</sup>—that is, just the right amount—to effectively reduce corruption.

The dissent pointed to the inadequacy of the lump-sum payment and of the traditional, *Buckley*-approved anti-corruption measures that Arizona originally enacted.<sup>202</sup> The "modest adjustments" to Arizona's public financing, the dissent argued, do not substantially burden speech, and they serve a compelling state interest in combating corruption.<sup>203</sup>

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195. *Id.* at 2830.

196. *See id.* (quoting *Republican Nat. Comm. v. FEC*, 487 F. Supp 280, 284 (S.D.N.Y. 1980), *aff'd* 445 U.S. 955 (1980)).

197. *Id.* at 2830 (citing R. Garrett, *Congressional Research Service Report for Congress, Public Financing of Congressional Campaigns: Overview and Analysis* 2, 32 (2009)).

198. *Id.* at 2831.

199. *Arizona Free Enter.* 131 S. Ct. at 2831 (Kagan, J., dissenting); *see id.* at 2831, n. 1 (noting that in the last presidential election cycle, President Obama raised \$745.7 million in private funds while the public financing allotment remained at \$105.4 million).

200. *Id.* at 2831 (asserting that "[a] public financing system with no participants does nothing to reduce the existence or appearance of quid pro quo corruption"); *see Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 611 F.3d 510, 527 (9th Cir. 2010), *rev'd sub nom.*

201. *Arizona Free Enter.*, 131 S. Ct. at 2832 (Kagan, J., dissenting).

202. *Id.* After the enactment of these anti-corruption measures, Arizona suffered its "worst public corruption scandal in history." *Id.* (citing Brief for State Respondents 1).

203. *Id.* at 2833.

*ii. The Dissent Finds a Small Burden*

The dissent disagreed with the majority's characterization of the matching funds scheme as a restriction. Rather, it argued that matching funds was a subsidizing scheme because it did not "limit," "bar," or "restrain[ ]."<sup>204</sup> In fact, a subsidy can never amount to a "restraint" because it "impose[s] no ceiling on [speech] and do[es] not prevent anyone from speaking."<sup>205</sup>

The difference between restrictions and subsidies is relevant. "There is a basic difference . . . between direct state interference with First Amendment protected activity and state encouragement."<sup>206</sup> The dissent validated the distinction by looking at the result from an "ordinary citizen[']s" perspective.<sup>207</sup> From this perspective, more debate, not less, would seem to support the electorate's interests in an election, thus enhancing First Amendment values. Yet the First Amendment subsidy cases the dissent cited involve neither elections nor political speech.

The dissent was also skeptical that matching funds imposes a "substantial burden" on either privately funded candidates or independent expenditure groups.<sup>208</sup> The dissent viewed a burden as something more than diminishing the effectiveness of a candidate's expression or deterring a candidate from spending money; a burden, rather, amounted to a coercive penalty on speech.<sup>209</sup> Thus according to the dissent's analysis, responsive speech, competitive speech, and debate do not amount to First Amendment injury because they do not restrict speech. The opportunity to test an idea in the marketplace of ideas is a benefit—perhaps for the speaker, but most certainly for the electorate.<sup>210</sup>

The dissent listed three reasons why the burden is not substantial. First, the lump-sum model imposed a similar burden.<sup>211</sup> Second, like disclosure requirements, the deterrent effect did not

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204. *Id.* at 2932.

205. *Id.* at 2833 (citing *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010)). In this characterization, the dissent does not consider whether the practical effect of the law is that it operates as a restraint. Rather, it finds the majority's argument merely semantics. For an approach that largely relies on the effects and consequences of laws, the dissent seems to side-step them here.

206. *Arizona Free Enter.*, 131 S. Ct. at 2834 (Kagan, J., dissenting) (citing *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)) (quoting *Maher v. Roe*, 432 U.S. 464, 475, (1977)).

207. *Id.* at 2835.

208. *Id.* at 2836 & n.5.

209. *See id.* at 2836–37.

210. *Id.* at 2837.

211. *See Arizona Free Enter.*, 131 S. Ct. at 2837–38 (Kagan, J., dissenting).



impose a ceiling on electoral expression.<sup>212</sup> Third, the burden did not exceed the burden on contribution limits.<sup>213</sup>

The degree of burden is inherently subjective and undefined when comparing public financing, disclosure requirements, and contributions. Despite the different constitutional treatment for each category, the dissent found the corresponding burdens were the same. Accordingly, a publicly funded dollar, a disclosed contribution dollar, a contribution dollar, and an expenditure dollar have effectively the same burden. The quantifiable nature of money makes speech quantifiable when money is equated with speech. Under *Buckley*, contribution limits, expenditure limits, disclosure requirements, and public funding offered different countervailing interests; *Buckley* was not decided under a qualitative analysis of the burden in each category.<sup>214</sup>

The dissent also distinguished *Davis*.<sup>215</sup> The link between the two cases was that one candidate's expenditures triggered "something": asymmetrical contribution limits in *Davis*, and matching funds in Arizona's scheme.<sup>216</sup> The dissent found the differences with *Davis* more relevant. Whereas *Davis* involved a discriminatory speech restriction, the Arizona scheme involved non-discriminatory speech subsidies. Therefore, if subsidies do not amount to restrictions, *Davis* should not control. Certainly, the question presented in *Davis* asked whether campaign contribution limits for candidates were constitutional.<sup>217</sup> Moreover, *Davis* did not call into question the trigger mechanism itself.<sup>218</sup>

In short, the restriction/subsidy distinction made the difference to the dissent. Because a subsidy does not operate to restrict speech, the subsidy's consequence to a speaker cannot amount to the same substantial burden that a restriction imposes. The greatest weakness of this analysis, however, was that prior subsidy cases did not involve elections.

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212. See *id.* at 2838.

213. See *id.*

214. See *Buckley v. Valeo*, 424 U.S. 1, 24–25 (1976) (per curiam) (stating that contribution limits should be analyzed under the closest scrutiny); *id.* at 44–45 (stating that expenditure limits should be analyzed under exacting scrutiny); *id.* at 64–65 (stating that disclosure requirements should be analyzed under exacting scrutiny); *id.* at 94 (stating that "access to the electoral process must survive exacting scrutiny") (*Buckley* was not decided under a qualitative analysis of the burden in each category).

215. See *Arizona Free Enter.*, 131 S. Ct. at 2839 (Kagan, J., dissenting).

216. See *id.*

217. See *Davis v. FEC*, 554 U.S. 724, 728 (2007) (stating that "[i]n this appeal, we consider the constitutionality of federal election law provisions that . . . impose different campaign contribution limits on candidates").

218. *Arizona Free Enter.*, 131 S. Ct. at 2840 (Kagan, J., dissenting).

*iii. The Dissent's Deference to State Interests in Combating Corruption*

The public financing system also serves to combat corruption, so a more effective public financing scheme further eliminates improper influence through contributions.<sup>219</sup> The dissent also afforded more deference to the findings in the Act.<sup>220</sup> Arizona's interest justified matching funds because the effectiveness of Arizona's public financing program depended on it.<sup>221</sup> Matching funds was, therefore, necessary to set a competitive yet efficient amount.<sup>222</sup>

The Court was not willing to compromise constitutional principles for efficient legislation. Procedural due process, for example, relies on a fairness rationale and not an economic rationale. Indeed, the Court has stated that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."<sup>223</sup> Furthermore, from a principled and prospective standpoint, the risk of undermining individual liberties for efficiency's sake could lead down a slippery slope.<sup>224</sup>

219. *See id.* at 2842–43.

220. The dissent calls the majority's finding a "denigration" of Arizona's primary interest in "protecting the strength and integrity of its democracy" through anti-corruption efforts. *Id.* at 2841. These findings plainly state the intended purpose was to improve the existing private fundraising system that had led to the corruption scandal by improving communication between candidates and voters. *Id.* at 2842 n.10 (citing the legislative findings). In addition, looking at the events that preceded this Act, the dissent finds Arizona's interest sincere. According to the dissent, the majority's attempt to supplant Arizona's interest with its own determination of what its interest is was improper for the Court. *Id.* at 2843. But evaluating the sincerity in state interests is certainly something the Court has done in the past, and ex-post rationales rarely survive. *Id.* at 2843–44. But evaluating the sincerity in state interests is certainly something the Court has done in the past, and is a practice that members of the majority have mocked. *Id.* at 2844 (citing *Sullivan v. Finkelstein*, 496 U.S. 617, 631–32 (1990) (Scalia, J., concurring in part)); *United States v. Hayes*, 555 U.S. 415, 434–35 (2009) (Roberts, C.J., dissenting). The dissent's focus on the text, however, makes clear that this is not an ex-post rationale. *Id.* at 2841–42.

221. *Id.* at 2845.

222. The dissent then notes that the majority's argument that Arizona's system does not sufficiently justify the mechanism lacks any reasoning. Efficiency arguments, however, have failed in the past. *See Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) ("[T]he First Amendment does not permit the State to sacrifice speech for efficiency."). *Compare Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (invalidating the negative "legislative veto"), *with id.* at 967 (White, J., dissenting) (arguing that the legislative veto in our "contemporary legislative system" is central in preserving accountability in Congress).

223. *Chadha*, 462 U.S. at 944.

224. *But see* James A. Gardner, *Anti-regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope*, 20 CORNELL J.L. & PUB. POL'Y 673 (2010) (Symposium: *Citizens United v. Federal Election Commission: Implications for the American Electoral Process*) (arguing that the Court's fear of a slippery slopes and adherence to absolutism is unnecessarily rigid).

The dissent then noted that any resulting equalization is simply an effect of implementing anti-corruption measures.<sup>225</sup> Even accepting that Arizona had an interest in “equaliz[ing] electoral opportunities,” the dissent found that it would not matter, so long as the state had a legitimate interest in combating corruption.<sup>226</sup> There is no “rule of automatic invalidation” if a statute is also related to equality; there is no prohibition against two compelling interests.<sup>227</sup>

In sum, the dissent’s approach would find that the subsidy furthers Arizona’s interest in a robust, corruption-free public financing program. The options available to Arizona were already found inadequate, so by tweaking the disbursement mechanism the dissent found that the system was even more effective in furthering First Amendment values.

### C. Arizona Free Enterprise’s Impact and Open Questions

With Arizona’s matching funds scheme invalidated, campaign finance regulations may not affect any expenditures. Money will therefore continue to play an influential role in elections.<sup>228</sup> Money is problematic in elections because it controls access to candidates. This distorts the public’s access to information and, as a consequence, their electoral choices. Therefore, candidates with the most uncoordinated support from the wealthy minority have a significant advantage, as well as an incentive to run on a pro-donor platform.<sup>229</sup> Publicly funded candidates, on the other hand, have a disincentive to accept public financing or to run at all. Consequently, corporate influence, amplified through PACs and super PACs, will appear to control candidates or issues—bordering on coercion, if not corruption—through their access to and domination of political advertising.<sup>230</sup>

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225. See *Arizona Free Enter.*, 131 S. Ct. at 2844 (Kagan, J., dissenting).

226. *Id.* at 2845.

227. *Id.*

228. See R. Sam Garrett, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress*, 22–23 (2011) (forecasting growing spending on elections).

229. See, e.g., Richard L. Hasen, *Rich Candidate Expected to Win*, SLATE (Mar. 25, 2011), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/03/rich\\_candidate\\_expected\\_to\\_win\\_again.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/03/rich_candidate_expected_to_win_again.html) (forecasting the Supreme Court’s outcome in *Arizona Free Enterprise*, and *McCormish v. Bennett*, the case consolidated with *Arizona Free Enterprise*).

230. This is what parodist news reporter Stephen Colbert refers to as a “megaphone made of cash.” Andrew Miga, *Comedian Colbert seeking ‘megaphone made of cash’*, THE WASHINGTON TIMES (May 13, 2011), <http://www.washingtontimes.com/news/2011/may/13/comedian-colbert-seeking-megaphone-made-of-cash/>; see Stephen Colbert’s Colbert Super PAC,

Campaign finance reform and campaign finance jurisprudence have moved in opposite directions. Today, elections are already heavily regulated, and new legislation continues to be proposed in this area.<sup>231</sup> The motivations behind campaign legislation are to combat corruption and, what the public perceives as, the ever-growing influence of “special interests.” The general electorate seems to equate these “special interests” with corruption. The Court’s adherence to formalist principles makes it difficult to develop regulations because the framework for doing so froze under *Buckley*. Furthermore, the Court has been on a mission to protect speech and speakers absolutely, despite countervailing interests and the changing nature of elections. But under *Arizona Free Enterprise*, the Court has not decided whether there is room to tailor the competitive financing mechanisms to impose a lesser burden in the interest of combating corruption or even the possibility of any other countervailing interest. Ultimately, these attempts are likely futile.<sup>232</sup> Tailoring the burden by changing the triggered amount asks for arbitrary line drawing, and no interest other than corruption seem viable even though *American Tradition Partnership* sets a high bar by showing that it is a legitimate countervailing interest.

### III. PUBLIC CANDIDATE FUNDING THROUGH BROADCAST ADVERTISING ACCESS COSTS

*Citizens United* and *Arizona Free Enterprise* put campaign finance jurisprudence on a new trajectory. In combination, these decisions, establishing a libertarian doctrine of speech in campaigns, exempt speech (and thus expenditures) from most regulation. With public financing schemes that provide one-to-one matching to privately-spent dollars invalidated, any matching scheme that might pass under *Arizona Free Enterprise* must not directly connect to private spending. Instead, the dispersing mechanism must target the actual harm that results from *Citizens United* (a harm the Court previously

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*Making a Better Tomorrow, Tomorrow*, <http://www.colbertsuperpac.com> (last visited December 2, 2011). See also Lessig, *supra* note 183, at 8.

231. See, e.g., Fair Elections Now Act, H.R. 1404, 112th Cong. (2011).

232. The majority also stated that it was the triggering itself that was problematic, not the amount. *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2824 (2011); see also *id.* at 2823 (citing *Davis v. FEC*, 554 U.S. 724, 738-40 (2007)) (“As in *Davis*, we do not need empirical evidence to determine that the law at issue is burdensome.”). Furthermore, considering the Court’s treatment of Montana’s attempts to distinguish *Citizens United* based on factual distinctions, it is unlikely the Court will abandon its formalist stance. See *supra* notes 85–102 and accompanying text (Part I.D, discussing the Court’s disapproval of factual distinctions to *Citizens United*).

recognized): privately funded candidates or independent expenditure groups monopolizing access to the political advertising market. This Article proposes a new system that correlates the matching funds with the money the privately funded candidate or independent expenditure group spent to buy advertising time. This system would not take into account production costs and would subtract a fixed percentage to account for fundraising costs. Further, it would provide candidates with equal *time*, not equal *money*.

One of the First Amendment's purposes is to produce more speech. This system accomplishes that without attempting to completely "level the playing field" by equalizing candidates' funding. Rather, this system merely equalizes media access, a key electoral principle repeatedly upheld under constitutional review.

But the ability to offer candidates equal time has some notable limitations due to the nature of the advertising purchasing process. Purchasing television advertising time is not a perfect process, and significant variables stand in the way of controlling if, when, and where an advertisement runs. First, there is typically a lag between when advertising time is purchased and when the commercial is sent to the station that will air the advertisement. Second, national advertising has priority over local advertising, and often either air space is not available or national advertisements might displace local advertisements. Third, priority is also given to advertisers who purchase their time first. Finally, advertising costs vary depending on the station and the time the advertisement runs. Consequently, operational obstacles persist, even if how much another campaign spends on advertisements is known.

Regulatory schemes rarely operate in a perfect world, yet this proposed system still has considerable advantages. One advantage is that it increases the efficiency of the matching funds scheme while ensuring that publicly funded candidates are directing public monies toward information aimed at the electorate. The system will likely survive under *Arizona Free Enterprise* because it imposes a less direct and less substantial burden on privately financed candidates or groups without requiring any arbitrary line drawing. Moreover, this system can rely on existing case law involving First Amendment challenges to federal telecommunications law. The relevant telecommunications law provisions include 47 U.S.C. § 315(a),<sup>233</sup> the "equal opportunity" provision for broadcasters, and 47 U.S.C.

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233. 47 U.S.C. § 315(a) (2012) ("If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.").

§ 312(a)(7),<sup>234</sup> the “reasonable access” requirement. Underlying these provisions is the broadcast policy of promoting the public interest under the Fairness Doctrine.<sup>235</sup> While these cases focus on the burden placed on broadcasters, rather than third party independent expenditure groups, they provide useful precedent in support of speech-maximizing statutes involving broadcast media. Such an approach marries the compelling interest in combating corruption to the long-recognized substantial interest in informing the citizenry.

This Part first connects democratic political theory, the importance of speech and information in the democratic process, to the role political campaign television advertisements play in fulfilling self-governance principles. Next, this Part illustrates the mechanics of the broadcast access cost matching system. Then, this Part provides an overview of relevant telecommunications law and policy involving political speech during campaigns as well as the underlying doctrines that justify subsidizing opposing candidates’ speech through broadcast media access costs. Finally, this Part reviews the system using the analyses of the *Arizona Free Enterprise* majority and dissent. At the very least, this proposal answers the *Arizona Free Enterprise* majority’s concerns regarding the burden inherent in one-to-one matching schemes and offers an additional interest to justify regulation. Moreover, the proposal takes up the dissent’s argument that incremental fund matching warrants a subsidy analysis. This approach sharpens and clarifies that argument by drawing parallels to telecommunications doctrines, placing the analysis more firmly in the electoral context.<sup>236</sup>

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234. 47 U.S.C. § 312(a)(7) (2012) (“for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy”).

235. See 47 C.F.R. § 73.1910 (1985); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 376–77 (1969).

236. See *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2821–22, 2822 n.9 (2011) (citation omitted):

In disagreeing with our conclusion, the dissent relies on cases in which we have upheld government subsidies against First Amendment challenge, and asserts that “[w]e have never, not once, understood a viewpoint-neutral subsidy given to one speaker to constitute a First Amendment burden on another.” But none of those cases—not one—involved a subsidy given in direct response to the political speech of another, to allow the recipient to counter that speech. And nothing in the analysis we employed in those cases suggests that the challenged subsidies would have survived First Amendment scrutiny if they were triggered by someone else’s political speech.

A. *The Importance and Influence of Campaign Advertising  
in American Democracy*

The United States' federal government and state governments maintain their self-governance through a democracy. This ideal is rooted in the United States' concept of an open society.<sup>237</sup> For citizenry to have a meaningful choice in the political process, free political expression is vital.<sup>238</sup> Accordingly, speech concerning public affairs is at the "core" of protected speech under the First Amendment, having its fullest and most urgent application to speech uttered during a campaign for political office.<sup>239</sup> This "assurance[s] [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."<sup>240</sup> Indeed, "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sake[ ]; it has a *structural* role to play in securing and fostering our republican system of self-government."<sup>241</sup>

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237. See generally RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 220–39 (1992) (arguing for absolute freedom of speech and against any censorship of expenditures, even by corporations, because speech is connected to every facet of modern society and humanity's self-determination).

238. See *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) ("For speech concerning public affairs is more than self-expression, it is the essence of self-government."). See also *Whitney v. California*, 274 U.S. 357, 375 & n.2 (1927) (Brandeis, J. concurring):

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

239. *Arizona Free Enter.*, 131 S. Ct. at 2817. ("[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.") (citing *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))).

240. *Roth v. United States*, 354 U.S. 476, 484 (1957). Furthermore, the freedom of speech grants the liberty to discuss publicly all matters of public concern without restraint or fear of punishment:

The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.

*Id.* at 488.

241. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring). See generally Brian C. Murchison, *Speech and the Self-Governance Value*, 14 WM. & MARY

For the electorate to fulfill its role in self-governance, participation is critical. Mere participation, though, is insufficient because the electorate must also be informed and educated about their governing options, hence “self-governance.” Political scientists have noted abysmally low participation levels in United States elections.<sup>242</sup> Despite those numbers, however, the American democratic system has remained relatively stable.<sup>243</sup>

The omnipresent nature of modern broadcast media<sup>244</sup> has significantly promoted the “American aspiration of deliberative democracy” that is rooted in the ideal of self-governance.<sup>245</sup> This medium is effective in informing citizens on public issues, which they can then use to make reasoned judgments, thus enhancing the democratic decision-making process.<sup>246</sup> “[T]he demand for deliberation has been a familiar theme in the American constitutional tradition. It is integral to the ideal of republican government as the Founders understood it. James Madison judged the design of political institutions in part by how well they furthered deliberation.”<sup>247</sup>

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BILL RTS. J. 1251, 1255–72 (2006) (providing a substantive account of the value of self-governance). Brian Murchison surveys and compares different legal perspectives, from colonial times to the present, of the different aspects of the civic personality that free speech advances.

The traditional model of the substantive account of self-governance thus combines elements of survival (Hamilton), integrity (Brandeis), membership (Brennan), and power (Powell). It imagines the citizen from perspectives of being and doing: the inherent value of the person as a citizen relates to the second and third elements, and the capacity for action affecting the world relates to the first and fourth. Expression embodies the citizen’s fundamental dignity as participant in public matters, and the state’s tolerance embodies its grasp and appreciation of that dignity. Freedoms of speech and press also mark out a citizen’s range of action, facilitating leverage over the political process, and bolstering the individual’s ability to resist state action when necessary.

*Id.* at 1267.

242. Cf. Paul Freedman, Michael Franz & Kenneth Goldstein, *Campaign Advertising and Democratic Citizenship*, 48 AM. J. POL. SCI. 723, 724–25 (2004) (“Americans, in short, fail to meet the dictates of even the most charitable versions of democratic theory.”).

243. See *id.* at 724.

244. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (noting that “the broadcast media have established a uniquely pervasive presence in the lives of all Americans”).

245. Cass R. Sunstein, *Television and the Public Interest*, 88 CALIF. L. REV. 499, 501 n.1 (citing AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 52–94 (1996)); Joshua Cohen, *Democracy and Liberty*, in *DELIBERATIVE DEMOCRACY* 185, 185–231 (Jon Elster ed., 1998)) (arguing for a continuing role for the broadcast market in promoting deliberative democracy). See also Scott London, *Teledemocracy vs. Deliberative Democracy: A Comparative Look at Two Models of Public Talk*, 3 J. INTERPERSONAL COMPUTING & TECH., 33, 33–55 (1995), available at <http://www.scottlondon.com/reports/tele.html> (explaining two concepts of public discourse, teledemocracy and deliberative democracy).

246. Sunstein, *supra* note 245, at 501 n.2 (citing ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION* (1999)).

247. AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 12 (1996).



The most effective means of informing and engaging the electorate is, arguably, through the thirty-second television advertisement.<sup>248</sup> Even the Supreme Court has noted that “[thirty second television advertisements] may be the most effective way to convey a political message.”<sup>249</sup> To be sure, the amount of campaign money spent on advertising in modern elections alone is sufficient to show its importance.<sup>250</sup>

Political television advertisements have “the potential to bring about a more attentive, more informed, and more participatory citizenry.”<sup>251</sup> A television advertisement has the unique ability to coat information with emotional content and deliver that information in an appealing and entertaining way.<sup>252</sup> Exposure to political advertising has been shown to produce a more informed and knowledgeable citizenry.<sup>253</sup> In addition, engagement and interest with candidates and campaigns are elevated with increased exposure to advertisements.<sup>254</sup>

Based on the strong effect campaign advertising can have, an imbalance in access to this medium can put one candidate at a significant disadvantage. In a relatively even-matched campaign, even a marginal advantage can have significant effects because campaigns are often decided in the margins.<sup>255</sup> The ability, then, for privately funded candidates or independent expenditure groups to effectively quash speech can more than affect the margins in an election; that ability can undermine self-governance.

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248. See Freedman et al., *supra* note 242, at 723; STEVEN WALDMAN, WORKING GROUP ON INFO. NEEDS OF CMYTS., THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE 72–78 (2011), available at [http://transition.fcc.gov/osp/inc-report/The\\_Information\\_Needs\\_of\\_Communities.pdf](http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf).

249. *Citizens United v. FEC*, 558 U.S. 310, 364 (2010) (citing *McConnell*, 540 U.S. at 261 (Scalia, J., concurring in part, dissenting in part)) (“Evidently, however, these ads do persuade voters, or else they would not be so routinely used by sophisticated politicians of all parties.”). See also *McConnell v. FEC*, 251 F. Supp. 2d 176, 646–47 (D.D.C. 2003) (comparing broadcast advertising to direct mail and noting that “there is no evidence that direct mail has reached the degree of effectiveness as broadcast advertising”).

250. See, e.g., Katy Bachman, *Political TV Ads Shatter Records, It's Not Over Yet*, ADWEEK, (Oct. 24, 2012), <http://www.adweek.com/news/advertising-branding/political-tv-ads-shatter-records-144746>; *Mad Money: TV Ads in the 2012 Presidential Campaign*, WASH. POST (Nov. 14, 2012), <http://www.washingtonpost.com/wp-srv/special/politics/track-presidential-campaign-ads-2012/>.

251. Freedman et al., *supra* note 242, at 723.

252. *Id.* at 725.

253. See *id.* at 730–31.

254. See *id.* at 731–32.

255. *Id.* at 734–35.

*B. Tailoring Matching Funds*

Properly structured public campaign financing systems remain constitutional after *Arizona Free Enterprise*, which expressly noted “[w]e do not today call into question the wisdom of public financing as a means of funding political candidacy.”<sup>256</sup> Instead, *Arizona Free Enterprise* imposed constitutional parameters on the scope of a public campaign finance system; that measure of that scope remains an open question. The Court invalidated a proportional matching fund scheme on the grounds that it presented a substantial burden on speech. While a lower ratio of funding would lower this burden, most funding reductions would appear arbitrary and would likely do little to address the Court’s concerns. A matching system based on media access costs would instead accomplish a reasoned reduction that would not impair the efficiency inherent to a fund matching system. Moreover, it provides a solution for defenders of such matching funds schemes that satisfies the necessary constitutional requirements. Mere access does not burden speech to the degree necessary to violate *Arizona Free Enterprise* because the amount spent to produce the speech is not equalized.

After the initial dispersal of funds, an election board can institute a matching system based on the proportionality of broadcast media access. There are two distinguishing aspects to this proposed system. First, the dispersed funds would not include the production costs of advertisements. Second, the media access costs to third parties would be higher than those to candidates on a per-time basis. In order to equalize access, candidates need only receive enough money to buy equal time at their discounted rate. Thus, money privately financed candidates or independent expenditure groups spent to purchase advertising time triggers the release of money for publicly funded candidate to purchase equal advertisement time. Accordingly, candidates will receive a discounted amount for purchasing media time; that is, total media costs minus production costs, with access costs discounted to candidate rates.

At present, campaigns spend a great majority of their media budget on local television broadcasting.<sup>257</sup> Broadcast stations have

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256. *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828 (2011).

257. See Michael Wolff, *Give Campaign Ads Free TV Time*, USA TODAY, Oct. 22, 2012, <http://www.usatoday.com/story/money/business/2012/10/21/michael-wolff-campaign-ads/1643949/>. More than \$3 billion spent on political advertising in the 2012 election year, with most of the money spent on local television advertisements. *Id.*

repeatedly been singled out as the main beneficiaries of the electoral media slog.<sup>258</sup> “Broadcast television, with its vast audience and quick reach, is not only the most expensive option . . . but its use most efficiently perpetuates a seesaw effect. One candidate’s media buy must be balanced by another candidate’s media buy.”<sup>259</sup> Recognizing the great power of broadcasters possess, Congress has created restrictions to ensure that no candidate receives a media monopoly based on backroom deals with media companies.<sup>260</sup> Of course, the overriding fear is that, in a post-*Citizens United* world, corporations may use money to construct a political monotone that access rules otherwise prohibit. In other words, privately financed candidates or independent expenditure groups’ market saturation will make publicly financed candidates less competitive and “quash” speech, distorting the electoral process.<sup>261</sup> Courts could, however, employ First Amendment case law involving telecommunications law and policy to prevent such an event. While the FCC has relaxed these rules recently, case law establishes important precedent for speech-maximization through equalization of media access.

*C. Crafting a Doctrine for Reasonable Media Access: Fairness  
and the First Amendment*

The constitutional authority to provide matching access costs is found in existing statutory law governing broadcasters and campaign advertising and its underlying policies. These laws and policies have always had First Amendment implications. Thus, by enhancing the policies underlying these laws, a matching access cost system could potentially survive exacting scrutiny by reducing the burden on speakers and providing an additional compelling justification.

This Part first illustrates the underlying policy allowing for certain restrictions on broadcasters’ speech. This policy, known as the

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258. See, e.g., *id.*

259. *Id.*

260. Under 47 U.S.C. § 315, broadcasting stations have a duty to give equal time to each opposing candidate for public office if they give time to one such candidate. This “equal time” provision has engendered a great deal of litigation. *E.g.*, *Rosenberg v. City of Everett*, 328 F.3d 12, 16 (1st Cir. 2003) (noting the “purpose of the equal time doctrine is to facilitate political debate by qualified candidates”) (quoting *Farmers Educ. & Co-Op Union v. WDAY*, 360 U.S. 525, 529 (1959)). For a historical survey of the statutory and regulatory history of access for political candidates to the media see William D. Wick, *The Federal Election Campaign Act of 1971 and Political Broadcast Reform*, 22 DEPAUL L. REV. 553, 582–83 (1973).

261. See *Arizona Free Enter.*, 131 S. Ct. at 2835 (Kagan, J., dissenting).

“Fairness Doctrine,” “provides that broadcasters have certain obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.”<sup>262</sup> When the FCC first instituted the policy, it sought to ensure that the airwaves were used in the “public ‘convenience, interest, or necessity.’ ”<sup>263</sup> Next, this Part describes the statutory provisions in the Communications Act of 1934<sup>264</sup> that govern political speech for political campaigns. The first statutory provision requires broadcast licensees to “allow reasonable access . . . for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.”<sup>265</sup> The second provision provides that if the licensee “permit[s] any person who is a legally qualified candidate for any public office to use a broadcasting station,” he or she incurs the additional obligation of “afford[ing] equal opportunities to all other such candidates for that office.”<sup>266</sup> Together, these statutory provisions and their underlying policy provide a constitutional justification for fund matching based on broadcast media access costs.

### 1. The First Amendment and Broadcast Media Policies

Congress first established a system for granting broadcast licenses to private individuals and entities through the Radio Act of 1927.<sup>267</sup> Broadcasting over radio frequencies requires a licensing system because when two or more broadcasters attempt to broadcast over the same frequency, it creates interference that renders both signals useless. Inherent in a licensing system is the exclusion of some would-be broadcasters, or speakers, in favor of others. The FCC is required to consider if granting a license to an applicant will serve the public interest.<sup>268</sup>

Under the Communications Act of 1934’s mandate to serve the public interest, the FCC developed the Fairness Doctrine.<sup>269</sup> This

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262. 47 C.F.R. § 73.1910 (1985).

263. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 376–77 (1969).

264. 47 U.S.C. § 312(a)(7) (1982).

265. *Id.* § 312(a)(7).

266. *Id.* § 315(a).

267. See The Radio Act of 1927, Pub. L. No. 69-632, ch. 169, 44 Stat. 1162 (1927). Broadcasting without a license is prohibited. See 47 U.S.C. § 301. Broadcasting over spectrum can create interference when two signals broadcast over the same frequency.

268. 47 U.S.C. § 307.

269. *In re Editorializing by Broad. Licensees*, 13 FCC 1246 (1949). See also *Nat’l Broad. Co. v. U.S.*, 319 U.S. 190, 219 (1943) (noting the FCC’s expansive mandate under the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*).

doctrine imposed a duty on broadcast licensees to cover controversial issues of public importance in a fair and balanced manner.<sup>270</sup> The doctrine had two basic requirements: first, “that every licensee devote a reasonable portion of broadcast time to the discussion and consideration of controversial issues of public importance;” and second, “that in doing so, [the licensee or broadcaster must be] fair—that is, [the licensee or broadcaster] must affirmatively endeavor to make . . . facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented.”<sup>271</sup> The application of these requirements, however, was never straightforward.<sup>272</sup>

The two Fairness Doctrine requirements were codified into regulation: the personal attack rule and the political editorial rule. When a personal attack occurred, the personal attack rule required the broadcaster to notify the person attacked, provide her with a copy of the broadcast, and allow her an opportunity to respond over the broadcaster’s station.<sup>273</sup> The political editorial rule provided that when a broadcaster endorsed a particular political candidate, the broadcaster was then required to provide other qualified candidates for the same office the opportunity to respond over the broadcaster’s station.<sup>274</sup> Congress amended section 312 of the Communications Act of 1934 by adding language that seemed to approve of the Fairness Doctrine, though it stopped short of codification.<sup>275</sup>

In *Red Lion Broadcasting Co. v. FCC*,<sup>276</sup> the Court upheld the Fairness Doctrine’s equal time rules for political broadcasting

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270. See *In re* Editorializing by Broadcast Licensees, 13 FCC 1246 (1949).

271. Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10,426 (1964).

272. Simply granting air time to those who requested it in order to respond to an issue previously discussed during the broadcaster’s regular programming did not satisfy these obligations. *In re* Editorializing by Broad. Licensees, 13 FCC at 1250–51. Broadcasters instead had the affirmative duty to determine what the appropriate opposing viewpoints were on these controversial issues and who was best suited to present them. *Id.* at 1249. If sponsored programming was not an option, the broadcasters had to provide it at their own expense. See *Cullman Broad. Co.*, 40 FCC 576 (1963) (*Cullman* doctrine).

273. 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1976).

274. *Id.* §§ 73.123, 73.300, 73.679.

275. 47 U.S.C. § 315 (2002) (“[None of the foregoing exemptions from equal time requirements] shall be construed as relieving broadcasters, in connection with the presentation of [news], from the obligation . . . to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.”). See also S. Rep. No. 86-1069, at 5 (1959), reprinted in 1959 U.S.C.C.A.N. 2582, 2584 (“[Section 315] is a restatement of the basic policy of the ‘standard of fairness’ which is imposed on broadcasters under the Communications Act of 1934.”).

276. 395 U.S. 367 (1969).

regulation over a First Amendment challenge from broadcasters.<sup>277</sup> Under the Fairness Doctrine and related rules governing broadcast licensees' personal attacks and political editorials, broadcasters must present public issues and give each side of those issues fair coverage.<sup>278</sup> The Court justified limiting First Amendment protection of broadcasting under the "scarcity rationale."<sup>279</sup> Due to problems unique to broadcasting over spectrum and the problem of interference,<sup>280</sup> the division of spectrum into usable portions, the assignment of subdivisions of the frequency to individual users, and regulation under which the "[g]overnment . . . tell[s] some applicants that they [cannot] . . . broadcast at all because there [is] room for only a few," warrants consideration when regulating speech over this medium.<sup>281</sup> Therefore, because "there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."<sup>282</sup>

Because licensees and those who cannot obtain a license have equal First Amendment rights, the Court further concluded that the First Amendment does not bar the government "from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."<sup>283</sup>

The Court then noted that,

the people as a whole retain their interest in free speech by radio and their collective right to have the medium function

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277. *Id.* at 394.

278. *Id.* at 375–86.

279. *See* Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 506 n.2 (D.C. Cir. 1986):

The notion that scarcity of broadcast frequencies could provide constitutional justification for broadcast regulation first arose in *National Broad. Co. v. United States*, 319 U.S. 190, 226–27 (1943). In his opinion for the majority, Justice Frankfurter enunciated the scarcity rationale to turn back a first amendment challenge to the FCC's chain broadcasting regulations, which governed the affiliation of stations with networks. *Id.* Until *Red Lion*, however, the Court had never addressed the question whether the scarcity doctrine could justify regulation of the content of broadcasts.

280. *Red Lion Broad. Co.*, at 388 ("[O]nly a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.").

281. *Id.*

282. *Id.*

283. *Id.* at 389.

consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.<sup>284</sup>

Thus, the limitations of broadcasting frequencies permitted government “to put restraints on licensees in favor of others whose views should be expressed on this unique medium” under the scarcity rationale.<sup>285</sup>

During the mid-1980’s, a period of hyper-deregulation, the FCC abandoned the Fairness Doctrine.<sup>286</sup> The FCC questioned the constitutionality of the doctrine<sup>287</sup> and determined that it had a chilling effect on broadcaster speech.<sup>288</sup> The FCC failed to decide whether Congress had actually codified the doctrine in amending section 315, but the Court of Appeals for the District of Columbia did decide that section 315 “ratified the Commission’s longstanding position that the public interest standard authorize[d] the Fairness Doctrine,” yet did not create an obligation to enforce the Fairness Doctrine.<sup>289</sup> The Commission finally repealed the doctrine in 1987.<sup>290</sup>

## 2. Communications Act Statutory Provisions Involving Political Candidates

Though the Fairness Doctrine is no longer FCC policy, closely related sections of the Communications Act survive and impose important election responsibilities on broadcasters. The two statutory provisions in the Communications Act of 1934 at issue are section 312(a)(7), the “reasonable access” provision, and section 315(a)(7), the “equal opportunity” provision. Borrowing from existing case law that interprets and upholds these statutes, the access cost matching system simply looks like a mechanism to carry out the intended goals of those provisions. The proportionality decried in *Arizona Free Enterprise* was always present in sections 315(a) and 312(a)(7): if a candidate purchases time on a station, that station

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284. *Id.* at 390.

285. *Id.*

286. See General Fairness Doctrine Obligations of Broadcast Licensees, Report, 50 Fed. Reg. 35,418 (Aug. 30, 1985).

287. See *id.* at 35,420.

288. *Id.* at 35,422.

289. *Telecomm. Research & Action Ctr. v. FCC*, 801 F.2d 501, 516–18 (D.C. Cir. 1986).

290. See *In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse*, New York, 2 FCC Rcd 5043 (1987), *aff’d* 867 F.2d 654 (D.C. Cir. 1988).

must allow other candidates the option to purchase *equal* amounts of time at the same rate.

*i. Section 312(a)(7)—The Reasonable Access Requirement*

Section 312(a)(7) of the Communications Act was passed as part of FECA and was designed in part “to give candidates for public office greater access to the media so that they may better explain their stand on the issues and thereby more fully and completely inform the voters.”<sup>291</sup> Section 312(a)(7) is known as the “reasonable access” clause. It provides the Commission with the authority to revoke a station license or construction permit “for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for [f]ederal elective office on behalf of his candidacy.”<sup>292</sup>

The Supreme Court upheld section 312(a)(7) over a First Amendment challenge in *CBS v. FCC*.<sup>293</sup> In *CBS*, the Carter-Mondale Presidential Committee had requested that each of the three major television networks provide time for a thirty-minute program that was to be presented in conjunction with President Carter’s formal announcement of his candidacy.<sup>294</sup> The networks declined.<sup>295</sup> The FCC determined that the networks violated section 312(a)(7), “conclud[ing] that the networks’ reasons for refusing to sell the time requested were ‘deficient’ under its standards of reasonableness.”<sup>296</sup> The Court of Appeals for the District of Columbia affirmed.<sup>297</sup> In deciding the First Amendment challenge, the court of appeals found that section 312(a)(7) “is a constitutionally acceptable accommodation between . . . the public’s right to be informed about elections[,] the right of candidates to speak, . . . and the editorial rights of broadcasters.”<sup>298</sup>

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291. Commission’s Policy in Enforcing § 312(a)(7), *Report and Order*, 68 F.C.C. 2d 1079, 43 Rad. Reg.2d (P & F) 1029, at ¶ 31 (1978) (quoting 117 Cong. Rec. 28,792). The quote from the *Congressional Record* was an explanation of the bill’s purpose by Senator Pastore, one of its sponsors. 117 Cong. Rec. 28,792. The Senate Commerce Committee later incorporated his statement of purpose for § 312(a)(7) in a Report. S. REP. NO. 92-96, at 20 (1971).

292. 47 U.S.C. § 312(a)(7) (1994).

293. *CBS, Inc. v. FCC*, 453 U.S. 367, 397 (1981).

294. *Id.* at 371–72.

295. *Id.* at 372.

296. *Id.* at 374 (citing *CBS v. FCC*, 74 F.C.C. 2d 631 (Nov. 20, 1979)).

297. *Id.* at 375 (citing *CBS v. FCC*, 629 F.2d 1 (D.C. Cir. 1980)).

298. *CBS*, 453 U.S. at 376 (citing *CBS*, 629 F.2d at 25).



The Supreme Court affirmed that reasoning<sup>299</sup> and noted that “it is of particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates’ personal qualities and their positions on vital public issues before choosing among them on election day.”<sup>300</sup> “Indeed, ‘speech concerning public affairs is . . . the essence of self-government.’”<sup>301</sup> The Court further stated that “[s]ection 312(a)(7) [ ] makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process.”<sup>302</sup> Explicit in the Court’s holding was an interest in creating more political speech for the electorate’s benefit during elections for public office under public interest or Fairness Doctrine principles.<sup>303</sup>

*ii. Section 315(a)—The Equal Opportunity Rule*

Section 315 of the Communications Act contains the “equal time” or “equal opportunity” rule. The rule requires that whenever a licensee permits “a legally qualified candidate for any public office” to use the broadcast station’s facilities, it must afford “equal opportunities to all other candidates for that office.”<sup>304</sup> The court has interpreted equal opportunity to mean on the same terms, conditions, and rates as the initial candidate’s use. Thus, candidates must be allowed to buy equal amounts of advertising time on a station. The rule also states, however, that there is “[n]o obligation . . . upon any licensee to allow the use of its station by any such candidate” in the first place.<sup>305</sup>

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299. *Id.* at 396 (“The First Amendment interests of candidates and voters, as well as broadcasters, are implicated by § 312(a)(7).”).

300. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 52–53 (1976) (per curiam)).

301. *Id.* at 396 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)).

302. *Id.* at 396.

303. *See, e.g., Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501, 506 n.1 (1986) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 391 (1969)):

*Red Lion* expressly noted that the equal-time provision of § 315 was “indistinguishabl” “[i]n terms of constitutional principle” from the implementing regulations of the fairness doctrine before the Court. Although § 312(a)(7) had not yet been enacted at the time of *Red Lion*, it seems clear that the opinion’s rationale applies with equal force to that provision, which affects broadcasters in a very similar manner to the fairness doctrine requirement that a broadcaster provide adequate ad time to the discussion of public issues.

304. 47 U.S.C. § 315(a) (West 2002).

305. *Id.*

Section 315(a) was challenged in part on First Amendment grounds in *Branch v. FCC*.<sup>306</sup> In *Branch*, a television reporter who wanted to run for public office challenged the FCC's decision that the station employing him would be required to provide "equal time" to his political opponents under section 315(a).<sup>307</sup> The FCC interpreted the equal time provision to require the station to offer his political opponents the same amount of time that he had spent on air performing his regular newscasting duties.<sup>308</sup> On administrative review, the Court of Appeals for the District of Columbia upheld the FCC's determination.<sup>309</sup>

The reporter in *Branch* had relied on *Tornillo* to argue that the equal opportunity rule violated the First Amendment.<sup>310</sup> *Tornillo*, on which *Arizona Free Enterprise* also relied, invalidated political opponents' "right to reply" to criticism and attacks published in a newspaper.<sup>311</sup> The reporter argued that, based on its impact, section 315(a) was essentially identical to the right of reply rule in *Tornillo*.<sup>312</sup> The Court found, however, that *Tornillo* did not apply based on *Red Lion*'s recognition of the Fairness Doctrine and the scarcity rationale.<sup>313</sup> Under *Red Lion*, First Amendment "protections for the press do not apply as powerfully to the broadcast media"<sup>314</sup> "[b]ecause of the scarcity of [broadcast] frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."<sup>315</sup> Thus the "'equal opportunities' rule in section 315 and the [FCC's] own fairness doctrine rest[s] on the same constitutional basis of the government's power to regulate 'a scarce resource which the Government has denied others the right to use.'"<sup>316</sup> Though *Branch*

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306. *Branch v. FCC*, 824 F.2d 37, 49–50 (D.C. Cir. 1987).

307. *Id.* at 39.

308. *See id.*

309. *Id.* at 50.

310. *Id.* at 49.

311. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2821 (2011); *Branch*, 824 F.2d at 49 (citation omitted).

312. *Branch*, 824 F.2d at 49.

313. *Id.*

314. *Id.* (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969)).

315. *Red Lion*, 395 U.S. at 390 (stating further that "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."). *See also Branch*, 824 F.2d at 49 (citing *Red Lion*, 395 U.S. at 389–90) ("What makes the broadcast medium unique . . . is the scarcity of broadcast frequencies.").

316. *Branch*, 824 F.2d at 49 (citing *Red Lion*, 395 U.S. at 391).

points out the doubts regarding the scarcity rationale, the Court has never overruled *Red Lion*.<sup>317</sup>

Perhaps more importantly, the cases interpreting “use” establish that the speech rights of the electorate must be considered paramount.<sup>318</sup> For example, during Fred Thompson’s campaign for the White House in 2008, NBC pulled episodes of *Law & Order* starring the actor-politician.<sup>319</sup> Of course this may marginally burden third party speech, but ultimately it prevents speech nullifying media saturation.

### 3. The *Zapple* Doctrine: A Recently Removed Remnant of Fairness Principles

Section 315 applies only to candidates and their “uses,” or appearances, on broadcast stations. Section 315 does not address a third party actor acting as a spokesperson or supporter of a candidate. Initially, these third parties were seemingly not subject to the equal opportunity rule. The FCC corrected this problem in *Zapple*.<sup>320</sup> There, the FCC provided for “quasi-equal opportunities,” holding that if supporters of one candidate were given time on a station, supporters of the opposing candidate would be given roughly equal amounts of time.<sup>321</sup> Though the FCC abandoned the Fairness Doctrine in the late 1980’s, for the next two decades political candidates could at least point to *Zapple* in support of arguments

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317. *See id.* at 49 (citing Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 509 (1986)) (“While doubts have been expressed that the scarcity rationale is adequate to support differing degrees of first amendment protection for the print and electronic media, . . . it remains true, nonetheless, that Branch’s first amendment challenge is squarely foreclosed by *Red Lion*.”).

318. The courts and the FCC have interpreted section 315 and “use” broadly in order to prevent the perception of media favoritism of a certain candidate. Therefore, actors-turned-politicians could not have their old works shown for it might influence the electorate. For instance, in *Adrian Weiss*, 58 F.C.C. 2d 342 (1976), the FCC ruled that a television station’s intention to air Ronald Reagan’s movies while he was campaigning for President would constitute a “use” by Reagan, and it would trigger equal time responsibilities on the part of the station. *Id.* at 343–44. The court explained that the FCC had no basis for distinguishing between candidate’s political and non-political appearances unless or until Congress decides to amend the section to that end. *Id.* at 343. The Commission has since overruled *Weiss* and now requires that the candidate or campaign committee authorize, control, or sponsor a qualified “use.” *In re* Codification of the Commission’s Political Programming Policies, 7 F.C.C. Rcd. 4611 (1992) (“We will continue to interpret Section 315 ‘uses’ to include only non-exempt candidate appearances that are controlled, approved or sponsored by a candidate or the candidate’s authorized committee.”).

319. Scott Horsley, ‘*Law & Order*’ Episodes with Fred Thompson to End, NPR MORNING EDITION, July 26, 2007, <http://www.npr.org/templates/story/story.php?storyId=12249382>.

320. *In re* Request by Nicholas Zapple, 23 F.C.C. 2d 707, 708 (1970).

321. *Id.* at 710.

for egalitarian access. For example, when the *Swift Boat* veteran documentary<sup>322</sup> was scheduled to air on television during the 2004 presidential campaign, the Kerry-Edwards campaign argued that the *Zapple* Doctrine would require “each . . . station that airs the documentary [to] provide supporters of the Kerry-Edwards campaign with a similar amount of time on that station.”<sup>323</sup> The stations backed away from airing the film, and the continued vitality of *Zapple* was not tested.<sup>324</sup> Commentators have noted that, though the *Zapple* Doctrine was “related to the now-defunct Fairness Doctrine, the *Zapple* Doctrine appears to have survived the repeal of the Fairness Doctrine.”<sup>325</sup> Only very recently has the FCC made clear that *Zapple* is no longer in effect.<sup>326</sup>

Although the FCC may have abandoned the Fairness Doctrine and more recently the *Zapple* Doctrine, the underlying principles of equal time for political broadcasting can still survive First Amendment challenge under *Red Lion*.<sup>327</sup> With judicial support and a legislative initiative to revive abandoned FCC doctrine, a matching access costs system would have a solid foundation in existing telecommunications case law.

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322. A group of Vietnam prisoners of war featured in a new documentary teamed up with Navy Swift Boat veterans in the final days of the presidential campaign to discredit John Kerry’s war record. See Jim VandeHei & Paul Farhi, *POWs Shown in Film Join Swift Boat Group’s Anti-Kerry Efforts*, WASH. POST, Oct. 14, 2004, <http://www.washingtonpost.com/wp-dyn/content/article/2004/10/14/AR2005033105699.html>.

323. Marc E. Elias, General Counsel of Kerry-Edwards 2004, Inc., *Letter to Sinclair Broadcast Group, Inc.*, GEO. WASH. U. (Oct. 15, 2004), [http://www.gwu.edu/~action/2004/media/kerry\\_sinclairltr.pdf](http://www.gwu.edu/~action/2004/media/kerry_sinclairltr.pdf). See also *id.* (invoking the *Zapple* Doctrine and arguing that the doctrine survived the repeal of the Fairness Doctrine as a complement to Section 315(a) (citing, *inter alia*, RTNDA v. FCC, 184 F.3d 872, 884 n.10 (D.C. Cir. 1999)); Drew Clark, *How Fair Is Sinclair’s Doctrine? Is John Kerry Entitled to Avenge His Stolen Honor?*, SLATE, (Oct. 20, 2004, 4:07 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2004/10/how\\_fair\\_is\\_sinclair\\_s\\_doctrine.html](http://www.slate.com/articles/news_and_politics/explainer/2004/10/how_fair_is_sinclair_s_doctrine.html).

324. See David Oxenford, *The Run-Up to Super Tuesday—Rush, the Super Bowl, Union Ads and an Hour on the Hallmark Channel*, BROADCAST L. BLOG, Feb. 3, 2008, <http://www.broadcastlawblog.com/2008/02/articles/the-run-up-to-super-tuesday-rush-the-super-bowl-union-ads-and-an-hour-on-the-hallmark-channel/> (last visited July 27, 2014).

325. LaVonda N. Reed-Huff, *Offensive Political Speech from the 1970s to 2008: A Broadcaster’s Moral Choice*, 8 U. MD. L.J. RACE RELIG. GENDER & CLASS 241, 254–55 (2008); see also David Oxenford, *What is the Impact on Broadcasters of Supreme Court Decision that Corporations Can Buy Political Ads? More Money, More Ad Challenges and the Return of the Zapple Doctrine*, BROADCAST L. BLOG (Jan. 22, 2010), <http://www.broadcastlawblog.com/2010/01/articles/what-is-the-impact-on-broadcasters-of-supreme-court-decision-that-corporations-can-buy-political-ads-more-money-more-ad-challenges-and-the-return-of-the-zapple-doctrine/> (last visited July 27, 2014).

326. F.C.C. Priv. Ltr. Rul., DA 14-621 (May 8, 2014) (“Given the fact that the *Zapple* Doctrine was based on an interpretation of the fairness doctrine, which has no current legal effect, we conclude that the *Zapple* Doctrine similarly has no current legal effect.”).

327. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369 (1969).

*D. A Media Access Cost Approach Satisfies the Concerns of the Libertarian Majority and the Egalitarian-Functionalist Minority*

A broadcast media access matching access system withstands *Arizona Free Enterprise* analysis. As an answer to the majority's concerns, this Article's proposed system lessens the burden on third parties and provides an alternate justification for fund-matching. As to the dissent, this system bridges the gap between subsidy analysis and election case law, matching the dissent's functionalist reasoning with concrete precedent.

1. Access Cost Matching under *Arizona Free Enterprise* Majority's Analysis

Two important features may change the outcome when applying the access cost system under the *Arizona Free Enterprise* majority's analysis. First, the burden of equal access costs is quantitatively less in monetary terms than the one-to-one matching at issue in *Arizona Free Enterprise*. Second, there is a compelling interest in encouraging the policies that support the Fairness Doctrine and sections 315(a) and 312(a)(7).

*i. Broadcast Media Access Cost Matching as a Lower Burden*

The *Arizona Free Enterprise* majority expressed concern that regulation would dissuade speakers if they knew that incremental fund matching would counteract their efforts. Of course, the lower the amount the state distributes in response to speech, the lower the chilling effect on the initial speaker. Matching access costs is perhaps the simplest way to lower this burden, as it establishes a practical method to lessen the burden below one-to-one matching.

The access cost matching system does not impose similar burdens under *Davis* or *Arizona Free Enterprise*. The *Arizona Free Enterprise* majority relied on *Davis v. FEC* and its asymmetrical fundraising scheme to find the one-to-one public funding scheme unconstitutional.<sup>328</sup> The scheme in *Davis* was discriminatory in that it gave the publicly funded candidate the ability to accept three times the amount of funds the privately financed candidate could raise.<sup>329</sup>

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328. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2818 (2011) ("The logic of *Davis* largely controls our approach to this case.").

329. *Davis v. FEC*, 554 U.S. 724, 739–40 (2008).

This imposed an indirect cap or penalty, forcing the privately financed candidate to choose whether or not to speak.<sup>330</sup> Similarly, the system challenged in *Arizona Free Enterprise* triggered a direct release of money, regardless of whether the speaker was a privately financed candidate, a private individual, or an independent expenditure group.<sup>331</sup>

Private candidates or independent expenditure groups already trigger, in a sense, an unfunded opportunity for an opposing candidate to access the media. Disbursed funds under the access cost matching system would simply allow the candidate to avoid turning down the opportunity due financial reasons, which is otherwise a probable consequence of running solely on public funds. There is no asymmetrical advantage or indirect cap triggered like in *Davis*. If there were any burden, it is simply the increased probability that the publicly funded candidate's advertisements would be broadcast. Nor is there a direct release of money that could put the publicly financed candidate in a potentially better position than the privately financed candidate, as in *Arizona Free Enterprise*. Again, the opportunity for a candidate to respond is already available, and there would be no direct release to the publicly funded candidate's war chest under the new system. Under access cost matching, there is only dedicated money for the candidate's existing ability to access media.

In rejecting the plan as a subsidy, the majority relied on *Tornillo* and *Pacific Gas & Electric Co.*<sup>332</sup> Compelled speech cases, though, are inapposite in this context because *Branch v. FCC* already distinguished compelled speech based on *Red Lion*.<sup>333</sup> Although *Red Lion* addressed the speech rights of the press,<sup>334</sup> it does not strain Fairness Doctrine principles to accept access funding based on the government's ability to put restraints on licenses in this unique medium. Further, speech rights of those other than broadcasters was always a concern; indeed, under section 312(a)(7), it " 'is a constitutionally acceptable accommodation between . . . the public's right to be informed about elections[,] the right of candidates to speak, . . . and the editorial rights of broadcasters' " to allow reasonable access.<sup>335</sup> "[A]lthough the First Amendment protects newspaper publishers from being required to print the replies of

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330. *Id.*

331. *Arizona Free Enter.*, 131 S. Ct. at 2818–19.

332. *Id.* at 2821.

333. *Branch v. FCC*, 824 F.2d 37, 49 (D.C. Cir. 1987).

334. *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 388–98 (1969).

335. *CBS, Inc. v. FCC*, 453 U.S. 367, 376 (1981) (citing *CBS, Inc. v. FCC*, 629 F.2d 1, 25 (D.C. Cir. 1980)).

those whom they criticize, . . . it affords no such protection to broadcasters.”<sup>336</sup>

Finally, if no evidence of a burden is required under *Davis*,<sup>337</sup> then a challenger could not challenge a theoretical burden without overcoming the burden that has always been present in *Red Lion*, *CBS*, and *Branch*.

*ii. Compelling Interest of Informing the Electorate.*

It is difficult to imagine a stronger compelling interest than combating corruption to justify expenditure regulations. This bare reasoning, however, did not sway the Court in *Arizona Free Enterprise*. This Article’s tailored method, by analogizing financial inequity to unequal media access, provides the Court with an alternate compelling interest. Self-governance principles, which undergird the Fairness Doctrine and sections 315(a) and 312(a)(7), support the proposed matching access costs system and preserve the paramount nature of the electorate’s speech rights.

In addition, a compelling interest inherent in sections 312(a)(7) and 315(a) supports preventing one candidate from saturating the media. Specifically, providing access to the media already justifies the compelling interest found in Fairness Doctrine principles.<sup>338</sup> The only incremental step added is that it is more likely that a publicly-financed candidate will take advantage of that opportunity. If he or she makes use of that dedicated money to buy advertising time, the value of political speech’s role in self-governance is furthered.<sup>339</sup>

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336. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (citations omitted).

337. *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2823 (2011) (citing *Davis v. FEC*, 554 U.S. 724, 738–40 (2008)).

338. Advertising on television is the most effective way to reach a large mass of people directly. “Digital advertisements are easy to avoid, but television is interruptive. . . . What other product can you get such a large audience?” Elizabeth Dexheimer, *Political Advertising: Influencing Business, Not Just Politics*, MEDILL REPORTS CHICAGO (June 5, 2012), <http://news.medill.northwestern.edu/chicago/news.aspx?id=206534>.

339. In the 2012 Presidential campaign, both Democrat and Republican parties and interest groups flooded the media, to combat negative advertisements and to try to convert voters. There was \$404 million spent on advertisements supporting President Obama, while \$492 million was spent on advertisements supporting Mitt Romney. *The Spending Race, Mad Money: TV Ads in the 2012 Presidential Campaign*, WASH. POST, Nov. 14, 2012, <http://www.washingtonpost.com/wp-srv/special/politics/track-presidential-campaign-ads-2012/> (last visited Feb. 2, 2013). Outside groups, like Super PACs and other interest groups, accounted for about half of the advertisements bought during the campaign. *Campaign Super PACs Who’s Buying the Ads — Mad Money: TV ads in the 2012 Presidential Campaign*, WASH. POST, Nov. 14, 2012, <http://www.washingtonpost.com/wp-srv/special/politics/track-presidential-campaign-ads-2012/whos-buying-ads/> (last visited Feb. 2, 2013). For a breakdown of top spending

Because the primary interest of the access cost matching system is not combating corruption, the majority's focus on the directness in combating corruption does not threaten the legitimacy of this interest. But that does not mean that the system cannot play a part in combating corruption.

In short, the policy rationales of the Fairness and *Zapple* Doctrines buttress this proposed system. Moreover, the continued existence of sections 315(a) and 312(a)(7) justify a public financing system focused on access costs for effectuating those provisions. Although this system fits under the *Arizona Free Enterprise* majority's analysis, the system is more akin to the subsidy program the dissent advocated. Perhaps the best possible outcome would be if the Court analyzed it as a subsidy.

## 2. Matching Access Costs as a Speech Subsidy

The strongest argument that the system is not a restriction on speech is that the mechanism already exists, and it does not "limit," "bar," or "restrain[ ]."<sup>340</sup> As the *Arizona Free Enterprise* dissent notes, "[t]here is a basic difference . . . between direct state interference with First Amendment protected activity and state encouragement."<sup>341</sup> Logically, matching access costs falls into the latter category. If the system is designed to encourage publicly funded candidates to take advantage of broadcast media laws and policies, challengers will have to show how the law suppresses their speech more than what they have already been subject to under existing laws.<sup>342</sup>

By offering a public financing system, the state is already encouraging First Amendment activities, and public financing is, in and of itself, constitutional.<sup>343</sup> For the government to encourage a candidate to accept public funding is simply the government choosing to

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groups and their political affiliations, *see id.* Clearly, media access means large amounts of money spent to access the voters during elections, and the one with the most dollars can potentially monopolize the media.

340. *Arizona Free Enter.*, 131 S. Ct. at 2833 (Kagan, J., dissenting).

341. *Id.* at 2834 (citing *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (quoting *Maier v. Roe*, 432 U.S. 464, 475 (1977) (internal quotations omitted)).

342. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) ("[R]espondents must demonstrate a substantial risk that application of the provision will lead to the suppression of speech.") (citations omitted). *See also* Robert C. Post, *Subsidized Speech*, FACULTY SCHOLARSHIP SERIES (1996), [http://digitalcommons.law.yale.edu/fss\\_papers/198](http://digitalcommons.law.yale.edu/fss_papers/198).

343. *See Freedman et al.*, *supra* note 242 and accompanying text.



“selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.”<sup>344</sup> The activities the government believes are in the public interest are exactly those interests behind the Fairness Doctrine and public financing themselves: educating the public on political campaigns in the manner least susceptible to corruption.

Moreover, because access costs do not function as a restriction, they do not act in any manner that might suppress “dangerous ideas.”<sup>345</sup> Under the *Arizona Free Enterprise* dissent’s view of the First Amendment’s purpose, the opportunity to test an idea in the marketplace of ideas is a simply a benefit, perhaps for the speaker, but most certainly for the public.<sup>346</sup>

Most importantly, matching access costs is, potentially, the Goldilocks solution.<sup>347</sup> Lump-sum grants of public money are inefficient in that they may overcompensate and waste public funds, or undercompensate and provide less incentive to opt in.<sup>348</sup> A public financing scheme with no participants is worthless.<sup>349</sup> If the system is perceived as a subsidy, the government has more latitude to control the limits because “when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.”<sup>350</sup> In establishing the limits, the court should allow the government to allocate money so that no more or less is dispersed than is needed.

The dissent’s greatest weakness in *Arizona Free Enterprise* was that the prior subsidy cases had not involved elections and political speech.<sup>351</sup> Tying the fund matching to broadcast media access, however, creates a direct reference to cases in which the Court has upheld the constitutionality of mandates that candidates receive broadcast advertising time. This subsidy for candidates, where the government provides media access funds, is now virtually indistinguishable from systems (previously held constitutional) that required broadcast media be made available. While the origin of

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344. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

345. *See id.* at 192 (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983)) (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)).

346. *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2837 (2011) (Kagan, J., dissenting).

347. *Id.* at 2832 (“The difficulty, then, is in finding the Goldilocks solution—not too large, not too small, but just right.”).

348. *Id.* at 2831–32.

349. *Id.* .

350. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

351. *See supra* note 236 and accompanying text.

the analysis differs, with telecommunications case law primarily focusing on broadcaster speech rights,<sup>352</sup> and *Arizona Free Enterprise* analysis focusing on the speech rights of candidates and expenditure groups, the underlying functionalist arguments remain the same: informing the electorate.

By improving efficiency, the public financing system will look more competitive to potential candidates. Having more candidates participate in campaigns with public funding will reduce the risk of corruption and the appearance of corruption. From an “ordinary citizen[’s]” perspective, it would produce more debate over broadcast media.<sup>353</sup>

In sum, a matching access cost system sharpens the arguments for a public fund matching system. The government has leniency in determining how subsidies are allocated. This is merely a subsidy to effectuate existing broadcast media advertising law and policy involving political elections. Moreover, the system encourages and enhances public debate, furthering First Amendment principles of self-governance and public debate. This approach is consistent with *Buckley’s* understanding of the First Amendment “to secure ‘the widest possible dissemination of information from diverse and antagonistic sources’ ”<sup>354</sup> and “to assure . . . unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>355</sup>

## CONCLUSION

Election laws have experienced a great upheaval in the last few years with concrete changes on campaign strategies. Corporate spending is playing an expanded role due to recent Supreme Court decisions. The 2012 election cycle broke records for expenses at both the state and national levels, fostering the public’s perception of widespread corruption.<sup>356</sup> Practical solutions, moreover, are

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352. *But see Adrian Weiss*, 58 F.C.C. 2d 342, 343–44 (1976) (holding that a television station could not air a program featuring Ronald Reagan as an actor while he was campaigning for President because it would constitute a “use” by Reagan, and thus trigger equal time responsibilities on the part of the station). *See supra* note 318 and accompanying text.

353. *Arizona Free Enter.*, 131 S. Ct. at 2835 (Kagan, J., dissenting).

354. *Buckley v. Valeo*, 424 U.S. 1, at 48–49 (1976) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964)) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)); *Roth v. United States*, 354 U.S. 476, 484 (1957).

355. *Roth*, 354 U.S. at 484.

356. Brennan Center for Justice, National Survey: Super PACs, Corruption, and Democracy 2 (2012); Jennifer Liberto, *2012 election priciest to date: \$4.2 billion tab and rising* (Nov. 5, 2012), CNN MONEY, <http://money.cnn.com/2012/11/05/news/economy/campaign-finance/> (last visited Nov. 12, 2014); Brennan Center for Justice, *Outside Spending and Dark*

shrinking, and the Court has signaled that no set of facts can justify the restriction of spending in elections. State legislatures' efforts to strengthen public financing systems by correlating fund dispersal with other candidate's spending face an uncertain future after *Arizona Free Enterprise*.

What is necessary is a way to reduce a matching system's burden on privately funded candidates and independent expenditure groups while simultaneously finding constitutional support in First Amendment election case law. This Article's proposed broadcast media access matching system does just that. Implementing such a system can mitigate the harm in increased corporate spending and make public financing more viable. Matching broadcast media access costs lowers the potential burden on privately financed candidates and independent expenditure groups, and directly serves a major constitutional underpinning of telecommunications law: educating citizenry in support of the democratic process.

The system is likely to increase the use and quality of broadcast advertising during campaigns. With more funding, publicly financed candidates can purchase more media time, which in turn will enhance the amount of campaign information available to the electorate. Candidates will have an incentive to direct their efforts to the quality of the production value and clarity of the content because those costs will not trigger the dispersal of public funds. Hopefully the result will be a more informed electorate that draws knowledge from a diverse set of speakers.

It remains to be explored how this system could affect the role of Internet media outlets in elections. *Citizens United*, while damaging to election reform efforts, did make one seemingly inevitable prediction: "Soon . . . it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues."<sup>357</sup> In line with *Citizens United's* prediction, free communication platforms on the Internet, like Twitter and Facebook, will become more important because they have no access costs. As more of the population continues to move to digital media platforms for information—including news, sports, etc.—campaign advertising will simply follow current trends.

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*Money in Toss-Up Senate Races: Pre-Election Update* (Nov. 3, 2014), <http://www.brennancenter.org/analysis/outside-spending-and-dark-money-toss-senate-races-pre-election-update> (discussing spending in the most recent 2014 midterm election cycle).

357. *Citizens United v. FEC*, 558 U.S. 310, 364 (2010). In striking down the law, the Court contemplated that "[r]apid changes in technology [ ] and the creative dynamic inherent in the concept of free expression" would play a significant role in conveying political messages. *Id.*

Search engine keyword advertising presents unique problems as a form of Internet advertising. Advertisers bid on search terms used in Internet searches through search engines, like Google or Bing, to control what search results return for certain searches.<sup>358</sup> By bidding on words, the advertisers can control what results appear in search engines.<sup>359</sup> The difference between the Internet and broadcast mediums like TV and radio, however, is that there is no scarcity rationale for the Internet to rely on for upholding any restrictions on any candidates' or Internet search companies' speech. Indeed, the FCC currently has limited power to regulate these new media forms.<sup>360</sup>

But today, broadcast advertising remains an influential tool. The proposed matching broadcast access cost system has the ability to make public financing a viable option for enhancing self-governance and mitigate market domination. States should therefore enact regulations to prevent advertising saturation and the manipulation of the decision-making process. A matching broadcast advertising access costs system accomplishes just that by satisfying the electorate's informational needs and encouraging participation among all citizens.

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358. *Adwords*, GOOGLE, <http://www.google.com/adwords> (last visited Nov. 9, 2014); *see also* *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 151 (4th Cir. 2012) (explaining Google AdWords).

359. Dan Malachowski, *Search Engine Trade-Marketing: Why Trademark Owners Cannot Monopolize Use of their Marks in the Paid Search*, 22 DEPAUL J. ART TECH. & INTELL. PROP. L. 369, 371–74 (2012) (Section II.A) (providing an overview of the importance of search engines and keyword advertising).

360. *See Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (finding that the FCC lacked authority to implement net neutrality). In addition to the problems stemming from money in elections outlined in this Article, there are other issues associated with online advertising, including deceptive advertising practices. *See generally* Nichole Rustin-Paschal, *Online Behavioral Advertising and Deceptive Campaign Tactics: Policy Issues*, 19 WM. & MARY BILL RTS. J. 907 (2011).

