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Pulling the Trigger on Public Campaign Finance: The Contextual Approach to Analyzing Trigger Funds

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PULLING THE TRIGGER ON PUBLIC CAMPAIGN FINANCE: THE CONTEXTUAL APPROACH TO ANALYZING TRIGGER FUNDS

*George LoBiondo**

The unpredictable nature of electoral politics makes it difficult for public campaign financing programs to be both efficient and effective. Programs that award too much money to publicly funded candidates risk insolvency, while miserly systems cannot attract participants. Moreover, the competitiveness of any given race changes with each election cycle—what was a landslide one year might be the closest of contests next November.

Several states have tried to address this dilemma by enacting “trigger” provisions that disburse extra money to publicly funded candidates only after their opponents raise or spend beyond a certain amount. These laws have faced legal challenges from political committees and candidates who argue that trigger funds provisions flout the First Amendment’s protection of political speech by aiding the speaker’s opponent. Supporters of campaign finance regulation counter that trigger funds facilitate political speech rather than chilling it.

This Note examines the widely divergent federal court rulings on these challenges, both before and after the U.S. Supreme Court’s important Davis v. FEC opinion, with a focus on the U.S. Court of Appeals for the Ninth Circuit’s recent McComish v. Bennett decision. It finds that none of the trigger funds jurisprudence has fully analyzed both the state interest in the provisions and in trigger funds’ burdensome effects. The Note then recommends a contextual approach to understanding the state interest in public finance legislation. It asserts that courts should not scrutinize a state’s trigger provision in isolation from the rest of its public finance regime. The Note concludes that because typical trigger funds provisions encourage participation in public financing, which in turn reduces corruption, trigger funds survive First Amendment scrutiny.

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INTRODUCTION

After a series of political corruption scandals, the State of Arizona passed the Citizens Clean Election Act (Act) through a ballot initiative in 1998.¹ Arizona’s public financing program includes a matching funds (or “trigger funds”) provision,² through which a participating candidate can receive additional funds from the government if her nonparticipating opponent’s expenditures exceed a certain threshold.³ Several conservative organizations and candidates for Arizona political office have sought to have the law declared unconstitutional on First Amendment and Equal Protection grounds.⁴ The case has made its way up the federal court system, and will soon appear before the U.S. Supreme Court.⁵

At the core of the trigger funds dispute are conflicting claims about the First Amendment. Does it exist to maximize the aggregate amount of speech? Or, rather, should it first protect speakers against state-imposed burdens on speech? The seminal Supreme Court case on public campaign finance, *Buckley v. Valeo*,⁶ offers conflicting advice. The per curiam decision upheld much of the amended Federal Election Campaign Act of 1971, and generally approved of public finance as promoting First Amendment values.⁷ *Buckley* confirmed that the First Amendment aimed to protect the “widest possible dissemination of information from diverse and antagonistic sources.”⁸ However, the Court cautioned that “the First Amendment simply cannot tolerate [a] restriction upon the freedom of a

1. See *McComish v. Bennett*, 611 F.3d 510, 514 (9th Cir.), cert. granted, 131 S. Ct. 644 (2010); Robert Barnes, *High Court to Weigh Arizona Campaign Finance Law*, WASH. POST, Nov. 30, 2010, at A2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR2010112906019.html>.

2. Because the term “matching funds” can refer to several very different public finance mechanisms, this particular type will be referred to throughout this Note as “trigger funds.”

3. ARIZ. REV. STAT. ANN. § 16-952 (2006).

4. *McComish*, 611 F.3d at 513. Although the *McComish* complaint alleged both First Amendment and Equal Protection violations, both the U.S. District Court for the District of Arizona and the U.S. Court of Appeals for the Ninth Circuit declined to rule on the Equal Protection claim. *Id.* at 513–14; *McComish v. Brewer*, No. CV-08-1550, 2010 WL 2292213, at *10 (D. Ariz. Jan. 20, 2010), rev’d sub nom. *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010).

5. See *McComish v. Bennett*, 131 S. Ct. 644 (2010); Lyle Denniston, *Feb., March Arguments Day by Day*, SCOTUSBLOG (Dec. 23, 2010, 1:02 PM), <http://www.scotusblog.com/2010/12/feb-march-arguments-day-by-day/>.

6. 424 U.S. 1 (1976).

7. *Id.* at 57 n.65, 92–93; see also *McComish*, 611 F.3d at 526 (“*Buckley* held that public financing of elections furthers First Amendment values . . .”).

8. *Buckley*, 424 U.S. at 49 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1963)).

candidate to speak without legislative limit on behalf of his own candidacy.”⁹

Lower courts have struggled with how to reconcile trigger funds provisions with *Buckley*'s dual edicts. Since protected speech triggers a public candidate's funds, courts have split as to whether this trigger burdens that protected speech, and if so, whether the burden can be justified. This Note explores the different conclusions that federal courts have reached, and answers the question of whether trigger funds can survive in light of the Roberts Court's recent campaign finance jurisprudence.

In Part I, this Note explains the background of public finance legislation, surveys the circuit split regarding trigger funds that existed prior to 2008, and shows how the Supreme Court's *Davis v. FEC*¹⁰ decision of that year fundamentally changed the framework for analyzing the constitutionality of trigger funds. In Part II, this Note explores how courts have undertaken this new analysis, with a focus on the *McComish* opinions by the U.S. District Court for the District of Arizona and the U.S. Court of Appeals for the Ninth Circuit. Finally, Part III argues that courts have failed to distinguish *Davis*'s analysis of the state's interest. It offers an approach by which courts can effectively analyze indivisible provisions of comprehensive public finance regimes. This Note concludes that Arizona's legislation would survive the scrutiny of such an approach; accordingly, the Supreme Court should uphold the Act.

I. TRIGGER FUNDS: A HISTORICAL AND LEGAL BACKGROUND

Part I begins by briefly discussing the history of public finance legislation. Next, it introduces the concept of trigger funds provisions in public finance regimes. It then analyzes *Buckley* and the legal framework federal courts use to evaluate campaign finance statutes and surveys the major circuit split on trigger funds that preceded the Supreme Court's *Davis* decision. Part I concludes by evaluating the *Davis* opinion and its effect on trigger funds analysis.

A. Campaign Finance, Public Finance, and Trigger Funds

This section briefly traces the origins of campaign finance reform at the beginning of the twentieth century, and then recounts the passage of the first national public finance regime, the Federal Election Campaign Act. It then discusses the problems facing public finance schemes and the solutions that trigger provisions offer. It concludes with a brief explanation of the criticisms of trigger funds.

9. *Id.* at 54.

10. 554 U.S. 724 (2008).

1. Campaign Finance and the Future of Public Financing

Campaign finance reform is often traced back to President Theodore Roosevelt.¹¹ After a quid pro quo scandal, wherein Roosevelt was accused of selling an ambassadorship for campaign contributions,¹² the President petitioned Congress for limits on campaign contributions and for a public financing scheme.¹³ Roosevelt's suggestions resulted in the Tillman Act of 1907, which limited some corporate contributions but stopped short of creating a framework for public finance.¹⁴

Campaign finance reform did not become salient again until the 1970s.¹⁵ In 1974, following Watergate and the specter of a corrupt presidential election, Congress amended its 1971 Federal Election Campaign Act (FECA) to incorporate several major reforms.¹⁶ Chief among these were the establishment of the Federal Election Commission (FEC) and amendments to the Internal Revenue Code allowing citizens to divert their tax dollars to finance presidential elections.¹⁷ In exchange for receiving "public" money from this fund, presidential candidates agree to a limit on private fundraising.¹⁸ Many states have adopted variations of this public funding regime.¹⁹

The Supreme Court's decision in *Buckley v. Valeo*, which struck down many of FECA's regulations on private campaign spending, made public financing all the more important.²⁰ Candidates cannot be required to limit campaign expenditures, but they can be induced to do so voluntarily with the promise of public funds.²¹ In many cases, a candidate who is unwilling

11. See, e.g., L. SANDY MAISEL, PARTIES AND ELECTIONS IN AMERICA: THE ELECTORAL PROCESS 236 (1987); Kate Pickert, *Campaign Financing: A Brief History*, TIME (June 30, 2008), <http://www.time.com/time/nation/article/0,8599,1819288,00.html>.

12. Pickert, *supra* note 11; see also HENRY F. PRINGLE, THEODORE ROOSEVELT: A BIOGRAPHY 451–52 (1931).

13. See LARRY J. SABATO & HOWARD R. ERNST, ENCYCLOPEDIA OF AMERICAN POLITICAL PARTIES AND ELECTIONS 275 (updated ed. 2007); Pickert, *supra* note 11.

14. THOM HARTMANN, UNEQUAL PROTECTION: HOW CORPORATIONS BECAME "PEOPLE"—AND HOW YOU CAN FIGHT BACK 124 (2d ed. 2010); Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 12–13 (Anthony Corrado et al. eds., 2005).

15. See Pickert, *supra* note 11; see also Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1055 (1996) (noting that federal campaign finance laws passed in the six decades after the Tillman Act were "generally toothless and were largely ignored").

16. BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 31–38 (2001); David R. Simon, *Watergate and the Nixon Presidency: A Comparative Ideological Analysis*, in WATERGATE AND AFTERWARD: THE LEGACY OF RICHARD M. NIXON 15 (Leon Friedman & William F. Levantrosser eds., 1992).

17. SMITH, *supra* note 16, at 32; Simon, *supra* note 16, at 15.

18. SMITH, *supra* note 16, at 32–33.

19. SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 444 (3d ed. 2007).

20. See *id.* at 443. For an analysis of *Buckley* and its impact, see *infra* Part I.B.

21. See ISSACHAROFF ET AL., *supra* note 19, at 443 ("*Buckley* imposes a constitutional barrier to Congress simply mandating restrictions on expenditures. The alternative would be to induce candidates to forego expenditures beyond a set level as a condition of receiving public funds.>").

to engage in vigorous fundraising (or one who is unsuccessful at it) may conclude that self-imposing such a limit is a small price to pay for an infusion of cash from the State.²²

One lingering problem with public financing, however, is its sustainability.²³ An inverse relationship exists between the decreasing public interest in funding public finance programs and the increasing cost of mounting competitive campaigns. Although polling data is inconclusive about public support for public finance,²⁴ the number of Americans participating in the tax check-off that funds the presidential public finance system has steadily decreased.²⁵ Some states that rely on tax check-off funding have seen a similar decrease.²⁶ Other states are facing broader budget crises that imperil their public finance programs.²⁷ In the midst of these revenue problems, the costs associated with mounting a competitive political campaign continue to rise.²⁸

2. Trigger Funds Provisions

Trigger funds provisions offer an interesting solution to this problem. Instead of disbursing a lump sum to public candidates, or a multiple of the total the candidate has raised from private sources (called “multiplier match”),²⁹ trigger funds operate differently. Under a trigger funds regime,

22. See, e.g., *McCain Presses Obama on Public Financing*, MSNBC.COM (Feb. 20, 2008), <http://www.msnbc.msn.com/id/23257223/> (noting that, if Senator John McCain and then-Senator Barack Obama each accepted \$85 million in public financing, this “would clearly give the advantage to McCain, who dislikes fundraising, and would hinder Obama and his widespread fundraising apparatus”).

23. ISSACHAROFF ET AL., *supra* note 19, at 443.

24. See Stephen R. Weissman & Ruth A. Hassan, *Public Opinion Polls Concerning Public Financing of Federal Elections 1972–2000: A Critical Analysis and Proposed Future Directions*, CAMPAIGN FINANCE INST., 2 (2005), www.cfinst.org/president/pdf/PublicFunding_Surveys.pdf (finding that responses to polls about public finance largely depend upon the language and context of the poll question).

25. *Id.*; see also ISSACHAROFF ET AL., *supra* note 19, at 443.

26. See, e.g., Sasha Horwitz, *Public Campaign Financing in Michigan: Driving Toward Collapse?*, CTR. FOR GOVERNMENTAL STUDIES, 10–11 (2008), http://www.cgs.org/images/publications/cgs_mi_final_081808.pdf; Steven M. Levin, *Public Campaign Financing in Wisconsin: Showing Its Age*, CTR. FOR GOVERNMENTAL STUDIES, 20 (2008), http://www.cgs.org/images/publications/cgs_wi_final_081808.pdf.

27. See, e.g., Jessica A. Levinson, *Public Campaign Financing in Florida: A Program Sours*, CTR. FOR GOVERNMENTAL STUDIES, 27 (2008), http://www.cgs.org/images/publications/cgs_pcf_fla_final_021909.pdf.

28. See, e.g., Leslie Wayne, *Campaign '08: Most Expensive Ever*, THE CAUCUS: THE POL. AND GOV'T BLOG OF THE TIMES (Oct. 24, 2008, 12:01 PM), <http://thecaucus.blogs.nytimes.com/2008/10/24/campaign-08-most-expensive-ever/> (calling the 2008 campaign cycle the most expensive ever); *Election 2010 to Shatter Spending Records as Republicans Benefit from Late Cash Surge*, CTR. FOR RESPONSIVE POL. (Oct. 27, 2010, 4:00 PM), <http://www.opensecrets.org/news/2010/10/election-2010-to-shatter-spending-r.html> (noting that the 2010 midterm elections were more expensive than the previous record-setting midterms of 2006).

29. For example, New York City’s public finance regime matches individual contributions at a \$6-to-\$1 rate. See *Why Should I Join?*, NEW YORK CITY CAMPAIGN FIN. BD., http://www.nycfb.info/candidates/candidates/whyJoin.aspx?sm=candidates_whyJoin (last visited Feb. 23, 2011).

public money is disbursed to the participating candidate based on how much her opponent has raised or spent.³⁰ Courts have praised the inherent efficiency of this structure:

By linking the amount of public funding in individual races to the amount of money being spent in these races, the State is able to allocate its funding among races of varying levels of competitiveness without having to make qualitative evaluations of which candidates are more “deserving” of funding beyond the base amounts provided to all publicly-funded candidates.³¹

Proponents of trigger funds regimes urge that other public finance disbursement devices, such as the lump sum and multiplier match, are less effective.³² Unlike those programs, trigger funds allow public finance systems to disburse only as much money to their candidates as is necessary in the context of a particular political contest.³³ They operate as a “time-sensitive market-correction device,”³⁴ tying the disbursement amount to the race at hand, rather than looking at what has been spent in past elections or guessing what may be spent in the future. Trigger funds also keep the public finance system current; rather than voters or the legislature having to tinker constantly with the disbursement amounts to keep up with trends in campaign spending, trigger funds adapt to any election in any year.³⁵

30. For a detailed description of Arizona’s trigger funds provision, see *infra* notes 136–39 and accompanying text.

31. *McComish v. Bennett*, 611 F.3d 510, 527 (9th Cir.), *cert. granted*, 131 S. Ct. 644 (2010); see also *McComish v. Brewer*, No. CV-08-1550, 2010 WL 2292213, at *8 n.12 (D. Ariz. Jan. 20, 2010) (surmising that larger lump-sum disbursements are “not fiscally possible”), *rev’d on other grounds sub nom.* *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010).

32. See Rick Hasen, *The Big Campaign Finance Story of 2011: An Effective End to Public Financing*, SUMMARY JUDGMENTS: THE LOYOLA LAW SCHOOL, LOS ANGELES FACULTY BLOG (Nov. 28, 2010), <http://summaryjudgments.lls.edu/2010/11/it-is-with-great-pleasure.html>; see also Amanda Terkel, *Supreme Court Takes Aim Yet Again at Campaign Finance Laws*, HUFFINGTON POST (Nov. 29, 2010, 4:48 PM), http://www.huffingtonpost.com/2010/11/29/supreme-court-clean-elections-law-mccomish-bennett_n_789353.html (“Paul Ryan, associate legal counsel at the nonpartisan Campaign Legal Center . . . also pointed to the multiple-match system as an alternative, although he argued that it’s unfortunately less efficient than the trigger system, which directed additional funds into the races that most needed them.”). *But see* Mimi Marziani, *Reports of Public Financing’s Demise Are Exaggerated*, ACSBLOG (June 10, 2010, 1:39 PM), <http://www.acslaw.org/node/16340> (arguing that the elimination of trigger funds would not itself doom public financing).

33. Terkel, *supra* note 32 (“[Trigger funds] directed additional funds into the races that most needed them.”); see also *supra* note 31 and accompanying text.

34. Kenneth N. Weine, *Triggering the First Amendment: Why Campaign Finance Systems That Include “Triggers” Are Constitutional*, 24 J. LEGIS. 223, 236 (1998) (arguing that public funding must be set by looking at expenditures made during the race; “[o]therwise, in an era where a national organization can use a mail-house to send glossy campaign literature to every voter in a given district in a matter of days, candidates would face too volatile of a campaign spending market”).

35. Of course, trigger funds can only “adapt” to the extent allowed by their enabling statute, which may limit trigger funds disbursements. See, e.g., *infra* note 140 and accompanying text (noting that Arizona’s trigger funds provision caps extra funds at three times the initial disbursement).

However, not everyone is enamored of rescue funds. As might be expected, traditional candidates who spend precious time and resources to fundraise take umbrage at a scheme that allows their opponents to benefit from their hard work.³⁶ Conservative and libertarian critics of the law argue that trigger funds are not only unfair to specific private candidates, but more broadly constitute troubling government intrusion into electoral politics.³⁷ Consequently, trigger funds regimes have long been the source of legal disputes. Over the past two decades, several such candidates have taken their frustration to the federal courts.³⁸

B. *Buckley v. Valeo and the First Amendment Analysis*

The Supreme Court has declared that, due to the protections afforded by the First Amendment, state restrictions of speech based on content are presumptively invalid.³⁹ Such laws are subject to strict scrutiny,⁴⁰ requiring a showing that they are narrowly tailored to be the least restrictive means of achieving a compelling government interest.⁴¹ Courts take an especially hard look at laws that restrict political speech, which is “at the very core of the First Amendment.”⁴²

The precedential framework for First Amendment challenges to campaign finance laws derives from the Supreme Court’s landmark *Buckley v. Valeo*⁴³ decision in 1976.⁴⁴ The Court’s “long and oftentimes rambling

36. Consider the plight of former Congressman Matt Salmon, who ran against Janet Napolitano for Governor of Arizona in 2002. According to Napolitano, a fundraiser for Salmon featuring President George W. Bush caused her campaign to receive \$750,000 in trigger funds, leading Napolitano to joke: “I am quite certain that I am the only Democratic Governor in the country for whom George Bush has held a fundraiser.” Gov. Janet Napolitano, *Money and Politics: The Good, the Bad, and the Ugly*, A Living Constitution Lecture (Apr. 10, 2008), available at <http://www.brennancenter.org/page/-/publications/Napolitano%20Speech%20FINAL.pdf>.

37. See, e.g., Paul Sherman, *The “Reform” View: We Need Regulation Because You Vote Incorrectly*, CONGRESS SHALL MAKE NO LAW: IJ’S FREE SPEECH BLOG (Dec. 10, 2010, 10:25 AM), <http://makenolaw.org/blog/5-politicalspeech/148-the-reform-view-we-need-regulation-because-you-vote-incorrectly> (cautioning that “nothing could be more destructive of liberty than to give our elected officials control over speech about elected officials”); see also *McComish v. Bennett (Clean Elections)*, GOLDWATER INST., <http://www.goldwaterinstitute.org/case/68> (last visited Feb. 23, 2011) (describing trigger funds as “government interference in campaign activities”).

38. For descriptions of legal challenges to various trigger funds provisions, see *infra* Parts I.C, II.B–D.

39. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 933 (3d ed. 2006).

40. *Id.*

41. *Id.* at 541–42.

42. *Id.* at 1070 (“If there is a hierarchy of protected speech, political speech occupies the top rung.”). As discussed *infra*, however, the standard for campaign finance regulation is not explicitly strict scrutiny, but rather “exacting scrutiny.” The *Buckley* Court did not clarify the distinctions between the two levels, but one might be that exacting scrutiny does not demand a showing that the regulation is the least restrictive alternative. For a discussion of this possibility, see *infra* note 309 and accompanying text.

43. 424 U.S. 1 (1976).

44. ISSACHAROFF ET AL., *supra* note 19, at 334.

opinion”⁴⁵ briefly affirmed the constitutionality of public finance,⁴⁶ but struck down several of the 1974 amendments to FECA.⁴⁷ Finding that FECA’s restrictions on money in campaigns “operate in an area of the most fundamental First Amendment activities,” the Court held that they were therefore subject to “exacting scrutiny.”⁴⁸

However, the Court distinguished expenditures from contributions, and scrutinized them differently. Expenditures, the Court reasoned, directly relate to the right of political expression because money is necessary to communicate with the electorate.⁴⁹ Practically speaking, because money enables speech, the Court scrutinized expenditures as though they *are* speech.⁵⁰ Adding to the Court’s skepticism about expenditure limits was its judgment that expenditures do not pose the same danger of corruption as contributions.⁵¹ Since the Court viewed corruption as quid pro quo,⁵² it concluded that candidates could not self-corrupt,⁵³ and outside parties that make independent expenditures could not collude with the candidate and thus could not corrupt him either.⁵⁴ Therefore, FECA’s limits on expenditures could not survive exacting scrutiny; indeed, the Court likened the law’s restrictions to “being free to drive an automobile as far and as often as one desires on a single tank of gasoline.”⁵⁵

The Court did not extend the same protection to contributions. It found that, because giving money to a candidate communicates only support, but

45. *Id.* at 335.

46. *See supra* note 7 and accompanying text.

47. ISSACHAROFF ET AL., *supra* note 19, at 334–35.

48. *Buckley*, 424 U.S. at 14, 44–45.

49. *Id.* at 19 (“[V]irtually every means of communicating ideas in today’s mass society requires the expenditure of money.”).

50. *But see id.* at 262 (White, J., concurring in part and dissenting in part) (“[T]he argument that money is speech and that limiting the flow of money to the speaker violates the First Amendment proves entirely too much.”); *see also* *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 508–09 (1985) (White, J. dissenting) (“[Expenditures] produce such speech; they are not speech itself. At least in these circumstances, I cannot accept the identification of speech with its antecedents.”). Scholars and commentators from across the ideological spectrum have criticized *Buckley*’s approach to evaluating expenditure restrictions, but a full analysis of these criticisms is beyond the scope of this Note. For a brief discussion of some critiques of *Buckley*, *see infra* notes 320–26 and accompanying text.

51. *Buckley*, 424 U.S. at 46 (“[T]he independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.”).

52. *See id.* at 26–28. For a detailed discussion of *Buckley*’s definition of corruption and its ramifications, *see infra* Part III.B.1.

53. *See Buckley*, 424 U.S. at 53 (finding that reliance on personal funds “reduces the candidate’s dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse”).

54. *See id.* at 47 (“The absence of prearrangement and coordination of an expenditure with the candidate . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”).

55. *Id.* at 19 n.18.

not necessarily the reason for or level of support,⁵⁶ statutory contribution limits are “only a marginal restriction” on free speech rights.⁵⁷ Contributions are political speech only insofar as they communicate “a general expression of support.”⁵⁸ Therefore, capping them is constitutionally permissible because it is the act of giving, not the amount given, that the First Amendment protects.⁵⁹

Because of *Buckley*'s distinctions between expenditures and contributions, courts have since interpreted *Buckley* to mean that contributions are subject to a lower level of scrutiny.⁶⁰ Accordingly, contribution limits are constitutional if “‘closely drawn’ to match a ‘sufficiently important interest.’”⁶¹ Since most trigger funds provisions implicate both contributions and expenditures, however, the level of scrutiny to be applied is a source of some confusion. That trigger funds provisions impose no actual cap on speech, unlike the provisions that *Buckley* contemplated, further complicates the scrutiny level inquiry. As will be discussed below, lower courts have approached the scrutiny question in different ways.

C. *The Pre-Davis v. FEC Circuit Split*

As Part I.D below discusses, the Supreme Court's 2008 decision in *Davis v. FEC*⁶² has altered the framework under which federal courts analyze trigger funds provisions. Prior to *Davis*, however, three circuits had ruled on the constitutionality of trigger funds. This section reviews this pre-*Davis* circuit split, which existed between 2000 and 2008.

1. “The Most Fundamental of Rights Is Infringed”: The Eighth Circuit Strikes Down Trigger Funds in *Day v. Holahan*

The first circuit court to review a trigger funds regime took a dim view of the practice and ruled it unconstitutional.⁶³ In 1994, the U.S. Court of Appeals for the Eighth Circuit reviewed Minnesota's campaign finance statute after a coalition of political candidates and donors challenged the law's constitutionality.⁶⁴ Rather than matching all of an opponent's funds,

56. *Id.* at 21 & n.22 (finding that the contribution amount is “at most” only a “very rough index” of the donor's level of support, and is only one of several factors that also include the donor's “financial ability”).

57. *Id.* at 20–21.

58. *Id.* at 21.

59. *See id.* (“The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.”).

60. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387 (2000) (“It has, in any event, been plain ever since *Buckley* that contribution limits would more readily clear the hurdles before them [than expenditure limits].” (citing *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 610 (1996))); *ISSACHAROFF ET AL.*, *supra* note 19, at 337.

61. *Nixon*, 528 U.S. at 387–88 (quoting *Buckley*, 424 U.S. at 30).

62. 554 U.S. 724 (2008).

63. *See Day v. Holahan*, 34 F.3d 1356, 1361–62 (8th Cir. 1994).

64. *See id.* at 1358–60.

the Minnesota system implicated only independent expenditures.⁶⁵ Moreover, it did not match the expenditures dollar-for-dollar; instead, it disbursed one-half of the expenditure's amount to the adversely affected candidate while raising the ceiling on her own expenditures.⁶⁶

Holding that the raised ceiling and trigger funds actually "impaired" the speech of those making independent expenditures, the Eighth Circuit struck down the Minnesota statute.⁶⁷ The court found that, because "the individual or group intending to contribute to [a candidate's] defeat becomes directly responsible for adding to her campaign coffers," the trigger funds provision chilled the free exercise of protected speech.⁶⁸ The court likened this chilling effect to government censorship,⁶⁹ and although acknowledging that such a burden could potentially be justified by a state interest, the court suggested that it would apply strict scrutiny, rather than the *Buckley* "exacting scrutiny" standard.⁷⁰

The Eighth Circuit could not identify such a state interest. Given that almost all Minnesota candidates participated in public financing before the enactment of the trigger funds provision, the court instead concluded that further incentivizing the public system could not possibly be justified.⁷¹ Accordingly, it declared the provision unconstitutional.⁷²

2. "No Right To Speak Free from Response": The First and Fourth Circuits Uphold Trigger Funds in *Daggett* and *Leake*

The next two circuit courts to evaluate trigger funds reached a different result than the Eighth Circuit. In 2000, the U.S. Court of Appeals for the

65. *See id.* at 1359–60 (citing MINN. STAT. ANN. § 10A.25 subd. 13(a) (1993)). The term "independent expenditure" generally refers to an expenditure made independently of a candidate's campaign, i.e., an advertisement created and aired by a union or interest group. *See, e.g.*, 2 U.S.C. § 431(17) (2006).

66. *Day*, 34 F.3d at 1359–60.

67. *See id.* at 1360.

68. *Id.*

69. *Id.* ("This 'self-censorship' that has occurred even before the state implements the statute's mandates is no less a burden on speech that is susceptible to constitutional challenge than is direct government censorship.").

70. *See id.* at 1361 ("[T]he statute may be upheld as against constitutional challenge if the state can show that it is narrowly drawn to serve a compelling state interest."). It is unclear how this relates to the *Buckley* Court's "exacting scrutiny" standard. *See supra* note 42, *infra* note 309 and accompanying text.

71. *See Day*, 34 F.3d at 1361. Because the Eighth Circuit's dismissal of the interest analysis is highly specific to the circumstances of Minnesota public finance, it is not necessarily applicable to other jurisdictions. This is especially likely for those states that had no public financing system before the passage of the legislation that included trigger funds (such as Arizona).

72. *See id.* at 1362. Two years later, the Eighth Circuit upheld other portions of Minnesota's campaign finance statute, including a provision that removed spending limits for opponents of well-funded candidates. *See Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996). *Rosenstiel* has been interpreted as calling the precedential value of *Day* into question. *See McComish v. Bennett*, 611 F.3d 510, 523 n.9 (9th Cir.), *cert. granted*, 131 S. Ct. 644 (2010) ("We decline to follow the Eighth Circuit down a road that even it refused to follow."); *Daggett v. Comm'n on Governmental Ethics and Elections Practices*, 205 F.3d 445, 465 n.25 (1st Cir. 2000) (describing *Day*'s status as "open to question").

First Circuit heard a broad challenge to the Maine Clean Elections Act.⁷³ Maine's statute matches dollar-for-dollar contributions and expenditures made against the public candidate.⁷⁴ However, it caps the trigger funds at double the initial disbursement.⁷⁵

As part of the challenge, the plaintiffs⁷⁶ made three principal arguments against trigger funds. First, they contended that the trigger funds chill and penalize the speech of the nonparticipating candidates and those making independent expenditures on their behalf.⁷⁷ Second, the plaintiffs claimed that trigger funds violated their freedom of association because the provision "forces them to be associated with candidates they oppose by in effect facilitating their speech."⁷⁸ Finally, the plaintiffs argued that trigger funds negate the only significant burden of participating in public financing—the public candidate's pledge "not to accept any private contributions and not to make expenditures except from disbursements made to [her] from the [public] [fund]."⁷⁹ The plaintiffs therefore alleged that trigger funds cause the public financing regime to be "impermissibly coercive—that is, it provides so many incentives to participate and so many detriments to foregoing participation that it leaves a candidate with no reasonable alternative" but to enroll.⁸⁰

Departing from the Eighth Circuit's rationale, the First Circuit found that trigger funds do not burden First Amendment rights.⁸¹ It reached this conclusion largely because the Maine statute imposed no active ban or cap on spending by nonparticipating candidates.⁸² Quoting the Supreme Court's pronouncement that the First Amendment's purpose is to "secure the 'widest possible dissemination of information from diverse and antagonistic sources,'"⁸³ the First Circuit reasoned that the Amendment protects "no right to speak free from response."⁸⁴

The First Circuit also disregarded the plaintiffs' association and coercion claims. Freedom of association was not burdened, the court reasoned, because no actual association occurred between the plaintiffs and the

73. *Daggett*, 205 F.3d at 450.

74. ME. REV. STAT. ANN. tit. 21-A, § 1125(9) (2010). This includes those of the nonparticipating candidate's campaign as well as independent expenditures. *Id.*

75. *See id.*

76. The plaintiffs included candidates for state office, contributors, political action committees, and the Libertarian Party of Maine. *See Daggett*, 205 F.3d at 450.

77. *Id.* at 463–64.

78. *Id.* at 464.

79. *Id.* at 451 (citing tit. 21-A, § 1125(6)).

80. *Id.* at 466.

81. *See id.* at 464.

82. *See id.* ("[T]he Maine statute creates no direct restriction. . . . [It] in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures."). For a discussion of how *Davis v. FEC* rendered this analysis moot, see *infra* Part I.D.

83. *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1963)).

84. *Daggett*, 205 F.3d at 464 (citing *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 14 (1986) (finding no right to speak "free from vigorous debate")).

candidates they opposed.⁸⁵ Nor was the trigger funds provision coercive, both because of its cap at two times the initial disbursement and because the nonparticipating opponent “holds the key as to how much and at what time the participant receives matching funds.”⁸⁶ Having determined that the Maine statute did not burden any First Amendment rights, the court declined to reach the question of the state’s interest.⁸⁷

In 2008, the U.S. Court of Appeals for the Fourth Circuit weighed in on the trigger funds question.⁸⁸ The appeal concerned North Carolina’s Judicial Campaign Reform Act, a clean elections statute affecting appellate judicial candidates.⁸⁹ The statute allows trigger funds to be disbursed to the participating candidate if the amount of money spent or raised against her or on behalf of her nonparticipating opponent exceeds a predetermined trigger amount.⁹⁰ It caps the total trigger funds available at twice that trigger amount.⁹¹ However, at the time of the Fourth Circuit decision, the statute included a ban on contributions to the nonparticipating opponent during the last twenty-one days of a general election if such contributions would trigger additional funds.⁹²

Echoing the First Circuit’s *Daggett* analysis, the Fourth Circuit concluded that the trigger funds provision creates no First Amendment burden because it does not impose any actual cap or penalty on speech.⁹³ Although trigger funds do empower the nonparticipating candidate’s opponent, the court found that this “‘further[s], not abridges, pertinent First Amendment values’ by ensuring that the participating [opponent] will have an opportunity to engage in responsive speech.”⁹⁴ The court also disregarded any actual deterrent effect of the trigger funds provision as emanating “from a strategic, political choice, not from a threat of government censure or prosecution.”⁹⁵ Like the First Circuit, the Fourth Circuit did not consider the state interest behind trigger funds once it determined that they posed no First Amendment burden.

85. *See id.* at 465 (“[A]ppellants’ freedom of association is not burdened because their names and messages are not associated—in any way indicative of support—with the candidate they oppose.”).

86. *Id.* at 468.

87. *See id.* at 464–65 & 465 n.26.

88. *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008). This was the last circuit court ruling on trigger funds before the Supreme Court announced its *Davis* decision. For more information on *Davis*, see *infra* Part I.D.

89. *See Leake*, 524 F.3d at 432.

90. *See id.* at 433 (citing N.C. GEN. STAT. ANN. § 163-278.67 (West 2010)). The “funds in opposition” amount to be matched by the trigger funds includes both monies raised or spent by the nonparticipating opponent (whichever is greater) as well as independent expenditures for the opponent or against the public candidate. *Id.* (citing § 163-278.67(a)). The statute defines the trigger amount as either the maximum qualifying contributions amount (for the primary) or the initial disbursement amount. § 163-278.62.

91. *See Leake*, 524 F.3d at 433 (citing § 163-278.67(a–c)).

92. *See id.* at 434 (citing § 163-278.13(e2)(3) (repealed 2008)).

93. *See id.* at 437.

94. *Id.* at 437 (quoting *Buckley v. Valeo*, 424 U.S. 1, 92–93 (1976) (per curiam)).

95. *Id.* at 438.

Thus, there were three circuit court decisions on trigger funds leading up to the Supreme Court's decision in *Davis v. FEC*. One court found that trigger funds constituted a burden akin to government censorship that could not survive "even the most cursory scrutiny."⁹⁶ The other two circuit courts, however, found that trigger funds constituted no burden whatsoever.⁹⁷ Remarkably, none of these analyses gave any thought to the state interest involved. Each turned almost exclusively on the question of whether a law that implicated—but did not directly cap—contributions and expenditures burdened First Amendment rights. This was the question that the Supreme Court settled in *Davis*.

D. The Supreme Court Upends the Burden Analysis in *Davis v. FEC*

This section will discuss the Supreme Court's decision in *Davis v. FEC*.⁹⁸ It will explain how the Court viewed the First Amendment as primarily protecting speakers instead of speech. Part I.D will then recount the various responses to Justice Alito's opinion, concluding by explaining the decision's significance for trigger funds analysis.

1. "An Unprecedented Penalty": The *Davis* Opinion

In *Davis*, the Supreme Court evaluated the Millionaire's Amendment to the Bipartisan Campaign Reform Act of 2002 (BCRA).⁹⁹ The Millionaire's Amendment, which was designed in part to mitigate the windfall that campaign finance restrictions heaped on wealthy candidates,¹⁰⁰ called for a calculation of candidates' "opposition personal funds amount."¹⁰¹ If this calculation determined that the self-financed candidate possessed a financial advantage of more than \$350,000, the Millionaire's Amendment altered some of the BCRA's provisions.¹⁰² Specifically, the self-financed candidate's opponent became eligible to receive contributions at triple the previous limit (raising the cap to \$6,900), as well as unlimited party expenditures.¹⁰³ However, the normal restrictions returned once the

96. *Day v. Holahan*, 34 F.3d 1356, 1362 (8th Cir. 1994).

97. See *Leake*, 524 F.3d at 437; *Daggett v. Comm'n on Governmental Ethics and Elections Practices*, 205 F.3d 445, 464–65 (1st Cir. 2000).

98. 554 U.S. 724 (2008).

99. *Davis*, 554 U.S. at 729.

100. Brief for Appellee at 33–34, *Davis*, 554 U.S. 724 (No. 07-320), 2008 WL 742921 at *33 (arguing that "Congress sought partially to restore that 'normal relationship'" between resources and support that contribution limits had wrought in the absence of corresponding expenditure limits); see also *Davis*, 554 U.S. at 743 ("[The Millionaire's Amendment] can be seen, not as a legislative effort to interfere with the natural operation of the electoral process, but as a legislative effort to mitigate the untoward consequences of Congress' own handiwork . . .").

101. *Davis*, 554 U.S. at 729 (citing Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441a-1(a)). This amount is obtained "by adding each candidate's expenditure of personal funds to 50% of the funds raised from contributors." Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL'Y 283, 319 n.222 (2010).

102. *Davis*, 554 U.S. at 729.

103. *Id.* (citing Bipartisan Campaign Reform Act § 441a-1(A)–(C)).

opponent caught up to the self-financed candidate.¹⁰⁴ To facilitate these modifications, the Millionaire's Amendment also imposed a scheme of disclosure requirements on self-financing candidates.¹⁰⁵

Writing for the majority, Justice Alito held that the Millionaire's Amendment "impermissibly burden[ed] [the plaintiff's] First Amendment right to spend his own money for campaign speech."¹⁰⁶ To the majority, it did not matter that the Millionaire's Amendment stopped short of imposing a hard limit on expenditures, which had been a feature of the legislation struck down in *Buckley*.¹⁰⁷ It was enough that the statute attached a "special and potentially significant burden" to the constitutionally-protected choice to spend one's own money on political speech.¹⁰⁸ Nor did the Court look to whether there was any evidence that the Millionaire's Amendment had actually chilled speech.¹⁰⁹ Rather, it reasoned that because the regulation assisted the self-financed candidate's opponent, that assistance correspondingly created a substantial burden on the candidate.¹¹⁰

To make matters worse, unlike a publicly-funded candidate who voluntarily accepts funding restrictions, there was no way for a self-financed candidate to opt out or escape from the Millionaire's Amendment's grasp.¹¹¹ The only thing the self-financed candidate could do to keep his opponent's traditional limits in place was to withhold spending his own money.¹¹² This presented a clear impediment to his ability to "engage in the discussion of public issues and vigorously and tirelessly to advocate his own election."¹¹³

Concluding that the Millionaire's Amendment imposed a substantial burden on the self-financed candidate's First Amendment rights, the Court turned to the interest analysis.¹¹⁴ It immediately rejected the possibility that

104. *Id.* (citing Bipartisan Campaign Reform Act § 441a-1(a)(3)).

105. *Id.* at 730 (citing Bipartisan Campaign Reform Act § 441a-1(b)(1)(B)).

106. *Id.* at 738.

107. *See Buckley v. Valeo*, 424 U.S. 1, 7 (1976) (per curiam).

108. *Davis*, 554 U.S. at 739. Justice Alito's opinion goes to some length to explain how such a burden on a candidate's choices is unconstitutional. *See id.* ("The resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice. . . . [T]he choice involved in *Buckley* was quite different from the choice imposed by [the Millionaire's Amendment].").

109. *See generally* Transcript of Oral Argument at 7, *Davis*, 554 U.S. 724 (No. 07-320) 2008 WL 1803646 ("Do we usually evaluate restrictions on First Amendment rights on the basis of whether the chill that was imposed by the government was actually effective in stifling the right? . . . If the person goes ahead and speaks anyway, is he estopped from saying that the government was chilling his speech nonetheless? . . . Isn't that what's going on here?" (Scalia, J.)).

110. *Davis*, 554 U.S. at 739 ("Under [Millionaire's Amendment] § 319(a), the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics."); *see also* Esenberg, *supra* note 101, at 318 ("Helping [o]ne [s]lide [b]urden[s] the [o]ther").

111. *Davis*, 554 U.S. at 739–40 ("In *Buckley*, a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures. Here, § 319(a) does not provide any way in which a candidate can exercise that right without abridgment.").

112. *See id.* at 740.

113. *Id.* at 738 (citing *Buckley v. Valeo*, 424 U.S. 1, 52–53 (1976) (per curiam)).

114. *See id.* at 740.

the Millionaire's Amendment could have any anticorruption effect, reasoning that "reliance on personal funds *reduces* the threat of corruption."¹¹⁵ The remaining justification, leveling electoral opportunities, was also pilloried.¹¹⁶ The Court's objection was not that the Millionaire's Amendment did not further that interest; rather, the Court refused to recognize the interest itself.¹¹⁷ Leveling electoral opportunities, it wrote, "means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election."¹¹⁸ Because this could not qualify as a legitimate state interest, the Millionaire's Amendment could not stand.

2. Reflections on *Davis*, and Its Implications for Trigger Funds

Editorial reactions to the *Davis* decision were swift and predictable. Although the *Wall Street Journal* was pleased with the decision,¹¹⁹ the *New York Times* lambasted the opinion as "conservative judicial activism of the first order."¹²⁰ The *Washington Post* was less concerned about the Millionaire's Amendment, however, and instead worried what the decision meant for trigger funds provisions across the country.¹²¹

Legal commentators asked the same question. Rick Hasen, a prominent election law professor and author of Election Law Blog, questioned whether public financing systems that tie "special benefits" to opposition spending could survive.¹²² Similarly, Professor Richard M. Esenberg concluded that, in the wake of *Davis*, "asymmetrical schemes of public financing that provide additional funding . . . in response to independent expenditures are

115. *Id.*; see also Esenberg, *supra* note 101, at 319 ("Self-financed candidates, [the majority] reasoned, cannot 'corrupt' themselves.").

116. See *Davis*, 554 U.S. at 741.

117. See *id.* (finding "no support for the proposition that [leveling electoral opportunities] is a legitimate government objective" (citing *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting))).

118. *Id.* at 742.

119. See Editorial, *Justices for Free Speech*, WALL ST. J., June 28, 2008, at A10, available at <http://online.wsj.com/article/SB121460646723712065.html>.

120. Editorial, *It's Nice to be Rich*, N.Y. TIMES, June 28, 2008, at A16, available at <http://www.nytimes.com/2008/06/28/opinion/28sat3.html>.

121. Editorial, *Millionaires Win*, WASH. POST, June 29, 2008, at B6, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/28/AR2008062801751.html> (dismissing the loss of the Millionaire's Amendment as "unfortunate but not disastrous" but characterizing the *Davis* Court's opinion and its citation to *Day v. Holahan* therein as "[t]he bigger threat").

122. See Rick Hasen, *Initial Thoughts on FEC v. Davis: The Court Primes the Pump for Striking Down Corporate and Union Campaign Spending Limits and Blows a Hole in Effective Public Financing Plans*, ELECTION LAW BLOG (June 26, 2008, 7:55 AM), <http://electionlawblog.org/archives/011095.html>.

presumably unconstitutional.”¹²³ Opponents of campaign finance saw the same implication in Justice Alito’s opinion.¹²⁴

That a majority of the Roberts Court viewed the prevention of quid pro quo as the only constitutional rationale for campaign finance legislation was perhaps unsurprising.¹²⁵ *Davis* was nevertheless a milestone for trigger funds analysis because it tempered *Buckley*’s vision of the First Amendment as seeking “the widest possible dissemination of information from diverse and antagonistic sources.”¹²⁶ Although *Buckley* had warned that “the First Amendment simply cannot tolerate [a] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy,”¹²⁷ *Davis* redefined “legislative limit” to include legislation that, in fact, imposed no limit whatsoever.¹²⁸ The question that had divided lower courts about the burden imposed by trigger funds—whether a regulation that implicates expenditures but stops short of capping them is a burden on First Amendment rights—had been answered with a resounding “yes.”¹²⁹

But while the Millionaire’s Amendment served no anticorruption interest, *Davis* said nothing about whether public financing statutes that include trigger funds provisions prevent corruption.¹³⁰ If they do, then they might be constitutional despite the substantial burden they likely impose on speech. This was the possibility that faced the District of Arizona in *McComish v. Brewer*.¹³¹

123. Esenberg, *supra* note 101, at 321–22. *But see* Case Comment, *Campaign Finance Regulation*, 122 HARV. L. REV. 375, 380–85 (2008) (arguing that “*Davis* is hardly the warning shot these commentators think it is” because their reading “oversimplifies the Court’s reasoning and ignores a crucial First Amendment distinction between government promotion of speech and government restriction of speech”).

124. *See, e.g.*, Tony Mauro, *Davis: Leveling Rich Candidates’ Speech Unjustified*, THE FIRST AMENDMENT CENTER AT VAND. U. (June 30, 2008), <http://www.firstamendmentcenter.org/analysis.aspx?id=20238> (“Candidates have a First Amendment right to fund their own speech without being burdened by government provision of benefits to their opponents. This has broad implication for public-funding schemes.”).

125. *See, e.g.*, *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting) (“As we have noted, ‘preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.’” (quoting *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985))).

126. *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

127. *Id.* at 54.

128. *See supra* notes 107–08 and accompanying text.

129. *See supra* note 110 and accompanying text.

130. *See* Case Comment, *supra* note 123, at 385 (“[*Davis*] says nothing of asymmetrical funding schemes and therefore says nothing about their constitutionality.”).

131. *See McComish v. Brewer*, No. CV-08-1550, 2010 WL 2292213, at *7 (D. Ariz. Jan. 20, 2010), *rev’d sub nom. McComish v. Bennett*, 611 F.3d 510 (9th Cir.), *cert. granted*, 131 S. Ct. 644 (2010) (“While *Davis* is instructive, it does not answer the precise question now before the Court.”).

II. THE CURRENT TRIGGER FUNDS CIRCUIT SPLIT

Part II analyzes the current trigger funds conflict and explains how courts have addressed the question of whether trigger funds can exist post-*Davis*. It focuses specifically on the legal dispute over Arizona's clean elections legislation, which will soon be before the Supreme Court. First, this part explains Arizona's Citizens Clean Elections Act. It then explores the district court's decision about the Act in *McComish v. Brewer*, as well as the Ninth Circuit's reversal in *McComish v. Bennett*, and the Supreme Court's order reinstating the District Court's injunction. Finally, Part II summarizes subsequent rulings on trigger funds by the Second, Eleventh, and First Circuits in the months preceding the 2010 elections.

A. Arizona's Citizens Clean Elections Act

The road to clean elections legislation was a particularly bumpy one for Arizona. Between 1986 and 1997, both Arizona senators, two consecutive governors, nine state legislators, and many other political actors were implicated in various corruption scandals.¹³² The illegal activity ranged from racketeering and fraud to extortion and bribery.¹³³

It is hardly surprising, then, that the voters of Arizona passed a ballot initiative known as the Citizens Clean Elections Act in 1998.¹³⁴ Section 16-940 declared the Act's intent "to create a clean elections system that [would] improve the integrity of Arizona state government by diminishing the influence of special-interest money, [would] encourage citizen participation in the political process, and [would] promote freedom of speech."¹³⁵ The Act rewards candidates who have received a minimum number¹³⁶ of five-dollar qualifying contributions with a disbursement of public funds,¹³⁷ almost all of which come from voluntary tax check-offs, tax credits, and a 10% surcharge on court assessments.¹³⁸ If such a participating candidate is outspent by her nonparticipating opponent, or if

132. See *McComish*, 611 F.3d at 514 (referencing Arizona's myriad corruption scandals). See generally Barnes, *supra* note 1; *AZSCAM Ushered in New Era of Clean Government* (KPHO CBS 5 News Television Broadcast Dec. 9, 2008), available at <http://www.kpho.com/video/18240345/index.html> (discussing AZScam and the consequent push for Clean Elections legislation).

133. See *McComish*, 611 F.3d at 514; see also Sally Ann Stewart, *New Tarnish on Arizona's Image*, USA TODAY, Feb. 13, 1991, at 6A.

134. See *Brewer*, 2010 WL 2292213, at *1; see also Barnes, *supra* note 1. Despite all of these scandals, the Act only passed with about 51% of the vote. *Brewer*, 2010 WL 2292213, at *2.

135. *Brewer*, 2010 WL 2292213, at *1 (quoting ARIZ. REV. STAT. ANN. § 16-940(A) (2006)).

136. § 16-950(D) (setting out the minimum number of qualifying contributions for each office sought).

137. § 16-951. Public candidates get this lump disbursement at the start of both the primary and the general election. *Brewer*, 2010 WL 2292213, at *2.

138. See *Funding—CCEC, CITIZENS CLEAN ELECTIONS COMMISSION*, <http://www.azcleanelections.gov/about-us/funding.aspx> (last visited Feb. 23, 2011); see also Napolitano, *supra* note 36 ("[A]lmost two thirds of Clean Election funding derives from surcharges on civil penalties and criminal fines like parking tickets, and about one third comes from voluntary check-offs on the state's tax return.").

there are independent expenditures made against her or for her opponent, then she receives “matching” or “trigger” funds—the difference between what she was initially disbursed and how much has been spent against her.¹³⁹ However, she cannot receive more than three times her initial grant.¹⁴⁰ “Simply, there are no consequences once a nonparticipating candidate has raised or spent more than three times the initial grant.”¹⁴¹

B. *The District of Arizona’s McComish v. Brewer Decision*

1. A Challenge to the Act

On August 21, 2008, the Goldwater Institute filed a complaint in the District of Arizona, alleging that the trigger funds provision of the Act posed an unconstitutional burden on the right to free political speech.¹⁴² The plaintiffs in the action¹⁴³ asserted that the Act unconstitutionally chilled their speech.¹⁴⁴ Also arguing on behalf of the plaintiffs was the Institute for Justice, a “libertarian public interest law firm”¹⁴⁵ that has been mounting challenges to the Act since at least 2004.¹⁴⁶

The plaintiffs first tried to obtain a temporary restraining order against the distribution of trigger funds.¹⁴⁷ Judge Roslyn O. Silver found that success on the merits was probable, but that the balance of harms weighed against intervening in the then-ongoing 2008 primary.¹⁴⁸ She therefore denied the motion¹⁴⁹ and similarly denied the plaintiffs’ motion for a preliminary injunction less than three weeks before the general election.¹⁵⁰ However, Judge Silver’s candid assessment of the plaintiffs’ chance of success on the merits clearly signaled how the court was likely to rule after a full trial.

139. *Brewer*, 2010 WL 2292213, at *2 (citing § 16-952).

140. *Id.* at *3.

141. *Id.*

142. *McComish v. Bennett (Clean Elections)*, THE GOLDWATER INST., <http://www.goldwaterinstitute.org/case/68> (last visited Feb. 23, 2011).

143. For a more detailed discussion of these plaintiffs, see *infra* notes 159–67 and accompanying text.

144. Second Amended Complaint at ¶ 3, *Brewer*, 2010 WL 2292213 (No. CV-08-1550), 2009 WL 6769421.

145. *About IJ: Our Vision*, THE INST. FOR JUSTICE, <http://www.ij.org/about> (last visited Feb. 23, 2011).

146. *See, e.g.*, Press Release, Institute for Justice, *IJ Asks Federal Court to Enjoin Arizona’s “Clean” Elections Act* (Feb. 19, 2004), *available at* http://www.ij.org/index.php?option=com_content&task=view&id=1235&Itemid=165; *see also* Ass’n of Am. Physicians & Surgeons v. *Brewer*, 363 F. Supp. 2d 1197 (D. Ariz. 2005) (challenging the Act).

147. *See Brewer*, 2010 WL 2292213 (No. CV-08-1550) (denying motion for temporary restraining order).

148. *Id.*

149. *Id.*

150. *See Brewer*, 2010 WL 2292213 (No. CV-08-1550) (denying motion for preliminary injunction). The court further found that “[t]he delay [after *Davis*] of almost two months before any action was filed in this court has to bear against the urgency of Plaintiffs’ claim and certainly mitigated against any real possibility that participating candidates might have time, after an injunction, to develop their own fundraising strategy.” *Id.* at *18.

2. What Exactly Is the Burden?

In determining the standard of review, the district court engaged in a bifurcated inquiry, the first part of which was the type of speech potentially burdened by the Act.¹⁵¹ Because the Act affected expenditures (including self-financing) as well as outside contributions, the district court concluded that the Act's burden, if any, was to be evaluated as implicating fully protected speech.¹⁵² In doing so, the court disregarded Arizona's claim that the Act mainly restricted contributions.¹⁵³ This aspect of the Act—its link not only to outside contributions but also to a candidate's ability to speak on behalf of her own candidacy—would prove crucial to the district court's decision.¹⁵⁴

The second part of the bifurcated inquiry, evaluating the Act's burden on speech, was trickier. In its findings of fact, the court had reviewed the plaintiffs' testimony on this subject. To demonstrate a burden, the plaintiffs had testified that they would have spent more money, or would have done so differently, but for the specter of matching funds.¹⁵⁵ The defendants countered, however, that if speech had actually been chilled, "one would expect to find candidates spend just up to but no more than the spending limit."¹⁵⁶ The court did not credit either of these interpretations, finding only that the testimony was inconclusive as to the Act's chilling effect.¹⁵⁷

Nor did Judge Silver seem particularly impressed by the individual plaintiffs' claims about the Act's effect on their own campaigns. After making individual findings of fact about each plaintiff, the court noted that the plaintiffs had complained of discrimination but confessed itself "unable to conceive of how an award of matching funds 'discriminates' against" non-participating candidates.¹⁵⁸ The court noted that one plaintiff, Nancy McClain, had not raised or spent enough money to trigger additional funds.¹⁵⁹ Similarly, the Arizona Taxpayers Action Committee had no money and thus was in no practical danger of triggering trigger funds.¹⁶⁰ Another plaintiff organization, the Arizona Free Enterprise Club's Freedom Club PAC, never actually made independent expenditures on behalf of candidates.¹⁶¹ Rick Murphy ran in 2004 as a public candidate, and had

151. *Brewer*, 2010 WL 2292213, at *6.

152. *See id.* at *7.

153. *See id.*

154. *See McComish v. Bennett*, 611 F.3d 510, 526 (9th Cir.), *cert. granted*, 131 S. Ct. 644 (2010) (noting that the district court "concluded that the Act did not further an anticorruption interest by providing matching funds to participating candidates triggered by non-participating candidates making contributions to their own campaigns from their own private funds").

155. *Brewer*, 2010 WL 2292213, at *3.

156. *Id.* ("In other words, candidates would attempt to spend the maximum amount they are able to spend without triggering matching funds.")

157. *See id.*

158. *See id.* at *4.

159. *See id.*

160. *See id.* at *6.

161. *See id.* at *5.

accepted public funds.¹⁶² In fact, one of Mr. Murphy's political consultants testified that in his opinion, Mr. Murphy would have lost the race without them.¹⁶³

Two plaintiffs, Tony Bouie and John McComish, testified that they had triggered additional funds for their opponents in the past and were forced to spend strategically to minimize their impact.¹⁶⁴ However, the court believed that trigger funds were largely irrelevant to the campaign of Robert Burns, concluding that "Mr. Burns simply communicated his message to the extent he felt necessary to win."¹⁶⁵ Perhaps most telling in Judge Silver's eyes was the testimony of Dean Martin, who could not remember if he had ever triggered extra funds to an opponent.¹⁶⁶ Of this uncertainty, the court observed, "if matching funds were a serious concern, Mr. Martin would know whether he had triggered such funds."¹⁶⁷

Despite the court's dissatisfaction with the plaintiffs' "scattered" and "vague" explanation of the burden,¹⁶⁸ it too had difficulty with this aspect of the analysis. Even before it analyzed the severity of the burden, the court first had to establish that such a burden existed. This question contained both practical and theoretical quandaries. When considered practically, the targeting of trigger funds specifically was counterintuitive.¹⁶⁹ Given that *Buckley* affirmed the constitutionality of public financing in lump sums,¹⁷⁰ the court found it difficult to ascertain how providing incremental (in effect, smaller) grants could be objectionable.¹⁷¹ The plaintiffs' argument, taken to its logical conclusion, was that the government is permitted to give their participating opponents a large sum of money at the start of the campaign, but giving those opponents smaller disbursements that could not exceed the plaintiffs' own spending violates the Constitution. For example, "an award under the current regime of \$25,000 (the initial grant plus some matching funds) violates their rights, but an award of twice that amount (not based on matching funds) would not."¹⁷²

Buckley caused problems for the plaintiffs on a theoretical level as well. There, the Supreme Court had held that the First Amendment existed "to secure 'the widest possible dissemination of information from diverse and

162. *See id.*

163. *See id.* at *5 n.10.

164. *See id.* at *3-4.

165. *Id.* at *5.

166. *See id.*

167. *Id.*

168. *Id.* at *3.

169. *See id.* at *8.

170. *Id.* ("If the Act provided for a single lump sum award, instead of incremental awards, the law would fall squarely within the regime blessed in *Buckley* and reaffirmed in *Davis*.").

171. *See id.*

172. *Id.* at *8 n.13. The court noted that the plaintiffs were not afraid to make this argument because most states cannot afford to disburse the higher, constitutionally-approved lump sums. *See id.* at *8 n.12.

antagonistic sources.”¹⁷³ Given this explicit preference for increasing the aggregate amount of speech, Judge Silver found it “illogical to conclude that the Act creating more speech is a constitutionally prohibited ‘burden’ on” nonparticipating candidates.¹⁷⁴ From this perspective, the Act’s effect of securing a greater amount of political speech furthered, not hindered, the First Amendment’s goal.

Ultimately, however, Judge Silver concluded that the Supreme Court’s *Davis* decision forced her to find a substantial burden upon the plaintiffs.¹⁷⁵ First, the court reasoned that trigger funds caused the same “negative consequence” for a nonparticipating candidate as the Millionaire’s Amendment had in *Davis*: if he spends more than a certain amount set by the campaign finance regime, his opponent is empowered to spend more as well.¹⁷⁶ The District Court also cited with approval to the U.S. District Court for the District of Connecticut’s *Green Party of Connecticut v. Garfield* decision, which found that trigger funds are even more constitutionally objectionable than the Millionaire’s Amendment because they actually put money in the opponent’s hand rather than making her work for it.¹⁷⁷

The District Court stopped short of precisely articulating the burden that the trigger funds provision imposed. It merely remarked that the dilemma the provision creates for private candidates mirrored that created by the Millionaire’s Amendment in *Davis*.¹⁷⁸ It seems that, to the district court, the coupling of disbursing public funds (an otherwise constitutional event) directly to an action by the nonparticipating opponent constituted the burden.¹⁷⁹ To be burdensome by this logic, a law need only impose a disincentive upon an action that the court has deemed a fully protected action—even if that disincentive is so minor as to be easily overcome by the incentives to perform that action. The plaintiff John McComish understood that his expenditures would trigger additional funds, but chose to make them anyway because the benefits of spending the money outweighed the detriment.¹⁸⁰ Yet even though it was likely an easy decision for McComish, that he was subjected to negative effects at all (or perhaps even

173. *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

174. *Brewer*, 2010 WL 2292213, at *7.

175. *Id.* at *8.

176. *Id.*

177. *Id.* (citing *Green Party of Conn. v. Garfield*, 648 F. Supp. 2d 298, 373 (D. Conn. 2009), *rev’d*, 616 F.3d 213 (2d Cir. 2010), *petition for cert. filed* (U.S. Dec. 9, 2010) (No. 10-795)). For a discussion of the Second Circuit’s subsequent review of this case, see *infra* Part II.D.2.a.

178. *Id.* (“Plaintiffs face a choice very similar to that faced in *Davis*: either ‘abide by a limit on personal expenditures’ or face potentially serious negative consequences.” (quoting *Davis v. FEC*, 554 U.S. 724, 740 (2008))).

179. For a discussion of *Davis*’s similar line of reasoning, see *supra* note 108 and accompanying text.

180. See *supra* note 164 and accompanying text (noting that McComish had triggered additional funds to his public opponent).

the possibility of negative effects) was enough to violate the First Amendment's protections under the district court's analysis.¹⁸¹

3. The Burden Is Not Justified

The district court next set out to determine the weight of the trigger funds provision's burden on the plaintiffs' speech. Here, Judge Silver made no attempt to hide her frustration with the *Davis* Court:

Unfortunately, *Davis* provided no guidance on how the statute at issue constituted a "substantial burden" on the plaintiffs' rights. After explaining its holding that discriminatory fundraising limitations constituted a burden, the *Davis* court jumped to the conclusion that the burden was "substantial." This *ipse dixit* was announced "without the slightest veneer of reasoning to shield the obvious fiat by which it [was] reached."¹⁸²

Once again, however, the district court felt bound by *Davis*: if the Millionaire's Amendment had been a substantial burden, albeit for no discernible reason, then trigger funds must also be such a burden.¹⁸³ Accordingly, the court ruled that the Act was subject to strict scrutiny.¹⁸⁴

After arriving at the standard of review, the court made short work of the constitutional analysis. It noted that the only compelling state interest in promulgating campaign finance legislation is preventing quid pro quo corruption or the appearance of such corruption.¹⁸⁵ But it could not square that anticorruption interest with what it perceived to be the Act's burden on candidates who self-finance their own campaigns.¹⁸⁶ Accordingly, it held that the Act was not supported by a compelling interest.¹⁸⁷ From this, the conclusion followed that the trigger funds provision was not the least restrictive alternative and therefore not narrowly tailored.¹⁸⁸ Because of the aforementioned burden on self-financed candidates in particular, the court found that "the Act 'significantly restrict[ed] a substantial quantity of speech that does not create' the appearance of corruption."¹⁸⁹

181. See *supra* notes 109–10 and accompanying text (explaining *Davis*'s similar analysis).

182. *Brewer*, 2010 WL 2292213, at *8 (quoting *Francis v. Henderson*, 425 U.S. 536, 552 (1976) (Brennan, J., dissenting)).

183. *Id.*

184. *Id.* See *supra* notes 42, 70 and accompanying text for a discussion of the relationship between strict scrutiny and *Buckley*'s exacting scrutiny standard.

185. *Brewer*, 2010 WL 2292213, at *9 (citing *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389–90 (2000)).

186. *Id.* The court quoted the *Davis* court's conclusion that "'reliance on personal funds reduces the threat of corruption' and 'discouraging use of personal funds disserves the anticorruption interest.'" *Id.* (quoting *Davis v. FEC*, 554 U.S. 724, 740–41 (2008)).

187. *Id.*

188. *Id.*

189. *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 n.7 (1989)). The court acknowledged Arizona's claim that trigger funds are designed not to deter self-financing but rather to "incentivize participation in the public financing system thereby reducing the risk of corruption" but considered it unresponsive to the question at issue. *Id.* at *9 n.17.

The district court concluded its First Amendment analysis with an intriguing suggestion. Judge Silver indicated that trigger funds would be constitutional if they were tied not to all of the nonparticipating candidate's expenditures but only to outside contributions that candidate received.¹⁹⁰ This alteration, according to the court, "would achieve the anticorruption goal recognized by the Supreme Court without burdening a candidate's decision to expend personal funds."¹⁹¹ It was clear to the court, however, that the Act's trigger funds provision in its current form violated the First Amendment.¹⁹² Accordingly, it granted summary judgment to the plaintiffs and enjoined enforcement of the Act.¹⁹³

C. *The Ninth Circuit's McComish v. Bennett Decision*

1. Minimal Burden, Intermediate Scrutiny

The Ninth Circuit, reviewing the grant of summary judgment de novo, undertook the same bifurcated inquiry as the lower court to determine the proper standard of review.¹⁹⁴ The Ninth Circuit agreed that the Act's trigger funds provision implicated both contributions and expenditures.¹⁹⁵ As such, it analyzed the Act as "affect[ing] fully protected speech."¹⁹⁶

With respect to the burden, however, the Ninth Circuit reached a different result than the lower court. It disagreed with that court's holding that the *Davis* ruling compelled finding a substantial burden.¹⁹⁷ The Ninth Circuit concluded that *Davis* was distinguishable because the Millionaire's Amendment "treated candidates running against each other under the same regulatory framework differently based on a candidate's decision to self-finance."¹⁹⁸ The Ninth Circuit reasoned that, unlike the Millionaire's Amendment, the Act's principal aim was not to "level electoral opportunities for candidates of different personal wealth."¹⁹⁹ Thus, because the interest was distinguishable, so too was the burden.

Equally significant to the court's analysis was the plaintiffs' failure to demonstrate actual chilling of their speech.²⁰⁰ The Ninth Circuit was skeptical that any effect on a private candidate's decision about when to spend money constituted a burden of any significance.²⁰¹ Denouncing the

190. *See id.* at *9.

191. *Id.*

192. *See id.* at *10.

193. *Id.* at *13. However, Judge Silver granted a stay of the injunction to allow Arizona to appeal to the Ninth Circuit. *Id.*

194. *See McComish v. Bennett*, 611 F.3d 510, 520 (9th Cir.), *cert. granted*, 131 S. Ct. 644 (2010).

195. *Id.*

196. *Id.*

197. *Id.* at 521.

198. *Id.* at 522 (citing *Davis v. FEC*, 554 U.S. 724, 738 (2008)).

199. *Id.* (quoting *Davis*, 554 U.S. at 741). Rather, the interest was in eliminating corruption. *See infra* Part II.C.2.

200. *McComish*, 611 F.3d at 522-25.

201. *Id.* at 524 ("Many campaign finance regulations, particularly disclosure requirements, lead candidates to engage in such strategic behavior, but this does not make

trigger funds provision's potential chilling effect as a "mere metaphysical threat[.]" the court looked instead for proof that trigger funds had actually chilled speech.²⁰² Finding none, it concluded that any burden was "indirect or minimal."²⁰³ Unlike the lower court, the Ninth Circuit explicitly identified the burden, but called it "merely a theoretical chilling effect on donors who might dislike the statutory result of making a contribution or candidates who may seek a tactical advantage."²⁰⁴ This effect, it reasoned, was less similar to *Davis* and far more analogous to *Citizens United v. FEC*²⁰⁵ and *Buckley* before that.²⁰⁶ The disclosure and disclaimer requirements in those cases had some deterrent effect on expenditures but stopped short of imposing a ceiling on them.²⁰⁷ Consequently, the Supreme Court had applied intermediate scrutiny.²⁰⁸

2. The Act Survives Intermediate Scrutiny

Proceeding to an intermediate scrutiny analysis, the Ninth Circuit first identified the state's interest. As the lower court had noted, *Buckley* had confirmed the compelling interest in eliminating quid quo pro corruption, as well as the appearance of corruption.²⁰⁹ An additional state interest, in encouraging participation in public financing schemes, had been recognized by several circuits but not by the Supreme Court.²¹⁰

Turning to the substantial relation inquiry, the Ninth Circuit's analysis marked a significant departure from that of the lower court. Whereas that court had compared the Act's effect on nonparticipating, self-financed candidates and had found no relation to the recognized anticorruption interest, the Ninth Circuit framed the issue differently.²¹¹ It found that the lower court erred by focusing on the nonparticipating candidate, and by construing the purpose of the trigger funds provision in particular as reducing the incentive to spend.²¹² This was misguided because "the Act is aimed at reducing corruption among *participating* candidates."²¹³

them unconstitutional."); see also *id.* at 528 (Kleinfeld, J., concurring) ("That different laws generate different strategies does not make them restrictions on speech."). But see *supra* note 108 and accompanying text (detailing how a choice can be unconstitutionally burdensome).

202. *McComish*, 611 F.3d at 522–23.

203. *Id.* at 523.

204. *Id.* at 525.

205. 130 S. Ct. 876 (2010).

206. *McComish*, 611 F.3d at 525.

207. See *id.*

208. *Id.* (citing *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (per curiam))).

209. *Id.* (citing *Buckley*, 424 U.S. at 26–27).

210. *Id.* at 526 (citing *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39–40 (1st Cir. 1993)). For a detailed discussion of the state interest in encouraging participation in public financing, see *infra* Part III.B.2.c.

211. See *McComish*, 611 F.3d at 526.

212. *Id.* ("The district court misapprehended how the Act functions to reduce corruption. It assumed that the Act works by reducing nonparticipating candidates' incentive to fundraise private contributions, thereby reducing the appearance of corruption among nonparticipating candidates.")

213. *Id.* (emphasis added).

Accordingly, the question to be answered was whether trigger funds bore a substantial relation to reducing corruption among public candidates, not among their opponents.²¹⁴ The Act met that goal, the court held, because trigger funds incentivized participation in the public financing program and enabled those participants to forgo private contributions—thereby insulating them from potential quid pro quo corruption.²¹⁵ The trigger funds provision, the court found, was not designed to chill speech by disincentivizing spending; rather, it existed so that Arizona could “allocate its funding among races of varying levels of competitiveness without having to make qualitative evaluations of which candidates are more ‘deserving’ of [additional] funding.”²¹⁶

In this way, the Ninth Circuit sidestepped a more exacting *Davis* analysis. Because Arizona had to enroll public candidates to reduce corruption, it was justified in matching all of the private candidate’s funds, even if those funds were the candidate’s own money.²¹⁷ The court theorized that trigger funds were essential to the public finance system’s health and that altering the disbursements would jeopardize that health.²¹⁸ It agreed with the lower court that changing them to higher lump sums would likely be “prohibitively expensive.”²¹⁹ However, it disagreed with that court’s suggestion to tie trigger funds only to third-party contributions, saying that such a change would “substantially diminish the Act’s ability to attract participants, thereby undermining its ability to prevent corruption.”²²⁰ Concluding that the Act was constitutional, the Ninth Circuit reversed and remanded the case to the district court.²²¹

D. Trigger Funds Post-McComish: *The Race to Election Day 2010*

1. The Supreme Court Intervenes

The Ninth Circuit’s stay of the injunction against trigger funds was short-lived. On June 8, 2010, the Supreme Court issued an order reinstating the injunction.²²² Because of the lengthy certiorari process, the Supreme

214. *Id.*

215. *Id.* (“The more candidates that run with public funding, the smaller the appearance among Arizona elected officials of being susceptible to quid pro quo corruption, because fewer of those elected officials will have accepted a private campaign contribution and thus be viewed as beholden to their campaign contributors or as susceptible to such influence.”).

216. *Id.* at 527.

217. *Id.* at 526 (“If matching funds were not triggered by independent expenditures or expenditures from a nonparticipating candidate’s own funds, the Act’s public funding plan would not attract participants.”).

218. *See id.* at 527.

219. *Id.*; *see* *McComish v. Brewer*, No. CV-08-1550, 2010 WL 2292213, at *8 n.12 (D. Ariz. Jan. 20, 2010) (assuming that larger lump-sum disbursements are “not fiscally possible”), *rev’d sub nom.* *McComish v. Bennett*, 611 F.3d 510 (9th Cir.), *cert. granted*, 131 S. Ct. 644 (2010).

220. *McComish*, 611 F.3d at 527.

221. *Id.*

222. *McComish v. Bennett*, 130 S. Ct. 3408, 3408 (2010) (issuing stay pending timely petition for writ of certiorari).

Court's order had the practical effect of eliminating trigger funds for the 2010 primary and general elections in Arizona.²²³ Several gubernatorial candidates, including the incumbent Governor, Republican Jan Brewer, had enrolled in the public program with the expectation of receiving trigger funds.²²⁴ Not surprisingly, Governor Brewer criticized the Supreme Court for "chang[ing] the rules of an election while it is being held,"²²⁵ a critique that prominent editorial boards shared.²²⁶

2. The Circuit Courts

a. *The Second Circuit Strikes Down Trigger Funds in Green Party of Connecticut v. Garfield*

The U.S. Court of Appeals for the Second Circuit was the next appellate court to rule on trigger funds' constitutionality.²²⁷ Declaring itself "not persuaded" by the Ninth Circuit's approach in *McComish*, the court struck down certain provisions of Connecticut's Citizens Elections Program (CEP).²²⁸ It found that trigger funds (referred to as "the excess expenditure provision") actually constituted a "harsher" penalty than the Millionaire's Amendment of *Davis* had because the CEP's provisions amounted to a guarantee of additional funds to the plaintiffs' opponents.²²⁹

After determining the burden, the Second Circuit concluded that the excess expenditure provision lacked a compelling state interest to support it.²³⁰ The court stopped short of explicitly stating, as the District Court of

223. See Adam Liptak, *Justices Block Matching Funds for Candidates in Arizona*, N.Y. TIMES, June 9, 2010, at A16, available at <http://www.nytimes.com/2010/06/09/us/politics/09scotus.html>.

224. Robert Barnes, *Arizona Blocked from Subsidizing State Candidates Facing Privately Funded Foes*, WASH. POST, June 9, 2010, at A5, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/08/AR2010060804816.html>.

225. Editorial, *Judicial Activism, Unbound*, WASH. POST, June 11, 2010, at A18, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/10/AR2010061004708.html> (quoting Governor Brewer, who also called the opinion "terribly troubling"). Governor Brewer went on to a decisive victory in November. Jeremy Duda, *Brewer Wins Full Term in Blowout*, AZCAPITOLTIMES.COM (Nov. 3, 2010, 2:25 AM), <http://azcapitoltimes.com/news/2010/11/03/brewer-wins-full-term-in-blowout/>.

226. See, e.g., Editorial, *Judicial Activism, Unbound*, *supra* note 225; Editorial, *Keeping Politics Safe for the Rich*, N.Y. TIMES, June 9, 2010, at A24, available at <http://www.nytimes.com/2010/06/09/opinion/09wed1.html> (calling the order a "burst of judicial activism" and concluding that "[u]nless the court veers from its determined path, there will be no limit to the power of a big bankbook on politics").

227. *Green Party of Conn. v. Garfield*, 616 F.3d 213, 218 (2d Cir.), *petition for cert. filed*, (U.S. Dec. 9, 2010) (No. 10-795).

228. *Id.* at 245 & n.19 ("We are not persuaded by the Ninth Circuit's opinion, which, we note, has been stayed by the Supreme Court pending a petition for a writ of certiorari.").

229. *Id.* at 244-45 (contrasting this guarantee to the Millionaire's Amendment in *Davis*, in which "there was some possibility that the non-self-financed candidate . . . would be unable to raise additional money under the relaxed restrictions"); see also *Scott v. Roberts*, 612 F.3d 1279, 1289 (11th Cir. 2010) ("Here, it's not just a potential dollar. It's a certain dollar." (internal quotation omitted)).

230. *Green Party*, 616 F.3d at 245.

Arizona had, that trigger funds actually undermined the anticorruption interest.²³¹ Rather, it simply held that the anticorruption interest could not justify the burden on expenditures.²³²

The Second Circuit's approach departed from that of the Ninth Circuit in another important respect. The Ninth Circuit had relied in large measure on the factual record, looking for actual evidence of chilled speech.²³³ Finding none, it scoffed at allegations of the provision's potential chilling effect as "mere metaphysical threats."²³⁴ In contrast, the Second Circuit's analysis was overwhelmingly hypothetical and did not rely on any evidence of an actual burden in striking the provision down as violative of the First Amendment.²³⁵

b. The Eleventh Circuit Enjoins Trigger Funds in Scott v. Roberts

The U.S. Court of Appeals for the Eleventh Circuit also enjoined the disbursal of trigger funds in the middle of the 2010 election cycle.²³⁶ Rick Scott, a wealthy candidate for the Republican Party's nomination for Florida Governor, brought the constitutional challenge to the Florida Election Campaign Financing Act (FECFA).²³⁷ FECFA operates differently from many public funding statutes in that its "excess spending subsidy"²³⁸ provision does not include independent expenditures in its calculus of trigger funds.²³⁹ Nor does FECFA prohibit private fundraising by ostensibly public candidates.²⁴⁰

As his campaign spending approached Florida's trigger amount, Scott had asked the lower court to declare trigger funds unconstitutional under *Davis*.²⁴¹ He argued that FECFA's excess spending subsidy was an

231. See *McComish v. Brewer*, No. CV-08-1550, 2010 WL 2292213, at *9 (D. Ariz. Jan. 20, 2010) (concluding that the Act does not serve the anticorruption interest because "reliance on personal funds reduces the threat of corruption" and "discouraging use of personal funds disserves the anticorruption interest" (quoting *Davis v. FEC*, 554 U.S. 724, 740-41 (2008), *rev'd sub nom. McComish v. Bennett*, 611 F.3d 510 (9th Cir.), *cert. granted*, 131 S. Ct. 644 (2010))). However, the Second Circuit's citations to the same section of *Davis* suggest that its analysis was similar to that of the District Court of Arizona. See *Green Party*, 616 F.3d at 245 (citing *Davis*, 554 U.S. at 740-41).

232. *Green Party*, 616 F.3d at 245, 246.

233. See *McComish*, 611 F.3d at 522-25.

234. *Id.* at 522.

235. See *Green Party*, 616 F.3d at 243 ("Consider, for instance, a race for Congress between Candidate A and Candidate B."). Cf. *McComish*, 611 F.3d at 522-23 (finding that any burden is contingent on "the extent that Plaintiffs have proven that the specter of matching funds has actually chilled or deterred them from accepting campaign contributions or making expenditures").

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

237. *Id.* at 1281.

238. *Id.*

239. See *id.* at 1284 (noting that Florida allows all candidates, "whether participating or not," to raise up to \$500 from contributors (citing FLA. STAT. ANN. § 106.011(18)(c) (West 2008))); cf. ARIZ. REV. STAT. ANN. § 16-952(C)(1) (2006) (counting independent expenditures for the purposes of disbursing trigger funds).

240. *Scott*, 612 F.3d at 1293 (citing FLA. STAT. ANN. § 106.08(1)(a)); cf. ARIZ. REV. STAT. ANN. § 16-941(A)(1) (prohibiting contributions with very limited exceptions).

241. See *Scott*, 612 F.3d at 1281.

unjustified, severe burden on his First Amendment rights and testified that it had caused him to drastically curtail his campaign spending.²⁴² He also argued that he was entitled to relief because of the Supreme Court's stay of the Ninth Circuit's *McComish* decision.²⁴³

The defendants countered with an argument similar to the Ninth Circuit's *McComish* reasoning. They claimed that the excess spending subsidy encouraged participation in public financing, "which in turn prevents corruption or the appearance of corruption."²⁴⁴ The district court agreed and held that Florida's compelling anticorruption interest justified the excess spending subsidy.²⁴⁵ Accordingly, it concluded that Scott was unlikely to win on the merits at trial and denied his motion for a preliminary injunction.²⁴⁶

On emergency appeal, the Eleventh Circuit reversed the lower court and enjoined the excess spending subsidy.²⁴⁷ It first agreed with Scott, the lower court, and the Second Circuit that trigger funds actually constitute a "harsher" penalty on speech than had the Millionaire's Amendment in *Davis*.²⁴⁸ The court did not reject outright the defendant's claim that trigger funds are constitutional because they encourage participation in an anticorruption regime. Rather, the court did not reach the claim because it found that the defendants had failed to show that FECFA prevents corruption or the appearance of corruption.²⁴⁹ Moreover, the court held that Scott would likely succeed in showing that trigger funds are not the least restrictive means of encouraging participation in public finance.²⁵⁰ Concluding that Scott would probably succeed on the merits and that his motion met the other standards for granting a preliminary injunction, the Eleventh Circuit enjoined the release of trigger funds to Scott's opponent.²⁵¹

242. *See id.* at 1281, 1283.

243. *See id.* at 1287 (citing *McComish v. Bennett*, 130 S. Ct. 3408 (2010)) (reinstating the stay of trigger funds' disbursement).

244. *See id.* at 1292.

245. *Id.* at 1289.

246. *See id.*

247. *See id.* at 1281–82.

248. *Id.* at 1291–92.

249. *See id.* at 1292–93. As Florida's public finance system limits only expenditures but not contributions, the Eleventh Circuit found that it "appears primarily to advantage candidates with little money or who exercise restraint in fundraising. . . . and that purpose is constitutionally problematic." *Id.* at 1293.

250. *See id.* at 1294 (concluding that Florida could encourage participation in public finance in a variety of other, less restrictive ways).

251. *See id.* at 1298. Scott eventually won the Republican primary, after spending more than \$50 million, "almost a quarter of what he claims to be his total net worth." Domenico Montanaro, *Rick Scott Spent \$50 Million on Primary Bid*, FIRST READ (Aug. 24, 2010, 6:08 PM), http://firstread.msnbc.msn.com/_news/2010/08/24/4962783-rick-scott-spent-50-million-on-primary-bid. He ultimately prevailed in a very close general election after spending more than \$78 million. Simone Baribeau, *Florida Republican Scott Elected Governor After Record Spending*, BLOOMBERG (Nov. 3, 2010, 3:21 PM), <http://www.bloomberg.com/news/2010-11-03/florida-republican-scott-elected-governor-after-record-spending.html>.

c. *The First Circuit Allows Trigger Funds in Respect Maine PAC v. McKee*

Most recently, however, the First Circuit denied an emergency appeal to enjoin trigger funds.²⁵² The district court had declared itself bound by the First Circuit's 2000 *Daggett* decision, which upheld trigger funds,²⁵³ and had held that no recent jurisprudence "cast *Daggett* into disrepute or otherwise reflect an overruling of *Daggett*."²⁵⁴ Because of this, the lower court had concluded that the plaintiffs had no chance of success on the merits and had denied the motion for a temporary restraining order.²⁵⁵

With less than one month before the November elections, the First Circuit heard the plaintiffs' emergency motion for injunctive relief.²⁵⁶ The court found that the root of the claim involved material factual disputes, rendering it impossible to predict the likelihood of success on the merits.²⁵⁷ The First Circuit also found that judicial invalidation of significant state election laws in the last weeks of the election cycle would harm the public interest, and that this last-minute "'emergency' [was] largely one of [the appellants'] own making."²⁵⁸ Accordingly, it denied the emergency motion.²⁵⁹

The appellants next sought injunctive relief from Justice Stephen Breyer, the Circuit Justice for the First Circuit.²⁶⁰ He denied relief on October 13, 2010 without asking for a reply from Maine.²⁶¹ The next week, the appellants re-filed their plea with Justice Kennedy.²⁶² Justice Kennedy asked the state to respond, and after it had done so, he referred the matter to the entire Court.²⁶³ However, the Supreme Court denied the request on

252. See *Respect Me. PAC v. McKee*, 622 F.3d 13, 14–15 (1st Cir. 2010).

253. For a greater discussion of the *Daggett* decision, see *supra* Part I.C.2.

254. *Cushing v. McKee*, No. 1:10-CV-330, 2010 WL 3699504, at *7 (D. Me. Sept. 15, 2010), *emergency appeal denied, sub nom.* *Respect Me. PAC v. McKee*, 622 F.3d 13, 14–15 (1st Cir. 2010). The court also explained that *Davis* was factually distinguishable from the case before it. *Id.* at *7 n.17.

255. *Id.* at *8.

256. See *Respect Me. PAC*, 622 F.3d at 14.

257. *Id.* at 15. Specifically, the court mentioned the differences between Maine's trigger funds provision and other states' regimes, as well as other potential factual issues including "the strength of the state's legitimate interest in combating election fraud and the appearance of fraud, the degree of burden created by the challenged laws, and the narrow tailoring of these laws to achieve the state's anticorruption interests." *Id.*

258. *Id.* at 16 (noting that the appellants intentionally chose to delay their filing, despite the impending election date and the fact that "the case law on which they rely is not new"). But see Andre Cushing, Guest Column, *Should Taxpayers' Money Still Fund Election Campaigns?*, BANGOR DAILY NEWS (Nov. 5, 2010), <http://www.bangordailynews.com/story/Opinion/Should-taxpayers-money-still-fund-election-campaigns,158053> (arguing that the challenge was promptly brought on the basis of the newly-decided circuit court cases).

259. *Respect Me. PAC*, 622 F.3d at 16.

260. Lyle Denniston, *Maine Election Plea Denied*, SCOTUSBLOG (Oct. 13, 2010, 1:58 PM), <http://www.scotusblog.com/2010/10/maine-election-plea-denied/>.

261. *Id.*

262. Lyle Denniston, *Update: Maine Election Challenge Fails*, SCOTUSBLOG (Oct. 22, 2010, 4:18 PM), <http://www.scotusblog.com/2010/10/maine-defends-campaign-law/>.

263. *Id.*

October 22.²⁶⁴ The Court noted that while it had intervened in *McComish*, there the appellants had requested a stay of a full appeals court decision rather than “an injunction against enforcement of a presumptively constitutional state legislative act.”²⁶⁵ This was significant, the Court found, because “unlike a stay, an injunction ‘does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.’”²⁶⁶ The Supreme Court was unwilling to so intervene less than two weeks before the election.²⁶⁷ However, its order stated that Justice Scalia and Justice Alito would have enjoined the trigger funds provisions,²⁶⁸ signaling how these two Justices might rule on the merits of the *McComish* case. Finally, the First Circuit affirmed its denial of the injunction on October 29, and trigger funds were disbursed as scheduled.²⁶⁹

III. PUTTING TRIGGER FUNDS IN CONTEXT

As detailed in Part II, circuit courts have split regarding whether public finance regimes with trigger provisions are constitutional in light of the Supreme Court’s decision in *Davis v. FEC*. Part III first asserts that no court has yet engaged in a full, considered analysis of both the state’s interest in trigger funds and the burden imposed by them. It continues by offering a contextual approach for this analysis that, while novel in name, is consistent with established jurisprudence.

When determining the constitutionality of public finance regimes, courts must engage in a comprehensive analysis that includes full consideration of both the burden on speech and the state’s interest in preventing corruption and the appearance of corruption. However, courts should not glibly rip each individual provision from its context and shove it under the anticorruption microscope. Public finance legislation is often comprehensive and interconnected, consisting of smaller provisions that cannot function independently of one another.²⁷⁰ Therefore, in order to decide whether a particular provision of a public finance statute is justified by the state’s interest in preventing corruption, courts must first ascertain the provision’s purpose within the context of the larger initiative. Where the provision does not help advance the anticorruption strategy of the larger

264. *Respect Me. PAC v. McKee*, 131 S. Ct. 445 (2010) (denying injunction).

265. *Id.* at 445.

266. *Id.* (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

267. *See id.* (noting “the difficulties in fashioning relief so close to the election”).

268. *Id.*

269. *See* *Respect Me. PAC v. McKee*, 624 F.3d 23 (1st Cir. 2010) (affirming denial of preliminary injunctive relief). The only named plaintiff who was an elected official, Representative Andre E. Cushing, III, nevertheless handily won his bid for reelection. *See Maine Election Results*, <http://www.bangordailynews.com/electionresults.html> (last visited Feb. 23, 2011).

270. *See infra* note 325 and accompanying text (noting that several Supreme Court Justices have cautioned against eliminating individual pieces of comprehensive campaign finance legislation).

package, or where the entire public finance regime fails to prevent corruption, courts should strike it down. However, where a provision implements or facilitates the public finance regime's other sections, and thereby serves the larger legislative package's anticorruption goals (albeit indirectly), as trigger funds usually do, courts should uphold the provision.

A. *Davis Revisited: Is It Distinguishable?*

Lower courts have struggled with the question of whether trigger funds can be upheld in light of *Davis* since that opinion's publication in 2008.²⁷¹ It is a difficult question, but one that must be addressed in a comprehensive way—something that has been missing from each post-*Davis* decision on trigger funds. This analysis must include a consideration of the Supreme Court's findings as to the burdensome effects of the Millionaire's Amendment and the state's interest behind it. Section A asserts that the Ninth Circuit incorrectly distinguished the burden found in *Davis* from that imposed by trigger funds. However, such similarity between the burdens should not end the constitutional inquiry. This section concludes that the state interest behind the Millionaire's Amendment in *Davis* is distinguishable from the interest in trigger funds.

1. The *Davis* Burden Is Not Distinguishable

With regard to the burden, it is clear that *Davis* is not distinguishable and demands a similar analysis of the burden imposed by trigger funds. As the First Circuit remarked in *Daggett*, the First Amendment confers “no right to speak free from response.”²⁷² But a speaker could arguably concede that point while nevertheless objecting to the government bankrolling his opponent's response. By enabling such robust state action, a trigger funds provision imposes a greater burden than the Millionaire's Amendment; rather than just opening up the possibility that the burdened candidate's opponent will get additional funds, it actually bestows those funds directly on the opponent. It is this aspect of trigger funds that the lower court in *Brewer*,²⁷³ the Second Circuit in *Green Party*,²⁷⁴ and the Eleventh Circuit in *Scott*²⁷⁵ ultimately found dispositive: if the mere possibility of additional funds is substantially burdensome, surely a guarantee of cash is even more so.

271. *Davis v. FEC*, 554 U.S. 724 (2008), struck down the Millionaire's Amendment to the Bipartisan Campaign Reform Act of 2002, which relaxed fundraising limitations for opponents of self-financed candidates, as unconstitutionally burdensome on the self-financed candidate's First Amendment rights. See *supra* Part I.D.

272. *Daggett v. Comm'n on Governmental Ethics*, 205 F.3d 445, 464 (1st Cir. 2000) (citing *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 14 (1986)). For a detailed discussion of the First Circuit's *Daggett* opinion, see *supra* Part I.C.2.

273. See *supra* note 177 and accompanying text (citing the same finding by the District of Arizona); see also *supra* Part II.B.

274. See *supra* note 229 and accompanying text (contrasting this guarantee to the Millionaire's Amendment of *Davis*).

275. See *supra* note 248 and accompanying text (citing the same finding by the Eleventh Circuit).

In *McComish*, the Ninth Circuit found that, unlike in *Davis*, the burden on the plaintiffs was minimal rather than substantial.²⁷⁶ However, the reasoning that led to this conclusion is fatally flawed. First, the Ninth Circuit was wrong to conclude that the burden is minimal simply because the plaintiffs chose to spend the money anyway. Such a conclusion presumes that the only evidence of a burden would be actually chilled speech. But, as in *Davis*, the burden inquiry does not begin and end with the question of whether speech was actually chilled.²⁷⁷ Indeed, the *Davis* court recognized that the burden can be “the activation of a scheme” hostile to the plaintiff, such as the triggering of additional funds.²⁷⁸ In other words, the provision burdens the plaintiff whether or not he chooses to speak.

The Ninth Circuit seemed to justify its finding of a minimal burden—and consequent decision to apply intermediate scrutiny—by pointing to *Buckley*, which subjected disclosure requirements to intermediate scrutiny because they “impose[d] no ceiling on campaign-related activities.”²⁷⁹ *Davis* precludes this reasoning, however, since that decision struck down a law that also stopped short of imposing a hard cap on spending.²⁸⁰ It did not matter to the *Davis* majority that the wealthy candidate remained free to spend as much money as he saw fit. This option did not eliminate the burden, which was significant enough to warrant strict scrutiny.²⁸¹

Moreover, the Ninth Circuit’s comparison of the Act’s burden to the burden imposed by disclosure and disclaimer requirements²⁸² is fundamentally untenable. Disclosure to the FEC really only deters those donors who do not want their contributions to be publicized.²⁸³ It cannot be denied that this burden, the possibility of getting fewer contributions, is considerably smaller than the certainty of one’s opponent receiving trigger funds.²⁸⁴ For the Ninth Circuit to pretend otherwise seems little more than an attempt to shift the focus away from that more obvious, ominous precedent: *Davis*.

Perhaps the reason that some courts, including the Second Circuit, have found the Ninth Circuit’s *McComish* decision so unpersuasive is because it doggedly strained to distinguish the burden imposed by the Act from that in

276. For a discussion of this finding, see *supra* Part II.C.1. (applying intermediate scrutiny to trigger funds because they imposed no limit on expenditures).

277. See *supra* note 109 and accompanying text (asserting that state action may be substantially burdensome despite not having actually chilled speech).

278. *Davis v. FEC*, 554 U.S. 724, 740 (2008).

279. *McComish v. Bennett*, 611 F.3d 510, 525 (9th Cir.) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam)), *cert. granted*, 131 S. Ct. 644 (2010).

280. See *supra* notes 107–08 and accompanying text (finding a substantial burden on speech rights despite the lack of such a ceiling).

281. For a brief discussion of the relationship between strict scrutiny and *Buckley*’s “exacting scrutiny,” see *supra* note 42 and *infra* note 309 and accompanying text.

282. See *supra* note 207 and accompanying text (comparing trigger funds to the disclosure and disclaimer requirements of other statutes).

283. See *Buckley*, 424 U.S. at 68 (“[P]ublic disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute.”).

284. See *Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010) (“[D]isclosure is a less restrictive alternative to more comprehensive regulations of speech.” (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986))).

Davis's Millionaire's Amendment. The truth is that the burdens in *McComish* and *Davis* are too similar to ignore. *Davis* ended the debate about whether the First Amendment prioritizes maximizing the amount of speech or only protects speakers from potential, state-imposed adverse effects of their speech. Justice Alito's majority opinion answered unequivocally that the First Amendment's duty is the latter.²⁸⁵ No longer may courts determine, as the First and Fourth Circuits once did, that trigger funds provisions constitute no burden on speech because they increase the amount of aggregate speech.²⁸⁶ Nor was the Ninth Circuit justified when it held that trigger funds only constitute a minimal or theoretical burden on speech.²⁸⁷ The burden is there, *Davis* proclaimed, and it is substantial.²⁸⁸ But this answers only half of the question of whether *Davis* is distinguishable.

2. The *Davis* Interest Is Distinguishable

Because the government could not show any anticorruption interest in the Millionaire's Amendment, the *Davis* Court concluded that its substantial burden on protected speech was not justified.²⁸⁹ As will be discussed below, trigger funds have a much stronger claim to the anticorruption interest than the Millionaire's Amendment. For this and the following reasons, *Davis* is distinguishable on the interest analysis, and lower courts evaluating trigger funds must not look to *Davis* in deciding whether trigger funds provisions justify the severe burden they impose on speech.

Most obviously, *Davis* and the Millionaire's Amendment had nothing to do with public funding. Indeed, when asked at oral argument what a less restrictive alternative to the Millionaire's Amendment would be, *Davis's* counsel suggested public finance.²⁹⁰ Similarly, the Millionaire's Amendment did nothing to fight corruption because it did not incentivize public funding or any other anticorruption choice by candidates. In fact, it arguably hindered the anticorruption interest by lifting the ceiling on potentially corrupting contributions.²⁹¹ Rather, its stated interest was in "level[ing] electoral opportunities,"²⁹² and was presented to the Court as a legislative response to a specific, legislatively and judicially created

285. See *supra* notes 125–29 and accompanying text (describing how the Court struck down the Millionaire's Amendment, which arguably increased the aggregate amount of speech).

286. For a discussion of this finding, see *supra* Part I.C.2.

287. For a discussion of this finding, see *supra* Part II.C.1.

288. See *supra* notes 110, 182, and accompanying text.

289. For a discussion of this finding, see *supra* Part I.D.1.

290. See Transcript of Oral Argument at 11–12, *Davis v. FEC*, 554 U.S. 724 (2008) (No. 07-320), 2008 WL 1803646. However, plaintiff's counsel stopped short of endorsing a hypothetical scheme put forth by Justice Scalia that resembled a trigger funds provision. *Id.* at 12.

291. See *supra* note 115 and accompanying text (noting that outside contributions, not self-financing, are potentially corrupting under *Buckley*).

292. *Davis*, 554 U.S. at 741.

problem—the unfair advantage that contribution limits bestowed upon affluent candidates post-*Buckley*.²⁹³

Opponents of trigger funds are quick to link the scheme to the forbidden interest in leveling electoral opportunities, and argue that they may not survive if that interest is not legitimate.²⁹⁴ Before *Davis*, supporters of trigger funds had also advanced the “leveling” conception of the scheme.²⁹⁵ Publicizing the equalizing effect of trigger funds made sense at the time because prior to the replacements of Chief Justice William Rehnquist and Justice Sandra Day O’Connor with Chief Justice John Roberts and Justice Alito, respectively, the Court had embraced a broader view of the anticorruption interest that justified more robust regulation of the amounts and sources of campaign money.²⁹⁶

The conception of trigger funds as leveling device resonates intuitively as well. It is easy to view trigger funds as having something of a neutralizing effect among the electioneering of competing candidates. Tying the payday of one candidate directly to the expenditures of his opponent would seem to implicate the same burdensome choice that the *Davis* Court found so loathsome.²⁹⁷ Whether this translates to intent by the drafters is dubious, however, especially since most trigger provisions cap the maximum amount of additional funds and thereby limit the “leveling” effect.²⁹⁸

More importantly, leveling electoral opportunities is not the end unto itself. Rather, the fact that trigger funds tend to promote a competitive race is a logical consequence of making the larger public finance regime attractive to potential participants. Indeed, it seems likely that any public scheme worth enrolling in would have at least some equalizing effect, making the “leveling” analysis something of a dead end when applied to public finance. While trigger funds do level the playing field somewhat, this is a collateral effect. The analysis cannot stop there.

Because trigger funds have at least a colorable claim to the anticorruption rationale, the *Davis* decision is not instructive on how this interest might be met. Summarily, it is not enough to say, as the Ninth Circuit tried to, that

293. See *supra* note 100 and accompanying text.

294. See *supra* notes 122–24 and accompanying text.

295. See, e.g., ARIZ. REV. STAT. ANN. § 16-940 (2006) (finding that candidates’ need to fundraise has decreased the quality of elections, and describing the Act’s intent to reduce the influence of money in campaigns); Weine, *supra* note 34, at 224 (“Triggers are complex mechanisms that are designed to achieve an objective that is relatively straightforward: leveling the financial playing field among candidates.”).

296. See, e.g., *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659–60 (1990) (upholding a law aimed at “a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth”). For a comprehensive analysis of the Court’s shifting ideas about what types of campaign finance regulations are justifiable, see Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 41 (2004), which argues that a majority of the Rehnquist Court came to accept, at least intermittently, a “barometer equality” rationale for certain campaign finance laws.

297. See *supra* notes 108–10 and accompanying text (describing the court’s denunciation of adverse regulations activating as a consequence of choosing to self-finance).

298. See, e.g., *supra* notes 140–41 and accompanying text (noting that Arizona’s trigger funds provision caps the level of additional funding at three times the initial grant).

the burdens in *McComish* and *Davis* are dissimilar.²⁹⁹ They are not. Nor is it enough to say, as the Second Circuit did, that because the burdens are similar, the outcome must be the same.³⁰⁰ A more rigorous analysis of the interest is necessary.

B. The Interest Analysis: A Contextual Approach

Courts that strike down trigger funds often make the same error: they conceive of trigger funds as a punitive measure.³⁰¹ Although this mistake ultimately dooms the analysis, it is easy to make. Trigger funds burden the speech of nonparticipating candidates, so it is not much of a leap to assume they must have been designed to do just that—to reduce corruption by disincentivizing private contributions or expenditures by nonparticipating candidates.

However, this conception of trigger provisions misses their point.³⁰² It obscures the primary justification for trigger funds provisions: they implement the public system by providing enough support to draw participants without unnecessarily emptying the public coffers.³⁰³ Candidates will be unlikely to enroll in public funding if doing so causes them to incur a serious spending disadvantage.³⁰⁴ Trigger funds schemes are an efficient way to provide this assurance since they give the public candidate only enough funding to be viable, but no more.³⁰⁵

The Ninth Circuit's opinion, although problematic in some important respects, is commendable for its precision in analyzing the interest of Arizona's Act. The court correctly found that the Act, and its trigger funds provision in particular, was not written to have a deleterious effect on candidates who had no desire to participate.³⁰⁶ Rather, it was concerned with winning over candidates thanks to the program's guarantee of a fairer fight.³⁰⁷ As the Ninth Circuit pointed out, the rationale behind tying the disbursements to the private opponent was not to make the opponent think

299. See *supra* notes 197–99 and accompanying text (detailing the Ninth Circuit's findings in *McComish*).

300. For a discussion of the Second Circuit's *Green Party* decision, see *supra* Part II.D.2.a.

301. See, e.g., *supra* note 212 and accompanying text (discussing the District of Arizona's assessment of the function of trigger funds).

302. See *McComish v. Brewer*, No. CV-08-1550, 2010 WL 2292213, at *9 n.17 (D. Ariz. Jan. 20, 2010) (“[Arizona] stressed that ‘[t]he point of matching funds is not to deter self-financing,’ it is ‘to incentivize participation in the public financing system thereby reducing the risk of corruption.’” (quoting oral argument)), *rev'd sub nom.* *McComish v. Bennett*, 611 F.3d 510 (9th Cir.), *cert. granted*, 131 S. Ct. 644 (2010).

303. For a greater discussion of this topic, see *supra* Parts I.A and II.C.2.

304. Weine, *supra* note 34, at 223 (“No candidate will unilaterally disarm, reformers argue, when faced with potentially unlimited expenditures by opposing candidates or their allies.”).

305. See *supra* notes 33–35 and accompanying text.

306. See *supra* note 212 and accompanying text (finding that the drafters' focus was on the participating candidate, rather than on her nonparticipating opponent).

307. See *supra* notes 213–15 and accompanying text.

twice about making expenditures. It was to keep the entire Act solvent by allocating resources only as necessary.³⁰⁸

Just because disbursing public money in the form of trigger funds is efficient—or even unavoidable—does not make it constitutional, however. Courts must still determine whether public finance regimes with trigger funds provisions serve the anticorruption interest.³⁰⁹ The next section addresses how courts should conduct this analysis.

1. Defining the Anticorruption Interest: Echoes of *Buckley*

In the past two decades, the Supreme Court has not always spoken consistently about the state interest necessary to justify campaign finance regulations that inhibit political speech.³¹⁰ When the Court has upheld such regulations, it has done so by referring to the anticorruption interest.³¹¹ What corruption encompasses has itself been something of a moving target.³¹² Recently, however, the Court has reaffirmed the narrow reading

308. See *supra* notes 218–19 and accompanying text (noting that the incremental nature of trigger funds is more efficient than disbursing public funding in large lump sums).

309. Some lower courts have imposed the burden on states to show that their solution not only prevents corruption but also is the least restrictive alternative. See, e.g., *supra* notes 188, 250, and accompanying text. However, it is not clear that Supreme Court campaign finance jurisprudence supports such a burden. The Court has insisted on the least restrictive alternative in evaluating content-based regulations unrelated to campaign finance. See, e.g., *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). However, *Buckley* asked only whether a provision was “reasonable and minimally restrictive” and upheld, out of deference to the legislature, provisions of the public financing tax check-off even where there were arguably less restrictive alternatives. *Buckley v. Valeo*, 424 U.S. 1, 82, 92 n.125 (1976) (per curiam). Moreover, members of the Court have cautioned against mechanically applying “least restrictive means” to “the difficult constitutional problem that campaign finance statutes pose.” *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (citing *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 233–34 (1989) (Stevens, J., concurring); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188–89 (1979) (Blackmun, J., concurring); *Kovacs v. Cooper*, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring)).

310. See *infra* note 312 (discussing the different approaches to scrutinizing the anticorruption interest in campaign finance statutes).

311. To be exact, the Court has spoken of preventing “corruption and the appearance of corruption.” See *Buckley*, 424 U.S. at 33 (emphasis added); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 394–95 (2009) (discussing courts’ concern about the electorate’s perceptions of political corruption). However, there is apparently no distinct analysis for whether a statute furthers the state’s interest in preventing the appearance of corruption. Some scholars have argued that “the Court’s invocation of this novel state interest has less to do with the importance of removing unsavory appearances and more to do with the difficulty of proving actual corruption.” Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 121 (2004). There is no such proof problem in Arizona, however, where evidence of actual corruption was plentiful when Arizona passed its public finance regime. See *supra* notes 132–33 and accompanying text (discussing Arizona’s political scandals). To the extent that the interest in preventing the appearance of corruption is rooted in concern for “confidence in the system of representative [g]overnment,” *Buckley*, 424 U.S. at 27 (citation omitted), it may be significant that Arizona’s public finance reforms were passed directly by the voters. See *supra* note 134 and accompanying text (noting that the Act was passed by ballot initiative).

312. For an explanation of the different conceptions of corruption in Supreme Court jurisprudence, see Teachout, *supra* note 311, at 383–97. See generally Hasen, *supra* note

of anticorruption, first articulated in *Buckley*,³¹³ that the only corruption worth combating is quid pro quo.³¹⁴ This reading of corruption has spelled doom for legislative attempts to regulate expenditures because of *Buckley*'s declaration that expenditures are not corrupting.³¹⁵

Some lower courts have condemned trigger funds to a similar fate. They have reasoned that, since expenditures do not corrupt like contributions, the burden that trigger funds impose on expenditures cannot be justified. This rationale played a critical role in the *Brewer* decision of the District of Arizona³¹⁶ and also found support in the Second Circuit's *Green Party* opinion.³¹⁷

Like the narrow reading of corruption itself, this "piecemeal approach to statutory construction" of campaign finance laws also traces its lineage back to *Buckley*.³¹⁸ That decision went through FECA line by line; scrutinizing each provision against the First Amendment and the anticorruption interest, the *Buckley* Court upheld certain provisions but struck many others.³¹⁹

Whatever the *Buckley* method's merits as a dogmatically pure exercise, few would defend the decision as having made a positive impact on campaign finance law.³²⁰ Pro-regulation scholars point to the *Buckley* decision as one that "took a congressional program designed to minimize the impact of wealth on campaigns and turned it into an engine for the glorification of money."³²¹ Similarly, those who would deregulate campaign finance feel that *Buckley* is "deeply flawed"³²² and should be

296; Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036 (2005).

313. 424 U.S. at 26–28; see Teachout, *supra* note 311, at 385 (noting that *Buckley* "introduce[d] the idea that corruption and quid pro quo might be interchangeable").

314. See *Citizens United v. FEC*, 130 S. Ct. 876, 908–09 (2010). But see Teachout, *supra* note 311, at 388–91 (arguing that *Buckley* has been misconstrued as holding that quid pro quo is the only type of corruption worth fighting).

315. *Citizens United*, 130 S. Ct. at 908 ("Limits on independent expenditures . . . have a chilling effect extending well beyond the Government's interest in preventing quid pro quo corruption."); *Buckley*, 424 U.S. at 55 ("No governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by [FECA's] campaign expenditure limitations."); see also *supra* Part I.B.

316. See *supra* notes 186–87 and accompanying text.

317. See *supra* notes 230–32 and accompanying text.

318. Stephen Kanter, *The Griswold Diagrams: Toward a Unified Theory of Constitutional Rights*, 28 CARDOZO L. REV. 623, 635 n.52 (2006).

319. For a discussion of *Buckley*, see *supra* Part I.B.

320. See Esenberg, *supra* note 101, at 292 ("*Buckley*'s distinction between expenditures and contributions has been criticized by opponents and advocates of regulation alike.>").

321. BURT NEUBORNE, CAMPAIGN FINANCE REFORM & THE CONSTITUTION: A CRITICAL LOOK AT *BUCKLEY V. VALEO* 18 (Brennan Center for Justice Campaign Finance Reform Series 1997) (framing the decision's flaws economically: "[T]he *Buckley* Court limited supply (contributions), while leaving demand (expenditures) free to grow without limit."); see also ISSACHAROFF ET AL., *supra* note 19, at 337 ("The [*Buckley*] result is an odd regulatory misalignment between the encumbered ability to raise money and the unfettered capacity to spend it.>").

322. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 640 (1996) (Thomas, J., concurring in the judgment and dissenting in part). Justice Thomas has argued that the distinction between contributions and expenditures "lacks constitutional significance" and would subject both to the most exacting scrutiny. *Id.* at 636, 640–41.

discarded.³²³ As Chief Justice Warren Burger (no fan of comprehensive election reform)³²⁴ remarked at the time: “By dissecting [the legislation] bit by bit, and casting off vital parts, the Court fails to recognize that the whole of this Act is greater than the sum of its parts.”³²⁵ Ideology or judicial philosophy aside, it is clear that the *Buckley* Court’s approach of striking some provisions and upholding others caused “campaign finance regulation [to] survive[] in a form that no legislature ever voted to create and, one may surmise, no legislature would ever have voted to create.”³²⁶ At the very least, it may be charitably stated that courts should not rush to apply the *Buckley* method to comprehensive public finance legislation.

2. A New Way Forward: Defining the Contextual Approach

This section describes the contextual approach and its application. It then explains how, under this approach, Arizona’s Act does not violate the First Amendment. This section concludes with an explanation of how the contextual approach is consistent with established jurisprudence.

When it comes to public finance regimes, the Supreme Court should embrace a more nuanced analysis. Statutes like Arizona’s Citizens Clean Elections Act are complicated pieces of legislation that contain many interlocking provisions. Each provision may be as important as the next, or one may lay the groundwork for the others. Either way, the regime may be severely compromised if one section is divorced from the larger package.

However, it would be futile to ask courts to make consistent, qualitative judgments about the usefulness of individual provisions. It would be even more futile for drafters of legislation to guess whether courts would find a particular provision sufficiently important and therefore worthy of a more contextual analysis. Accordingly, courts should not endeavor to determine how crucial a certain provision is to the larger public finance regime. Rather, the inquiry should be, as the Eleventh Circuit put it, whether the provision “further[s] the anticorruption interest by encouraging participation in the public campaign financing system of [the state], which in turn prevents corruption or the appearance of corruption.”³²⁷ Given that the inquiry is built upon the need to encourage participation, this approach should be confined to voluntary public finance regimes.

323. See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 408–09 (2000) (Kennedy, J., dissenting) (“*Buckley* has not worked.”).

324. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 235 (1976) (Burger, C.J., concurring in part and dissenting in part) (calling public financing “an impermissible intrusion by the Government into the traditionally private political process”).

325. *Id.*; see also *Nixon*, 528 U.S. at 408 (Kennedy, J., dissenting) (“Our First Amendment principles surely tell us that an interest thought to be the compelling reason for enacting a law is cast into grave doubt when a worse evil surfaces in the law’s actual operation.”); *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 518 (1985) (White, J., dissenting) (excoriating the majority’s decision to “[strike] down one portion of an integrated and comprehensive statute”).

326. ISSACHAROFF ET AL., *supra* note 19, at 338.

327. *Scott v. Roberts*, 612 F.3d 1279, 1292 (11th Cir. 2010).

If courts do not acknowledge context and instead isolate certain sections of public finance laws—in the case of *McComish*, the trigger provision—from the rest of the legislation, they will set up such regimes to fail every time. But if courts admit that trigger funds are the driving force by which comprehensive public finance legislation fulfills its anticorruption mission, they will likely conclude that the benefits of clean elections outweigh trigger funds' substantial burden on speech rights.

Because this approach is fact specific, it need not amount to a rubber stamp. If a court is not convinced that a public finance program prevents corruption,³²⁸ the contextual approach will not shield any of its individual provisions. Similarly, if a particular provision adds little to a public finance regime's effectiveness,³²⁹ there is no reason for the court to uphold it.

a. Applying the Contextual Approach to Arizona's Act

Under this approach, Arizona's Act should survive exacting scrutiny. Its trigger funds provision is the foundation for the state's larger public finance system because it simultaneously facilitates two benchmarks without which the regime could not function: participation and efficiency. Candidates interested in "running clean" have little incentive to do so without a mechanism to protect their speech from being drowned out entirely.³³⁰ To accomplish that, however, the mechanism must disburse as few funds as necessary so as not to bankrupt the regime.³³¹ Trigger funds have achieved unparalleled success at negotiating these two mandates, which are otherwise fundamentally at odds. In Arizona, trigger funds have allowed the Act to guard candidates for public office against quid pro quo corruption by enrolling them in its voluntary, no-contribution regime. Taken as a whole, the Act clearly meets even the Supreme Court's own, narrow definition of anticorruption by enrolling candidates in public financing where they cannot be ensnared by quid pro quo corruption.

b. This Approach Is Consistent with Davis

Many proponents of campaign finance reform claim that the Supreme Court decided *Davis* incorrectly.³³² A full consideration of that claim is beyond the scope of this Note. Rather, this section asserts that, irrespective of the wisdom of the *Davis* opinion, its rationale can be squared with the contextual approach to evaluating public finance regimes.

The Supreme Court's decision in *Davis* illustrates why the contextual approach should be limited to public finance statutes, and why the approach

328. See *supra* note 249 and accompanying text (discussing a case that enjoined a trigger provision because of doubts about the larger public finance regime).

329. See *supra* note 71 and accompanying text (discussing a case that struck down a trigger provision as unnecessary to bolster the public finance system, which already enjoyed near-unanimous participation).

330. See *supra* note 304 and accompanying text.

331. See *supra* notes 23–28 and accompanying text.

332. See, e.g., *supra* notes 120–21, 122, and accompanying text (criticizing *Davis*).

is therefore consistent with that ruling. Although BCRA furthers the anticorruption interest, its Millionaire's Amendment did not. It had nothing to do with public financing.³³³ Moreover, unlike trigger funds, it did not facilitate the larger legislative package's anticorruption measures. It was not tasked with encouraging participation, which was mandatory since candidates could not opt out of BCRA's reforms, as they can with public finance.³³⁴ Nor was it concerned with efficiency or solvency since it had no funds to administer. At most, the Millionaire's Amendment complemented BCRA's other provisions, which restricted or outlawed various types of contributions, by burdening personal expenditures.³³⁵ However, this attempt to achieve consistency across the regime ignored *Buckley*, which carved out far greater protection for expenditures than for contributions.³³⁶ Because the Millionaire's Amendment did nothing to help the BCRA regime further the anticorruption interest, but merely mitigated some other adverse effect of the campaign finance regulations, the Court properly scrutinized whether the provision itself served the anticorruption interest.

c. The Contextual Approach Is Consistent with That of Several Circuit Courts

This approach is also consistent with that of several circuit courts. Perhaps recognizing that every single individual provision in comprehensive public finance regimes cannot possibly be shown to prevent quid pro quo corruption or the appearance thereof directly, these courts have held that such provisions are instead justified by a state interest in encouraging participation in the public finance program. The First Circuit was the first court to recognize such a participation interest, finding it to be a natural byproduct of *Buckley*'s public finance imprimatur: "When, as now, the legislature has adopted a public funding alternative, the state possesses a valid interest in having candidates accept public financing"³³⁷ The Eighth Circuit was next, taking the extra step of finding that the state's interest in encouraging participation was compelling.³³⁸ The Ninth Circuit adopted these holdings in its *McComish* opinion.³³⁹

333. See *supra* note 130 and accompanying text (noting that the Millionaire's Amendment did not relate to public financing).

334. See *supra* note 111 and accompanying text (noting that candidates could not opt out of BCRA's provisions).

335. See *supra* note 100 and accompanying text (finding that the Millionaire's Amendment was intended to correct the advantages conferred on self-financing candidates by FECA and *Buckley*).

336. *Davis v. FEC*, 554 U.S. 724, 743 (2008). For an explanation of *Buckley*, see *supra* Part I.B.

337. *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (finding that public financing programs "'facilitate communication by candidates with the electorate,' free candidates from the pressures of fundraising, and, relatedly, tend to combat corruption" (quoting *Buckley v. Valeo*, 424 U.S. 1, 91 (1976) (per curiam))).

338. See *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996) ("[T]he State has a compelling interest in stimulating candidate participation in its public financing scheme.")

Most recently, the Second Circuit and Eleventh Circuit considered the participation interest.³⁴⁰ The Second Circuit concluded that the interest was not compelling.³⁴¹ The Eleventh Circuit did not reach the question of whether to recognize the interest because it found that Florida had not yet proven that the underlying public financing system furthered the anticorruption interest.³⁴²

If the Supreme Court adopts the determinations of these three circuit courts and recognizes a compelling state interest in encouraging participation in public financing programs, its analysis would be simple. The Court could simply find that this interest justifies the severe burden that trigger funds impose on speech rights, and uphold Arizona's Act.³⁴³ However, the Court need not take the rare step of formally recognizing a new compelling state interest. It must only analyze whether the trigger funds provision "furtheres the anticorruption interest by encouraging participation in the public campaign financing system of [the state], which in turn prevents corruption or the appearance of corruption."³⁴⁴ If the provision passes this test, the Court should hold that it is constitutional.

3. Without the Contextual Approach, Can Trigger Funds Survive?

If the Supreme Court refuses to adopt the contextual approach or the participation interest, and instead analyzes Arizona's trigger funds provision without the context of the Citizens Clean Elections Act, it will likely find that trigger funds provisions as they currently exist unconstitutionally burden First Amendment protections. If this happens, state public finance regimes across the country will have to be discarded or redesigned. States may choose to do away with trigger funds entirely in favor of another delivery mechanism, such as multiplier match.³⁴⁵ Such a

(citing *Vote Choice*, 4 F.3d at 39; *Wilkinson v. Jones*, 876 F. Supp. 916, 928 (W.D. Ky. 1995)).

339. *McComish v. Bennett*, 611 F.3d 510, 526 (9th Cir.) ("Because *Buckley* held that public financing of elections furthers First Amendment values, federal courts have found that states may structure them in a manner which will encourage candidate participation in them."), *cert. granted*, 131 S. Ct. 644 (2010).

340. *Scott v. Roberts*, 612 F.3d 1279, 1292 (11th Cir. 2010); *Green Party of Conn. v. Garfield*, 616 F.3d 213, 245 (2d Cir.), *petition for cert. filed* (U.S. Dec. 9, 2010) (No. 10-795).

341. *Green Party*, 616 F.3d at 245 ("Davis was clear that a 'burden . . . on the expenditure of personal funds is not justified by any governmental interest in eliminating corruption or the perception of corruption.'" (quoting *Davis*, 554 U.S. at 740)). However, *Davis* noted only that restricting self-funding *itself* does not reduce corruption. This proposition seems completely irrelevant to the question at hand: whether an interest in encouraging participation justifies a substantial but indirect burden on expenditures.

342. *Scott*, 612 F.3d at 1292. For a discussion of this finding by the court, see *supra* note 249 and accompanying text.

343. Admittedly, such a perfunctory analysis does not address the question of whether a state can go too far in furthering the participation interest. The difficulties inherent in drawing such a line may weigh against the adoption of this interest by the Supreme Court.

344. *Scott*, 612 F.3d at 1292.

345. See *supra* note 29 and accompanying text (describing New York City's multiplier match program).

mechanism would have to avoid any association with opposition spending, thus lacking the efficiency of trigger funds, which disburse only as much money as needed in the context of a particular electoral contest.³⁴⁶ Other mechanisms are also vulnerable to the criticism that they simply do not create enough of an incentive for candidates to participate.³⁴⁷ A public funding regime with no participants does nothing to fight corruption, no matter how constitutionally unassailable it may be.

Alternatively, if states wish to preserve the essential triggering element, they can adopt the suggestion of the District Court of Arizona and tie trigger funds only to contributions, not expenditures.³⁴⁸ Unlike other mechanisms, such a revised provision would preserve the efficiency of the original by only allocating money when needed. However, like other mechanisms, a revised trigger funds provision that only matches contributions would be blind to the spending that candidates fear the most: spending by wealthy opponents and independent groups.³⁴⁹ It seems likely that enrollment in public financing programs would fall as a result. Nevertheless, for states looking to maintain the basic functionality of their public finance regimes, the weakened trigger funds mechanism suggested by the District Court may present the best option.

CONCLUSION

The Supreme Court's *Davis* decision made clear that the First Amendment must first protect speakers from government regulation instead of maximizing the aggregate amount of speech. Despite this principle, trigger funds provisions of public finance regimes facilitate needed participation in the public system while preserving that system's solvency. In doing so, they play a crucial role in preventing quid pro quo corruption, and the Supreme Court should affirm their constitutionality.

346. See *supra* notes 33–35 and accompanying text.

347. See Hasen, *supra* note 32 (arguing that such alternatives are comparatively unattractive because they cannot compete with “wealthy candidates, [or] independent spending campaigns which can now be funded by unlimited corporate or union funds through super-PACS”).

348. See *supra* note 191 and accompanying text; see also *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 388 (2000) (“While we did not attempt to parse distinctions between the speech and association standards of scrutiny for contribution limits, we did make it clear that those restrictions bore more heavily on the associational right than on freedom to speak.” (citing *Buckley v. Valeo*, 424 U.S. 1, 24–25 (1976) (per curiam))).

349. Weine, *supra* note 34, at 226–27 (describing these types of spending as “a leading concern of candidates” with “ample reason The financial power of self-funded candidates and independent spenders has grown significantly in the post-*Buckley* era.”).