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"Leveling the Playing Field": Reconsidering Campaign Finance Reform in the Wake of Arizona Free Enterprise

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"LEVELING THE PLAYING FIELD": RECONSIDERING CAMPAIGN FINANCE REFORM IN THE WAKE OF *ARIZONA FREE ENTERPRISE*

INTRODUCTION

Campaign finance reform and regulation have become areas of increasing governmental and public interest. This is especially so in an era of heightened contribution and expenditure amounts. For example, Barack Obama's campaign, along with the Democratic National Committee, spent over one billion dollars from the beginning of 2011 through the election of 2012.[1] Meanwhile, the campaign for the President's Republican opponent, Mitt Romney, along with the Republican National Committee, spent nearly $850 million.[2] And while these figures are shockingly high, they do not take into account money spent by independent Super PACs, or political action committees, which spent, in total, more than $600 million in the 2012 election cycle.[3] As the amount of money spent in elections continues to increase, the Federal government and states have enacted regulations that attempt to stop the sharp rise in campaign expenditures.[4]

After the passage of the Federal Elections Campaign Act in 1971,[5] there have been many Court decisions that have provided guidance for modern campaign finance regulation jurisprudence.[6] One thing the decisions seemingly all have in common is a general avoidance of instituting a so-called "leveling

1. Jeremy Ashkenas, et al., *The 2012 Money Race: Compare the Candidates*, N.Y. TIMES, http://elections.nytimes.com/2012/campaign-finance/ (last visited Apr. 19, 2013).

2. *Id.*

3. *Super PACs*, OPEN SECRETS: CTR. FOR RESPONSIVE POLITICS, http://www.opensecrets.org/pacs/superpacs.php (last visited Apr. 19, 2013).

4. *See, e.g.*, Bipartisan Campaign Reform Act, 2 U.S.C. § 431 (2000) (invalidated in part by Fed. Election Comm'n v. Wis. Right to Life, 551 U.S. 449 (2007) and Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008)); The Arizona Citizens Clean Elections Act, ARIZ. REV. STAT. ANN. § 16–940 (1956) (overturned in part by Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011)).

5. *See* Federal Election Campaign Act, 2 U.S.C. § 431(2000).

6. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010); *Davis*, 554 U.S. 724; *Wis. Right to Life*, 551 U.S. 449; Randall v. Sorrell, 548 U.S. 230 (2005); McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003); Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

the playing field" approach to campaign finance.[7] Instead, the decisions have focused primarily on the Government's interest in combating corruption.[8] Though that interest is a compelling one, this article will question why the leveling the playing field approach should not be considered as another compelling state interest.[9] Acknowledging this approach as a compelling interest would allow states and the federal government to curb campaign spending that continues to grow and that has arguably put the possibilities of winning a campaign out of reach for many individuals that do not have deep pockets or connections to wealthy donors.[10]

This approach to campaign regulation will certainly be met, as it has in past cases, with arguments concerned with First Amendment free speech infringements.[11] However, as this note will argue, there is room to incorporate the leveling the playing field approach to campaign finance reform without stepping outside the bounds of the Constitution.[12]

By reconsidering this approach to campaign finance reform, this article will show that the cases that have rejected the idea of leveling the playing field[13] have been off the mark. They have overlooked a possibility that could lead to a substantial and long-lasting change for campaign finance as well as for those individuals running for elected office.

Part I of this article looks at the history of campaign finance regulation and how the leveling approach fits within it. By examining the past cases that have analyzed states' attempts to regulate campaign spending, Part I shows that the debate over how much campaign finance regulation the First Amendment will allow is not a new one. Part II then examines *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, both the majority decision as well as the dissent. In Part III, the article criticizes *Arizona Free Enterprise* and argues, contrary to what both the majority and the dissent posit, that campaign expenditure regulations seeking to level the playing field among candidates

7. *See infra* note 13.

8. *See infra* note 14.

9. *See infra* Part III.

10. *See* Ognibene v. Parkes, 671 F.3d 174, 190 (2d Cir. 2011).

11. *See, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2818 (2011); *Citizens United*, 130 S. Ct. at 912–13; *Buckley*, 424 U.S. at 48–49.

12. *See infra* Part III.C.

13. *See, e.g.*, *Citizens United*, 130 S. Ct. at 904 (noting that the Court in *Buckley* rejected the argument that the Government has an interest in leveling the playing field and the "skyrocketing cost of political campaigns" could not sustain a government prohibition on expenditures); Davis v. Fed. Election Comm'n, 554 U.S. 724, 741 (2008) (noting that the Court's prior decisions "provide no support" for the proposition that limitations on campaign expenditures "level electoral opportunities for candidates of different personal wealth"); Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (rejecting as "wholly foreign to the First Amendment" the idea of "equalizing the relative ability of individuals and groups to influence the outcome of elections" by imposing expenditure limitations in campaigns).

should not be seen as infringing upon the First Amendment Free Speech rights of any candidates. Rather, there is a need for such regulation. Furthermore, this article argues that there should be a recognized compelling state interest in leveling the playing field, especially in an era of increasing amounts of money being spent on political campaigns. The article concludes by reiterating the probable consequences resulting from *Arizona Free Enterprise*, and why such consequences beg for serious reconsideration of current Supreme Court campaign finance precedent.

I. HISTORY OF CAMPAIGN FINANCE REGULATION

In analyzing attempts at campaign finance reform, the Supreme Court has repeatedly focused on one compelling state interest that would justify restrictions on campaign contributions or expenditures: limiting corruption or the appearance of corruption.[14] At the same time, however, the Court has struck down repeated attempts at justifying expenditure limitations by way of leveling the playing field.[15] The dichotomy between these two interests has been the focus of the Court's analysis when confronted with a scheme that seeks to impose some kind of restraint on campaign expenditures.[16] And although the history of cases examining reform favors the former interest, the

14. *See, e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2828 (noting that contribution limitations, "of course, is the primary means" that the Court has upheld to combat corruption); *Davis*, 554 U.S. at 740 (mentioning the eradication of corruption or the perception of corruption as legitimate governmental interests targeted by campaign regulation); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 136 (2003) (recognizing the importance of contribution limits in reducing actual corruption and the public's confidence in the electoral process through the appearance of corruption.); Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 440–41 (2001) (explaining that limitations on contributions have been upheld because of their link to political corruption); Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 208 (1982) (noting that the Court has upheld the "importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption."); *Buckley*, 424 U.S. at 26 (focusing on the limitation of the "actuality or appearance" of corruption resulting from large individual campaign contributions).

15. *See, e.g.*, *Citizens United*, 130 S. Ct. at 904 (2010) (noting that the Court in *Buckley* rejected the argument that the Government has an interest in leveling the playing field and the "skyrocketing cost of political campaigns" could not sustain a government prohibition on expenditures); *Davis*, 554 U.S. at 741 (noting that the Court's prior decisions "provide no support" for the proposition that limitations on campaign expenditures "level electoral opportunities for candidates of different personal wealth."); *Buckley*, 424 U.S. at 48–49 (1976) (rejecting as "wholly foreign to the First Amendment" the idea of "equalizing the relative ability of individuals and groups to influence the outcome of elections" by imposing expenditure limitations in campaigns).

16. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2824–26; *Citizens United*, 130 S. Ct. at 904–11; *Davis*, 554 U.S. at 740–41; *Buckley*, 424 U.S. at 45–49.

question remains whether there is room left to find the latter interest a compelling one that can stand alone against constitutional attack.[17]

A. "Leveling the Playing Field"

The term "leveling the playing field" has been discussed in a variety of ways[18] since the inception of campaign finance reform measures enacted over a century ago.[19] For much of the first half of the twentieth century, the idea of "leveling" was considered a piece of a larger reform movement that sought to root out corruption that could tarnish political elections and the trust of the electorate in those elections.[20] Today, the idea of leveling the playing field is synonymous with limiting campaign expenditures, in some way, among competitors in an election.[21] Opponents of leveling see it as a way to restrict the speech of some in order to enhance the speech of others.[22] Proponents of the approach, on the other hand, have repeatedly touted the idea as a way to restrict "the role of personal wealth in political campaigns"[23] and the "corrosive and distorting effects of immense aggregations of wealth."[24]

B. Early Attempts at Reform

"Leveling the playing field," as the term is used today, is not a recent development in campaign finance reform.[25] The first laws enacted to combat electoral corruption came about in the late nineteenth century.[26] The driving

17. *See infra* Part III.

18. Throughout this article I will be using the term "leveling the playing field" as it is presently used by modern courts that have explicitly discussed the term and the ideals it propounds.

19. *Citizens United*, 130 S. Ct. at 930 (Stevens, J., dissenting); *see also* Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 603.

20. *See* John R. Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 ARIZ. L. REV. 373, 380 (1980); *see also* Pasquale, *supra* note 19, at 606.

21. *See* Ognibene, L.L.C. v. Parkes, 671 F.3d 174, 197–98 (2d Cir. 2011) (Calabresi, concurring); *see also Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2825; *Davis*, 554 U.S. at 750–52. (Stevens, J., dissenting).

22. Buckley v. Valeo, 424 U.S. 1, 48–49 (1976). The dissent saw things much differently. It found the idea of leveling the playing field advanced the notion that "personal wealth ought to play a less important role in political campaigns." *Id.* at 266 (White, J., dissenting in part).

23. *Buckley*, 424 U.S. at 266 (White, J., dissenting in part).

24. Austin v. Chamber of Commerce, 494 U.S. 652, 659–60 (1990).

25. *See infra* notes 26–48.

26. Pasquale, *supra* note 19 at 604–05; ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND THE COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW, at xvii (1988) ("The concern among the electorates of the industrialized nineteenth century was that their elected representatives might not be the real policymakers, that government might still be controlled by those who provide campaign funds. It was such concern that, in the 1890s, led several states to enact disclosure law to provide voters with information on the sources and uses of campaign

force behind these laws and other laws enacted during this "progressive era" was a fear that elected officials would become beholden to moneyed interests if those interests were allowed too much of an influence in campaigns.[27] The first substantial law to regulate campaign financing was the Tillman Act, enacted in 1907, which focused on corporate contributions to campaigns.[28] Subsequent concerns that only wealthy candidates could run for federal office led to passage of an amendment to that law in 1911 that included an expenditure limit of $5,000 for candidates for the House of Representatives and $10,000 for Senatorial candidates, as well as campaign finance disclosure provisions.[29]

From 1925 to 1947, three other federal laws were enacted with the goal of combating money in politics.[30] In reaction to the infamous "Teapot Dome" scandal of the Harding Administration,[31] Congress passed new disclosure provisions in a new Federal Corrupt Practices Act of 1925.[32] Following enactment of that law, the 1930s saw the enactment of campaign regulations that limited the influence of government workers on campaigns.[33] In 1940, amendments to the so-called "Hatch Act of 1939," limited, among other things, the contributions made by federal employees to $5,000 per person per calendar

contributions. In 1897 four states — Nebraska, Missouri, Tennessee, and Florida . . . prohibited corporation political contributions.").

27. *See* Pasquale, *supra* note 19, at 604.

28. Tillman Act, ch. 420, 34 Stat. 864 (1907); *see also* Pasquale, *supra* note 19, at 605–06; Bolton, *supra* note 20, at 378 ("Congress appeared to agree with Roosevelt by making it unlawful for any corporation organized pursuant to a federal statute to make money contributions in connection with federal, state, or local elections; in addition, all corporations were prohibited from making money contributions in connection with federal elections.").

29. Act of Aug. 19, 1911, ch. 33, 37 Stat. 25, 25–28; *see also* Pasquale, *supra* note 19, at 606.

30. *See* Pasquale, *supra* note 19, at 606.

31. MUTCH, *supra* note 26, at 24 ("In 1921 and 1922 President Warren G. Harding's secretary of the interior leased government oil land to private developers; the leases had been made without competitive bidding and there had been exchanges of money between the secretary and the developers. One of these developers was Harry F. Sinclair of the Sinclair Oil Corp., which had leased Wyoming's Teapot Dome Oil reserve from the Interior Department. A Senate committee investigating these transactions, acting on rumors of a link between the Teapot Dome lease and developers' contributions to the Republican party, discovered that Sinclair had indeed given sizeable sums to the GOP.").

32. Pasquale, *supra* note 19, at 607; *see also* MUTCH, *supra* note 26, at 24–25 ("In final form the FCPA required political committees active in two or more states to file quarterly financial reports in nonelection years, the first strengthening of the disclosure law since the addition of preelection reporting requirements in 1911. But . . . [t]he increasingly strong wording of the law distracted attention from the fact that it contained no provisions for enforcement.").

33. Pasquale, *supra* note 19, at 608.

year.[34] Finally, in 1947, the Taft-Hartley Act limited the campaign activities of unions.[35]

Importantly, the enactment of the Taft-Hartley Act of 1947 did not go unchallenged.[36] Shortly after the new prohibitions were enacted, the government brought suit against the Congress of Industrial Organizations (CIO) for publishing an editorial supporting a Democratic candidate in a special congressional election.[37] In court, the CIO argued that the act infringed upon their constitutional rights, and the district court agreed.[38]

Hearing the case on appeal, the Supreme Court did not directly rule on the constitutionality of the government regulation.[39] However, Justice Rutledge, in a concurring opinion, introduced what would become the general argument against any leveling approaches taken by the government.[40] Justice Rutledge recognized the Government's argument that "large expenditures by unions in publicizing their official political views bring about an undue, that is supposedly a disproportionate, sway of electoral sentiment and official attitudes."[41] In response to this argument, however, Justice Rutledge found that "any asserted beneficial tendency of restrictions upon expenditures for publicizing political views, whether of a group or of an individual, is certainly counterbalanced to some extent by the loss for democratic processes resulting from the restrictions upon free and full public discussion."[42] He went on to say that an effect of restricting expenditures "for the publicizing of political views . . . necessarily deprives the electorate . . . of the advantages of free and full discussion."[43]

The first half of the twentieth century spawned several federal acts that aimed to limit electoral activities of moneyed interests in federal campaigns.[44]

34. Act of July 19, 1940, ch. 640, sec. 4, § 13(a), 54 Stat. 767, 767, 770; *see also* Bolton, *supra* note 20, at 382.

35. Taft-Hartley Act, ch. 120, sec. 304, § 313, 61 Stat. 136, 159–160 (1947); *see also* Pasquale, *supra* note 19, at 608; MUTCH, *supra* note 26, at 157. The scope of the prohibitions was vague, especially to opponents of the bill. When asked about the scope of the prohibitions, however, Senator Robert A. Taft (R-OH) said that "the source of funds was the criterion — anything funded from the general treasury" of the union "rather than from money contributed especially to finance that particular activity" would be prohibited. *Id.*

36. MUTCH, *supra* note 26, at 158.

37. *Id.* The government indicted the CIO and its president for making an unlawful expenditure in connection with a federal election. Bolton, *supra* note 20, at 386–87.

38. MUTCH, *supra* note 26, at 158.

39. Pasquale, *supra* note 19, at 609.

40. United States v. Cong. of Indus. Orgs., 335 U.S. 106, 143 (1948) (Rutledge, J., concurring); *see also* Pasquale, *supra* note 19, at 610–11.

41. *Cong. of Indus. Org.*, 335 U.S. at 143 (Rutledge, J., concurring).

42. *Id.*

43. *Id.* at 144.

44. Pasquale, *supra* note 19, at 603–11.

However, it is important to note that none of these pieces of legislation, which included expenditure limitations, was struck down by the Court for infringing upon the First Amendment.[45] Yet in 1976, with its ruling in *Buckley*, the Court set a precedent with an opinion that marked the beginning of the modern debate over how much campaign finance regulation the Constitution allows.[46]

C. Buckley v. Valeo

The enactment of the Federal Election Campaign Act (FECA) in 1971 resulted in the seminal Supreme Court case of *Buckley v. Valeo*.[47] In its opinion, the Supreme Court considered whether limitations on political election contributions and expenditures were an abridgment of the First Amendment.[48] Importantly, the Court held that money was a form of speech and reducing or limiting how much a candidate can spend on their election would be an unnecessary infringement by the government on a candidate's right to free speech under the First Amendment.[49] The only exception to this rule, the Court held, would be conditioning "acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations."[50] In an oft-quoted passage from the decision, the Court rejected the idea now known as leveling the playing field by stating that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[51]

However, it is important to note that the Court made a distinction between expenditure limitations and limitations on the amount any one person or group may contribute to a candidate or political committee.[52] According to the Court, restrictions on contributions, as opposed to expenditures, involved "only a marginal restriction upon the contributor's ability to engage in free

45. *See, e.g.*, *Cong. Of Indus. Orgs.*, 335 U.S. at 120–21. Although this case did not address the constitutionality of the Taft-Hartley Act, it nonetheless failed to declare limitations on campaign activity unconstitutional. *Id.* at 110.

46. *See* Buckley v. Valeo, 424 U.S. 1, 143 (1976).

47. *Id.* at 6.

48. *See id.* at 13–14 (noting that the "major contribution and expenditure limitations in [The Federal Elections Campaign] Act prohibit individuals from contributing more than $25,000 in a single year or more than $1,000 to any single candidate for an election campaign and from spending more than $1,000 a year 'relative to a clearly identified candidate.' Other provisions restricted a candidate's use of personal and family resources in his campaign and limit the overall amount that can be spent by a candidate in campaigning for federal office."). The Court also reviewed the Act in an action based upon equal protection, which will not be considered for purposes of this note. *See id.* at 11.

49. *See id.* at 19–20.

50. *Id.* at 57 n.65.

51. *Id.* at 48–49.

52. *Buckley*, 424 U.S. at 20–21.

communication."[53] Thus, the limits placed on campaign contributions were upheld based on what the Court saw as the "primary purpose" of FECA, which was to limit corruption or the appearance thereof.[54]

D. Post-Buckley *Cases*

After the *Buckley* decision, there have been many Supreme Court rulings that charted the course that campaign finance reform jurisprudence has continued to take.[55] It is these cases, together with *Buckley*, that have allowed the Roberts Court to view the leveling approach as a constitutional attack under the First Amendment.[56]

Throughout the decades following *Buckley*, the Court continued to view restrictions on campaign expenditures with caution and heightened scrutiny.[57] The closest the Court came to recognizing the legitimacy of any kind of leveling approach to campaign finance reform was its decision in *Austin v. Michigan Chamber of Commerce*.[58] The Court found a restriction on corporate campaign expenditures was part of a larger goal of limiting corruption.[59] Importantly, it implicitly spoke of a leveling approach by stating that an expenditure restriction was aimed at limiting "the corrosive and distorting effects of immense aggregations of wealth" that are held by large corporations.[60] In its finding, the Court called these effects "a different type of corruption in the political arena."[61] That is, different than the danger of "financial *quid pro quo*" that *Buckley* held was a basis for a compelling state

53. *Id.* The Court went further in its distinction between impermissible and permissible restrictions on campaign speech by stating that while "contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 21.

54. *Id.* at 26.

55. *See supra* note 6.

56. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2825–26 (2011).

57. *See, e.g.*, Fed. Election Comm'n v. Mass. Right to Life, 479 U.S. 238, 263–65 (1986). The Court narrowed its holding to striking down restrictions on expenditures by a non-profit ideological advocacy entity. *Id.* In the spirit of *Buckley*, however, the Court noted that such restrictions should be subject to strict scrutiny. *See also* Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 608 (1996) (holding that an expenditure limit on an independent campaign expenditure, not in coordination with any particular candidate, violated the First Amendment); MONICA YOUN, *First Amendment Fault Lines and the* Citizens United *Decision*, *in* MONEY, POLITICS, AND THE CONSTITUTION: BEYOND CITIZENS UNITED 95, 106–07 (Monica Youn ed., 2011).

58. Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) (overruled by Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010)).

59. *See id.* at 660.

60. *Id.* at 660.

61. *Id.*

interest for campaign regulation.[62] The Court went on to say that limitations on corporate expenditures do not attempt "to equalize the relative influence of speakers on elections," but, rather, they ensure "expenditures reflect actual public support for the political ideas espoused by corporations."[63] The *Austin* court treated political expenditures in a manner more consistent with *Buckley*'s treatment of campaign contributions, that is, as "low value, proxy speech."[64]

This idea was relatively short lived, however, because during Chief Justice Roberts' tenure on the Supreme Court, regulations of political expenditures have been routinely declared unconstitutional, with the First Amendment being the basis for such rulings.[65] The decision that received the most attention was *Citizens United v. Federal Election Commission*,[66] which overruled *Austin* and invalidated restrictions on independent corporate expenditures spent on elections.[67] Though this decision has been controversial in the history of campaign finance regulation,[68] the *Arizona Free Enterprise* Court rested its opinion upon an earlier campaign finance case decided by the Roberts Court.[69]

E. Davis v. Federal Election Commission

The most important case to the *Arizona Free Enterprise* Court was *Davis v. Federal Election Commission*.[70] The case involved a challenge to the so-called "Millionaire's Amendment," which was enacted under the Bipartisan

62. Buckley v. Valeo, 424 U.S. 1, 26–27 (1976).

63. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990).

64. YOUN, *supra* note 57, at 108.

65. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010) (holding that governmental restrictions on independent corporate expenditures were unconstitutional and no governmental interest justified limits on the political speech of non-profit or for-profit corporations); Wis. Right to Life v. Fed. Election Comm'n, 551 U.S. 449, 476–81 (2007) (holding that regulations pertaining to issue ads during elections are unconstitutional and cannot be upheld based on an interest in combating corruption or the "corrosive and distorting effects" of immense aggregations of wealth collected by corporate forms); Randall v. Sorrell, 548 U.S. 230, 236 (2006) (holding that campaign expenditure limits imposed by the state of Vermont were unconstitutional under the First Amendment).

66. *Citizens United*, 131 S. Ct. at 876.

67. *Id.* at 913. *See also* YOUN, *supra* note 57, at 95 (noting an arguably dire consequence for this holding, stating that "the majority's sweeping endorsement of the First Amendment status of corporate political expenditures certainly issued an open invitation for . . . a [campaign] spending blitz.").

68. *See* MONICA YOUN, *Introduction*, *in* MONEY, POLITICS, AND THE CONSTITUTION: BEYOND CITIZENS UNITED, 1, 2, 5 (Monica Youn ed., 2011); James A. Gardner, *Anti-Regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope*, 20 CORNELL J.L. & PUB. POL'Y 673, 674–75 (2011).

69. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2818–20 (2011).

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

Campaign Reform Act of 2002.[71] The Millionaire's Amendment, simply put, allowed House of Representative candidates whose opponents spent over $350,000 to raise money at triple the limit, (up to $6,900 per individual contribution, rather than the normal limit of $2,300)[72] while the candidate that triggered the change in contribution limits was required to raise money at the normal limit of up to $2,300 per individual contribution.[73]

The *Davis* court found the Millionaire's Amendment imposed "an unprecedented penalty on any candidate" who chose to use personal funds toward their campaign and who triggered the lopsided contribution limitations.[74] Notably, the Court distinguished the Millionaire's Amendment from the expenditure limitation upheld in *Buckley*,[75] stating that the Millionaire's Amendment did not give a choice to a candidate but, rather, it restricted a candidate's spending without giving them a choice.[76] Thus, because of the substantial burden the amendment placed on a candidate's First Amendment right to free speech, the Court held that the scheme had to be justified by a "compelling state interest."[77] However, under the facts of the case, the Court found no compelling interest, which, under *Buckley*, would be to eliminate corruption or the perception of corruption.[78] Thus, the Millionaire's Amendment was found to be unconstitutional.[79]

F. Justice Stevens, Dissenting in Part: An Important Note

Importantly, in *Davis*' dissenting opinion, Justice Stevens did not see the Millionaire's Amendment, or any kind of limitation placed on expenditures as "offensive" to the First Amendment.[80] In his opinion, *Buckley* was not the right

71. *Id.* at 729.

72. *Id.*

73. *See id.*

74. *See id.* at 738–39.

75. *See supra* note 50 and accompanying text.

76. *Davis*, 554 U.S. at 739–40.

77. *Id.* at 740 (citing Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 256 (1986); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 205 (2003); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 657–58 (1990); Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 500-01 (1985); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978); Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 609 (1996) (*Colorado I*)).

78. *Id.*

79. *Id.* at 744. The Court rejected the Government's argument that asymmetrical contribution limits are justified because they leveled "electoral opportunities for candidates of different personal wealth." *Id.* at 741 (quoting Brief for Appellee at 34, *Davis*, 554 U.S. 724). The Court further noted that the argument in favor of leveling electoral opportunities "has ominous implications because it would permit Congress to arrogate the voter's authority to evaluate the strengths of candidates competing for office." *Id.* at 742 (quoting *Bellotti*, 435 U.S. at 791–92).

80. *Id.* at 752 (Stevens, J., dissenting in part).

case to which one should look for guidance on the issue of limitations on campaign expenditures.[81] Echoing similar reasoning he gave in his dissent in *Randall v. Sorrell*, Justice Stevens noted that reasonable campaign expenditure limitations would "free candidates and their staffs from the interminable burden of fundraising."[82] Also, Justice Stevens saw campaign expenditure limitations as likely "improving the quality of the exposition of ideas" because, as in litigation before the Supreme Court, "repetitious arguments are disfavored and are usually especially unpersuasive."[83] Furthermore, he noted, "flooding the airwaves with slogans and sound bites may well do more to obscure the issues than to enlighten listeners."[84]

Thus, there has been some fracturing amongst Justices when it comes to the issue of campaign expenditure limitations, as some, including Justice Stevens, have argued for a more egalitarian approach to campaign spending.[85] Although the jurists that have argued for leveling the playing field have not been in the majority in the pertinent campaign finance decisions, their opinions merit recognition.[86] As will be addressed later in this article, this is especially so in the current political climate, which draws criticism for an environment that seems to breed runaway political spending by candidates and their political supporters.[87]

II. *ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC V. BENNETT*[88]

In *Arizona Free Enterprise*, the Supreme Court took another look at a campaign finance scheme set up by a state.[89] Within a complex regulatory

81. *See id.* at 750–51 (discussing Justice White's dissent in *Buckley* and pointing out that Justice White saw expenditure limitations "not as direct restrictions on speech, but rather as akin to time, place, and manner regulations" which are constitutional as long as the "purposes they serve are legitimate and sufficiently substantial." (quoting Buckley v. Valeo, 424 U.S. 1, 264 (1976) (per curiam)); *see also* Randall v. Sorrell, 548 U.S. 230, 274–81 (2006) (Stevens, J., dissenting) (explaining that the holding from *Buckley*, striking down the expenditure limitations, "upset a long-established practice"; that money and speech should not be viewed as being the same; expenditure limitations not only reduce corruption in campaigns, but also provide for equal access to the political arena as well as free candidates from the "fundraising straightjacket"; and that the Framers would be in favor of campaign expenditure limitations).

82. *Davis*, 554 U.S. at 751 (Stevens, J., dissenting in part) (quoting Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 649 (1996)).

83. *Id.*

84. *Id.* at 752.

85. *See, e.g.*, *id.* at 749–57; *Randall*, 548 U.S. 230, 274–81 (2006) (Stevens, J., dissenting); *Buckley*, 424 U.S. at 259 – 66 (White, J., dissenting); *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 649–50 (1996) (Stevens, J., dissenting); *see also infra* Part III.C.

86. *See infra* Part III.C.

87. *See infra* Part III.B–C.

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

89. *Id.*

scheme, Arizona attempted to impose a so-called "trigger mechanism" within a public-funding campaign finance law.[90] Although both the majority and dissent discussed the idea, each failed to give the notion of leveling the playing field much of a chance.[91] The majority decision, authored by Chief Justice Roberts, dismissed the idea explicitly.[92] Meanwhile, the dissent chose only to focus on the matching funds scheme's end-goal of limiting corruption as the vehicle for finding any chance of the law's constitutionality.[93]

A. The Issue of the Public Finance Scheme

The scheme at issue in *Arizona Free Enterprise* was known as The Arizona Citizens Clean Elections Act, passed by initiative in 1998.[94] The Act set up a public financing system to fund the primary and general election campaigns of candidates running for state office in Arizona.[95] In the system, if a candidate opted to receive public funding in their campaign, they had to collect a specified number of five-dollar contributions from Arizona voters as well as accept certain conditions in order to receive the funding.[96] After accepting these conditions, candidates wishing to participate in the scheme were granted public funds with which they could run their campaign.[97]

Though often times the initial allotment of public funds was all the support the participating candidates may have needed, if certain conditions were met, publicly funded candidates were given additional matching funds.[98] The matching funds were available in both primary and general elections,[99] and

90. *Id.* at 2814–15.

91. *Id.* at 2825; *id.* at 2844 (Kagan, J., dissenting).

92. *Id.* at 2825 (majority opinion).

93. *Id.* at 2844 (Kagan, J., dissenting).

94. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2813 (majority opinion).

95. *Id.*

96. *Id.* at 2813–14 ("Publicly funded candidates must agree, among other things, to limit their expenditure or personal funds to $500, § 16 – 941(A)(2) (West Supp. 2010); participate in at least one public debate, § 16 – 956(A)(2); adhere to an overall expenditure cap, § 16 – 941(A); and return all unspent moneys to the State, § 16 – 953.").

97. *Id.* at 2814.

98. *Id.*

99. *See id.* at 2814 ("In a primary, matching funds are triggered when a privately financed candidate's expenditures, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceed the primary election allotment of state funds to the publicly financed candidate. §§ 16 – 952(A), (C). During the general election, matching funds are triggered when the amount of money a privately financed candidate receives in contributions, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceed the general election allotment of state funds to the publicly financed candidate. § 16 – 952(B). A privately financed candidate's expenditures of his personal funds are counted as contributions for purposes of calculating matching funds during a general election."); *see also* Citizens Clean Elections Commission, Ariz. Admin. Code § R2–20–133(B)(1)(f) (2009).

once the matching funds were triggered, the State allocated such funds in roughly the same manner in both primary and general elections, that is, in a dollar-for-dollar matching scheme dictated by the money spent by the privately-financed candidate in the same election.[100] The matching funds provided by the State of Arizona topped out at two times the initially authorized grant of public funding.[101]

The petitioners in *Arizona Free Enterprise* were five past and future candidates for Arizona state office (four members of the House of Representatives and the Arizona state treasurer), and two independent groups that spent money in Arizona state races.[102] The petitioners filed suit over the Arizona campaign finance scheme, claiming the matching funds provision unconstitutionally penalized their speech and burdened their ability to fully exercise their First Amendment rights.[103]

B. Procedural History

The district court, siding with the petitioners, found the matching funds provision "constitute[d] a substantial burden" on the speech of privately-financed candidates because it "award[ed] funds" to those candidates' opponents based on the privately-financed candidate's speech.[104] Therefore, the court equated the privately-financed candidate's campaign expenditures with speech.[105] Furthermore, the district court held there was "no compelling interest" being served by the "provision that might justify the burden

100. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2814 ("Once matching funds are triggered, each additional dollar that a privately financed candidate spends during the primary results in one dollar in additional state funding to his publicly financed opponent (less a 6 percent reduction meant to account for fundraising expenses). § 16 – 952(A). During a general election, every dollar that a candidate receives in contributions — which includes any money of his own that a candidate spends on his campaign — results in roughly one dollar in additional state funding to his publicly financed opponent. In an election where a privately funded candidate faces multiple publicly financed candidates, one dollar raised or spent by a privately financed candidate results in an almost one dollar increase in public funding to each of the publicly financed candidates. . . . Spending by independent groups on behalf of a privately funded candidate, or in opposition to a publicly funded candidate, results in matching funds. § 16 – 952(C). Independent expenditures made in support of a publicly financed candidate can result in matching funds for other publicly financed candidates in a race. *Ibid*. The matching funds provision is not activated, however, when independent expenditures are made in opposition to a privately financed candidate.").

101. *Id.* at 2814–15.

102. *Id.* at 2816.

103. *Id.* It was precisely the fact that the matching funds provision was triggered initially by candidate *expenditures* that brought about the challenge to the statute and enabled the Court to strike down the Arizona law based on First Amendment principles. *Id.* at 2817–18.

104. *Id.* at 2816.

105. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2816.

imposed."[106] Consequently, the district court entered a permanent injunction against the enforcement of the matching funds provision, but stayed the implementation of the injunction to allow the State to appeal.[107]

The Ninth Circuit Court of Appeals, after staying the district court's injunction, reversed that court's holding, finding the matching funds provision imposed "only a minimal burden on First Amendment rights" because it did not "actually prevent anyone from speaking in the first place or cap campaign expenditures."[108] Important to this note, the Ninth Circuit relied only upon an anti-corruption rationale for upholding the matching funds provision, finding that it "bears a substantial relation to Arizona's important interest in reducing *quid pro quo* political corruption."[109]

The Supreme Court stayed the Ninth Circuit's decision, vacated that court's stay of the district court's injunction, and, after granting certiorari, reversed the judgment of the Ninth Circuit.[110]

C. The Majority Decision

In his analysis of the constitutionality of the Arizona statute, Chief Justice Roberts first noted that speech uttered during a campaign is subject to strict scrutiny, meaning that laws wishing to impose restrictions on political speech must be shown to serve a compelling state interest and be narrowly tailored to achieve that interest.[111] The Court noted that the petitioners argued that their spending, or "speech," was not directly capped by Arizona's matching funds provision, but that their political speech was substantially burdened by the state law in the same way that speech was burdened by the law invalidated in *Davis v. Federal Election Commission.*[112]

The majority compared the *Davis* decision[113] to the case at bar, finding that, although the penalties imposed under each system were different, the

106. *Id.*

107. *Id.*

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

109. *Id.* (quoting *McComish*, 611 F.3d at 513).

110. *Id.* at 2816, 2829.

111. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2817.

112. *Id.* at 2817. By this the petitioners meant that their decision to spend freely in their campaign was being burdened by the possible monetary gains their opponents could receive as a result of their spending. *See id.* at 2817–18.

113. *See supra* Part I.D. In comparing Arizona's matching funds scheme to the Millionaire's Amendment in *Davis*, the Court found that, similar to the scheme in *Davis*, here, the matching funds provision "impose[d] an unprecedented penalty on any candidate who robustly exercise[d] his First Amendment rights. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2818 (quoting Davis v. Fed. Election Comm'n, 554 U.S. 724, 739 (2008)). The Court went on to imply that under Arizona's scheme, "the vigorous exercise of the right to use personal funds to finance campaign speech" led to "advantages to opponents in the competitive context of electoral politics." *See id.* (quoting *Davis*, 554 U.S. at 739).

differences made "the Arizona law *more* constitutionally problematic, not less."[114] First, the Court found it problematic that, unlike the law in *Davis*, which still made the benefitting candidate responsible for raising their own funds, here, "the benefit to the publicly financed candidate is the direct and automatic release of public money."[115] The Court also had a problem with the "multiplier effect" that was possible under the Arizona law, which meant if the privately-funded candidate was facing two publicly-funded candidates, each dollar spent by the former candidate resulted in dollars being provided to the latter candidates, creating, in effect, two dollars in opposition as a result of one dollar spent by the privately-funded candidate.[116]

The Court also recognized two problems with how the Arizona law treated spending by independent expenditure groups: first, as the majority saw it, even if the privately-financed candidate chose to spend less than the initial public financing cap, "any spending by independent expenditure groups to promote the privately financed candidate's election—regardless whether such support was welcome or helpful—could trigger matching funds."[117] The Court further stated that the money going to the publicly financed candidate as a result of the independent expenditure groups' spending "would go directly to the publicly-funded candidate to use as he saw fit."[118] Due to the nature of the Arizona law as it pertained to independent expenditure groups, the Court saw the burden on them as, in the least, comparable and possibly worse than the burden placed on the privately-financed candidates.[119] This was due to the fact that independent groups could avoid the triggering mechanism only by changing their message from discussing a candidate or by not speaking at all.[120]

1. A Substantial Burden Placed on Privately-Funded Candidates

Arizona, in support of the public financing scheme, advanced multiple arguments for why there was no substantial burden placed on the privately-funded candidates by the Arizona law.[121] However, the Court found none to be persuasive.[122]

First, Arizona argued the *Davis* decision only pertained to asymmetrical contribution limits, and therefore that decision could not guide the case before

114. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2818.
115. *Id.* at 2818–19.
116. *Id.* at 2819.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2819–20.
121. *Id.* at 2820. The State of Arizona was joined in the lawsuit by the Clean Elections Institute and the United States. *Id.*
122. *Id.*

the Court.[123] In response, the Court reiterated that the burden on speech resulting from the Arizona law was more than the burden resulting from the law at issue in *Davis*.[124]

Arizona also argued that the Arizona scheme actually resulted in *more* speech by increasing debate over issues of public concern in Arizona elections and by promoting free and open debate, which the First Amendment was intended to foster, and, thus, these ideals offset any burden the law might place on speech.[125] However, the Court rejected this argument, finding that "[a]ny increase in speech resulting from the Arizona law is of one kind and one kind only — that of publicly financed candidates."[126] The Court explicitly dismissed the idea that the privately-funded candidates and independent-expenditure groups experience an increase in free speech by stating that "restriction[s] on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression."[127] Thus, the Court found that reducing one group's free speech at the expense of another, or what the Court called a "beggar-thy-neighbor" approach to free speech, was "wholly foreign to the First Amendment."[128]

The Court also rejected the idea that, due to the matching funds provision, no candidate or independent-expenditure group was obligated to express a message they disagreed with or was required by the government to subsidize a message with which they disagreed.[129] Though the Court acknowledged this argument as "true enough," it also pointed out that the "direct result" of speech

123. *See id.*; *see also* Brief of State Respondents at 26, *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. 2806 (2011) (No. 10-238) ("The provision at issue in *Davis* tied the hands of self-funded candidates with respect to their efforts to raise funds while releasing opponents from the same restrictions. The Act's matching funds provision does not discriminate against any political actor's speech, but rather distributes funds for which participating candidates have qualified based on aggregate activity in a race. It thus neither discriminates on the basis of identity nor imposes any limitations on political actors."). *See also* Brief of Respondent Clean Elections Institute, Inc. at 22–23, 27–28, *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. 2806 (2011) (No. 10-238) ("*Davis* addressed a law, divorced from any public financing program, that resulted in discriminatory contribution limits being applied to two privately financed candidates competing against each other in the same race. No similar issue exists here, where publicly financed and privately financed candidates, far from being similarly situated, voluntarily occupy separate campaign financing worlds in which different rules necessarily and constitutionally apply. . . . Under Arizona's law, there are no "discriminatory" or "asymmetrical" limits comparable to those in *Davis*.").

124. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2820; *see also supra* notes 114–120.

125. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2820.

126. *Id.*

127. *Id.* at 2820–21 (quoting Buckley v. Valeo, 424 U.S. 1, 19 (1976)).

128. *Id.* at 2821 (quoting *Buckley*, 424 U.S. at 48–49.). This approach to campaign regulation is also what is commonly known as "leveling the playing field." *See Buckley*, 424 U.S. at 48–49.

129. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2821.

proffered by a privately-financed candidate and independent-expenditure group is a state-provided monetary subsidy to a "political rival," and that subsidy penalized speech more directly than the Millionaire's Amendment in *Davis*.[130]

2. "Leveling the Playing Field" Is Not a Compelling State Interest

Because the Court found there was a substantial burden placed on the privately-funded candidates' speech, a "compelling state interest" had to be present in order for the Court to justify the matching funds provision.[131] Important to this analysis was the Court's consideration of the privately-financed candidates and independent-expenditure groups' contention that the Arizona law sought to "level the playing field,"[132] rather than combat corruption or the appearance of corruption.[133]

In addressing this argument, the Court found "ample support" for the contention that the matching funds provision sought to "level the playing field" between the candidates and their resources.[134] First, the Court found the operation of the law, by ensuring campaign financing is "equal, up to three times the initial public funding allotment," was the "clearest evidence" of the end goal of leveling the playing field.[135] Also pertinent to its opinion was the text of the provision itself, which was entitled "Equal funding of candidates."[136] Further, the Court deemed it important that the Act referred to

130. *Id.* at 2821–22. The subsidy was not the only fact the Court pointed to in striking down the Arizona law as overly burdensome on privately-funded candidates. For example, the Court focused on instances of candidates limiting their fundraising efforts and discouraging groups to spend in their name in order to avoid the triggering provision. *Id.* at 2822. Also, the Court dismissed arguments, put forth by the State in support of the provision, that privately-funded candidates could choose to "hover" just below the matching-fund provision's funding limit or to spend more than the limit, resulting in no burden on their speech. *Id.* at 2823. In dismissing this argument, the Court stated "[i]t is clear not only to us but to every other court to have considered the question after *Davis* that a candidate or independent group might not spend money if the direct result of that spending is additional funding to political adversaries." *Id.* Lastly, the Court was not persuaded by Arizona's argument that the matching-funds provision might have been more efficient than other forms of public finance, stating that "the First Amendment does not permit the State to sacrifice speech for efficiency." *Id.* at 2824.

131. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2824.

132. *Id.* at 2824–26.

133. *Id.* The State argued that the matching funds provision "further[ed] Arizona's interest in preventing corruption or the appearance of corruption." *Id.* at 2825 (quoting Brief for Respondent at 42, 47, *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. 2806 (2011) (Nos. 10–238, 10–239); *id.* at 47.

134. *Id.*

135. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2825.

136. *Id.* (quoting ARIZ. REV. STAT. ANN. § 16–952 (2010)).

the funds, allotted to publicly-funded candidates as a result of the privately-funded candidates' spending, as "equalizing funds."[137]

The Court found more evidence of leveling the playing field in the fact that, in the event the publicly-funded candidates could not be provided with funds from the State due to a shortage of monies, the law "allow[ed] the publicly funded candidate to 'accept private contributions to bring the total monies received by the candidate' up to the matching funds amount."[138] The Court noted it had upheld limiting contributions as a means to combat corruption in the past,[139] and Arizona argued that limitations on contributions to the publicly-funded candidates eliminated the possibility of *quid pro quo* exchanges between private interests and publicly-financed candidates.[140] However, the Court found that "when confronted with a choice between fighting corruption and equalizing speech, the drafters of the matching funds provision chose the latter."[141]

The Court also emphasized it had "repeatedly rejected" the argument that there was a compelling state interest in leveling the playing field.[142] It noted that "equalizing campaign resources 'might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.'"[143] Also, importantly, the Court made one final critique of the leveling the playing field approach. It stated that it can "sound like a good thing," but recognized that "in a democracy, campaigning for office is not a game."[144] Rather, the Court viewed campaigning as a "critically important form of speech" and noted that the "guiding principle," when it comes to such speech, is "freedom — the 'unfettered interchange of ideas' — not whatever the State may view as fair."[145]

Thus, the majority completely disavowed the idea of leveling the playing field, citing multiple cases for this decision.[146] Even though Arizona did not rely on the leveling approach in its argument,[147] the Court sided with the

137. *Id.* (quoting ARIZ. REV. STAT. ANN. §§ 16–952 (C)(4) & (5) (2010)). The Court also noted that the regulations implementing the matching funds referred to those funds as "equalizing funds" as well. *Id.*

138. *Id.* (quoting ARIZ. REV. STAT. ANN. § 16–954(F) (2006)).

139. *Id.* (citing Buckley v. Valeo, 424 U.S. 1, 23–35, 46–47 (1976)).

140. *Id.*

141. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2825.

142. *Id.* at 2825–26 (citing Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 904–05 (2010); Davis v. Fed. Election Comm'n, 554 U.S. 724, 741 (2008); *Buckley*, 424 U.S. at 56).

143. *Id.* at 2826 (quoting *Buckley*, 424 U.S. at 57).

144. *Id.*

145. *Id.* (quoting *Buckley*, 424 U.S. at 14).

146. *Id.* at 2825.

147. *See* Brief of State Respondents at 12–15, *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. 2806 (2011) (No. 10–238); *see also* Brief of Respondent Clean Elections Institute at

challengers of the statute, who argued that "electoral opportunities" between candidates were being leveled because the matching funds provision equalized candidate "resources and influence."[148]

D. Justice Kagan's Dissent

Justice Kagan, in her dissent, posited the argument that the First Amendment's "core purpose" is to "foster a healthy, vibrant political system full of robust discussion and debate."[149] Thus, Justice Kagan believed the anti-corruption statute at issue in this case did not violate the First Amendment, as it enhanced "the 'opportunity for free political discussion to the end that government may be responsive to the will of the people.'"[150]

59–60, *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. 2806 (2011) (No. 10–238). Instead, the State argued that the goal of the matching funds provision was to combat corruption and the appearance of corruption. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2826. The State contended that the provision both directly and indirectly combated corruption because it "ensur[ed] that enough candidates participate in the State's public funding system, which in turn helps combat corruption." *Id.* at 2827. However, the Court rejected this argument. *Id.* at 2828. It is important to note that the State's argument here was not based on a loose foundation. Arizona has had a history of corruption at the state government level. The most notable scandal was the so-called "AzScam" scandal, which, through an undercover police sting operation, uncovered state legislators taking thousands of dollars in bribes in agreement to pass gambling legislation. Brief of State Respondents at 3–4, *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. 2806 (2011) (No. 10–238). After the AzScam scandal, a round of state laws meant to curtail corruption were enacted, but the appearance of corruption, bolstered by a "seamless interplay between fundraising and lawmaking" in Arizona, persisted. This resulted in Arizona voters passing the Citizens Clean Elections Act in 1998, which is the statute at issue in this case. Brief of State Respondents at 4, *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. 2806 (2011) (No. 10–238).

148. *See Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2824–25.

149. *Id.* at 2830 (Kagan, J., dissenting). Justice Kagan began her dissent with a rather detailed hypothetical, relying on the concept of ridding a state of corruption as a legitimate goal of a public-financing system similar to the one enacted by Arizona. *Id.* at 2829. Justice Kagan first described one state that enacts a system of campaign finance reform, which includes measures previously upheld by the Court, such as capping campaign contributions, requiring disclosure of substantial donations, and creating an optional public financing program giving candidates a fixed public subsidy if they refrain from private fundraising. *Id.* These measures, in her hypothetical, do not work. The second state she described takes heed of these failures and enacts a public financing system much like the one Arizona enacted, including, importantly, a public financing system that candidates choose to participate in because "they will receive sufficient funding to run competitive races." *Id.* Thus, in the second state Kagan described, the voter-enacted program "carefully adjusts" the money that is given to candidates through a matching funds mechanism that, as Justice Kagan pointed out, "does not discriminate against any candidate or point of view, and . . . does not restrict any person's ability to speak." *Id.* She also pointed out that "by providing resources to many candidates, the program creates more speech and thereby broadens political debate. . . . The second State rids itself of corruption." *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2829.

150. *Id.* at 2830 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)).

1. Justice Kagan Discusses *Buckley v. Valeo* and Possible Problems With Attempted Campaign Finance Reform

Justice Kagan noted that the history of campaign finance reform has focused on one key question: "how to prevent massive pools of private money from corrupting our political system."[151] Thus, to prevent corruption and the appearance of corruption, citizens have enacted reforms with the goal of curbing the power of special interests.[152] One of these reforms, Justice Kagan pointed out, has been public financing of elections.[153]

In *Buckley v. Valeo*, the Court declared the presidential public financing system constitutional.[154] Justice Kagan pointed out that in *Buckley*, the Court found that Congress had created the public financing program "for the 'general welfare' — to reduce the deleterious influence of large contributions on our political process," and to foster communications between candidates and voters and to free candidates from the "rigors of fundraising."[155] Also, as Justice Kagan noted, the Court "reiterated 'that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest.'"[156] Furthermore, the Court upheld the public financing system against a First Amendment free speech challenge.[157] In so doing, it found "the program did not 'restrict or censor speech, but rather . . . used public money to facilitate and enlarge public discussion and participation in the electoral process.'"[158] Thus, the Court gave state and municipal governments the "green light" to set up public financing schemes resembling the presidential model.[159]

Even though she noted the Court had upheld certain public financing schemes, Justice Kagan pointed out that systems like the one upheld in *Buckley* suffer from a "significant weakness."[160] That is, they lack a "mechanism for setting the subsidy at a level that will give candidates sufficient incentive to participate, while also conserving public resources."[161] Justice Kagan argued that, in order for a public financing scheme to be effective in achieving its goals, it must be voluntary, and candidates will only enter into the system if it gives them the chance to run competitive races.[162] The system, therefore, must

151. *Id.*
152. *Id.*
153. *Id.*
154. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2831 (Kagan, J., dissenting).
155. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 91 (1976)).
156. *Id.* (quoting *Buckley*, 424 U.S. at 96).
157. *Id.*
158. *Id.* (quoting *Buckley*, 424 U.S. at 92–93).
159. *Id.*
160. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2831 (Kagan, J., dissenting).
161. *Id.*
162. *Id.*

fall into a "Goldilocks" zone, not too large of a lump sum, but also not too small.[163] As Justice Kagan stated, it is the difficulty in *ex ante* predictions of how much public funding will be necessary to run an effective campaign that has made an anti-corruption mechanism such as the one implemented by Arizona desirable to the States.[164]

2. Justice Kagan's Response to the Majority's Take on the Matching Funds Provision

Justice Kagan then challenged the Majority's analysis of Arizona's matching funds provision.[165] She challenged the majority's opinion that, as she saw it, attempted to separate the Arizona public funding system from other speech subsidy systems that have been deemed constitutional.[166] In her view, the majority did this by pointing to the system's effects on privately-funded candidates' speech by either burdening their speech by giving their opponent an opportunity to respond or by deterring a candidate from speaking in fear of triggering the matching funds provision.[167] However, Justice Kagan argued that Arizona's matching funds provision did "nothing remotely resembling a coercive penalty on privately funded candidates."[168] The State did not "jail them, fine them, or subject [the privately-funded candidates] to any kind of lesser disability."[169] The only burden that Arizona's law placed on a privately-funded candidate came by way of a subsidy to the publicly-funded candidate and the response that subsidy would allow.[170] In this case, therefore, the

163. *See id.* at 2832.

164. *See id.*

165. *Id.* at 2833.

166. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2836 (Kagan, J., dissenting).

167. *Id.*

168. *Id.*

169. *Id.* at 2836–37.

170. *Id.* at 2837. In Justice Kagan's opinion, the subsidy to the publicly-financed candidate produced *more*, not less, political speech. *Id.* at 2833. As Justice Kagan saw it, the law imposed no ceiling on speech, did not prevent a candidate or anyone else from speaking, did not tell candidates or their supporters how much money they could spend or when they could spend it, or what they could spend money on. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2833 (Kagan, J., dissenting). Rather "[b]y enabling participating candidates to respond to their opponents' expression, the statute expand[ed] public debate, in adherence to 'our tradition that more speech, not less, is the governing rule.'" *Id.* at 2834. Justice Kagan also pointed out that prior cases have made a distinction between speech restrictions and speech subsidies, and by so doing she noted that state subsidies of speech "by definition and contra the majority, do not restrict any speech." *Id.* In her opinion, the Arizona law did not dictate who received money based upon their ideas, and, thus, the law did not violate the only First Amendment limitation on speech subsidies. *Id.* She also noted that Arizona never denied funds to the privately-funded candidates, but, rather, they chose to turn down public money while making a "novel" argument: "that Arizona violated *their* First Amendment rights by disbursing funds to *other* speakers even

majority's concept of what constitutes a restriction on a candidate's speech was, in Justice Kagan's opinion, "wholly foreign to the First Amendment."[171]

In order to rest her opinion on a stronger foundation, Justice Kagan pointed out other instances where the Court upheld campaign reform laws that placed a type of burden on privately-funded candidates.[172] First, she noted that any system of public financing, even a lump-sum model like the one upheld in *Buckley*, imposes a similar burden on a privately-funded candidates' speech, such as the burden the majority fears would come from Arizona's law.[173] Secondly, Justice Kagan pointed out that the Court has upheld laws requiring disclosure and disclaimer of campaign expenses, even though these laws "will deter some individuals" from engaging in expressive activity."[174] Thirdly, Justice Kagan argued that "[a]ny burden that the Arizona law imposes does not exceed the burden associated with contribution limits," which, she mentioned, the Court has "repeatedly upheld."[175] Contribution limits, she stated, "impose *direct quantity restrictions* on political communication and association."[176] Therefore, contribution limits "significantly" interfere with First Amendment interests.[177] Such contribution limits, Justice Kagan noted, do not deter or diminish the effectiveness of expressive activity, but, rather, they "stop it cold."[178] Yet, the Court has never subjected such limits to "the most stringent review."[179] Thus, by referring to past precedent upholding such laws and regulations, that either deter or limit speech, as constitutional, Justice Kagan

though they could have received (but chose to spurn) the same financial assistance." *Id.* at 2835 (emphasis in original).

171. *Id.* at 2837 (quoting Buckley v. Valeo, 424 U.S. 1, 49 (1976)). Justice Kagan made it a point to note that the First Amendment does not protect "any person's, or any candidate's, 'right to be free from vigorous debate.'" *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2835 (Kagan, J., dissenting) (quoting Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1, 14 (1986) (plurality opinion)). As she saw it, the First Amendment exists so that debate can occur, "robust, forceful, and contested." *Id.*

172. *Id.* at 2837.

173. *Id.* By this she meant that, because a privately-funded candidate's opponent would be getting more money to spend under a lump-sum model, it could also deter speech by forcing a candidate, who feared such a sum going to his opponent, to avoid entering a race at all or making it more likely that the candidate would "choose to speak in different ways — for example, by eschewing dubious, easy-to-answer charges — because his opponent has the ability to respond." *Id.* at 2838.

174. *Id.*

175. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2838 (Kagan, J., dissenting).

176. *Id.* (quoting *Buckley* 424 U.S. at 18).

177. *Id.* at 2838–39 (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 378 (2000)).

178. *Id.* at 2837.

179. *Id.* at 2939 (citing *Buckley*, 424 U.S. at 29–38).

argued in support of the constitutionality of Arizona's law in the face of a First Amendment free speech challenge.[180]

3. Leveling the Playing Field

After an analysis of why Arizona had a compelling state interest—based on combating corruption or the appearance of corruption[181]—in using the matching funds provision to publicly-finance elections, Justice Kagan turned to the topic of leveling the playing field.[182] Most importantly, she only considered the prospect of leveling the playing field if it was joined with the state interest

180. *Id.* Justice Kagan criticized the majority's reliance on the *Davis* decision by saying that the "similarity between *Davis* and this case matters far less than the differences." *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2839 (Kagan, J., dissenting). The lone similarity, as she saw it, was that, "[i]n both cases, one candidate's campaign expenditure triggered . . . something." *Id.* The main difference was that the matching funds provision, in Justice Kagan's opinion, was a "non-discriminatory subsidy, of a kind this Court has approved for almost four decades." *Id.* at 2841. This was unlike the "discriminatory speech restriction" that was triggered by a candidate's expenditure in *Davis*. *Id.* at 2939.

181. Justice Kagan believed that the State of Arizona did indeed have a compelling state interest, based on past precedent, in implementing the matching funds provision, which was to combat corruption or the appearance of corruption. *Id.* at 2841 (citing Davis v. Fed. Election Comm'n, 554 U.S. 724, 741 (2008); Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985)). Furthermore, she believed that public financing of elections was one way to serve such an interest. *Id.*

182. *See id.* at 2843. Before moving on to her discussion of "leveling the playing field" being joined with a compelling state interest in preventing corruption, Justice Kagan mentioned three "smoking guns" that, the majority claimed, revealed Arizona's true interest was to level the playing field. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2843 (Kagan, J., dissenting). First was the fact that the matching funds provision was titled "Equal funding of candidates" and referred to matching grants as "equalizing funds." *Id.* However, Justice Kagan noted that a synonym for "match" is "equal," and Arizona used the word "equal" in place of "match" and the word was meant to describe what the statute did. *Id.* Secondly, Justice Kagan examined how the majority pointed to the Act's allowance of publicly-funded candidates to accept private contributions if, and only if, Arizona cannot provide the funds it promised for some reason. *Id.* at 2844. The majority argued that this showed the State cared more about "leveling" than about fighting corruption. *Id.* However, Justice Kagan countered this by stating that this provision in the law was only meant to assure publicly-funded candidates they would not be "left in the lurch" if public funds became unavailable. *Id.* This encouraged candidates to enter into the public funding system, and thus furthered Arizona's goal of combating corruption. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2844 (Kagan, J., dissenting). Third, Justice Kagan mentioned the majority's point that a footnote in the Clean Elections Commission's website once stated the "Act was passed by the people of Arizona . . . to level the playing field." *Id.* This statement was placed on the website in 2011, and Justice Kagan argued that attempting to say, as, in her opinion, the majority did, that such a statement, written in 2011 by "who-knows-whom," revealed what "hundreds of thousands of Arizona's voters sought to do in 1998 when they enacted the Clean Elections Act by referendum" was strange. *Id.*

of eliminating corruption.[183] She considered a scenario where a state had two reasons to pass a statute that affected speech.[184] In that scenario, in addition to eliminating corruption, the state also wanted to "level the playing field."[185] The former interest was "compelling and may justify restraints on speech," while the latter "according to well-established precedent, cannot support such legislation."[186] But, according to Justice Kagan, the Court has never said a law restricting speech needed to have two compelling interests and, thus, one is enough.[187] In this case, the compelling interest was the intention to prevent corruption—therefore, the idea of equalizing campaign speech, in her opinion, should not have mattered in *Arizona Free Enterprise*.[188]

According to Justice Kagan, when it comes to leveling the playing field, if there is a compelling interest that can be highlighted by a state implementing a public financing system, then the "hunt for evidence of 'leveling' is a waste of time."[189] But she insinuated that she agreed with, and arguably explicitly accepted, the idea that a statute resting solely on the interest of leveling the playing field would not be able to restrict campaign expenditures in a constitutional manner.[190] Unfortunately, Justice Kagan did not challenge the majority's outright rejection of leveling the playing field.[191] In failing to do so, she missed an opportunity to question whether leveling the playing field should be an approach the Court considers a compelling state interest.

III. WHAT IS THE PROBLEM WITH "LEVELING THE PLAYING FIELD"?

A. The Majority and Dissent's Shortsightedness, and the Consequences of Arizona Free Enterprise

Chief Justice Roberts found the trigger mechanism in the Arizona law unconstitutional based on what he saw as an attempt to level the playing field.[192] He viewed the trigger mechanism as a way to "equalize electoral

183. *See id.* Justice Kagan's view that equalizing campaign opportunities by way of expenditure limits is constitutional only if coupled with another compelling interest will be examined in Part III.

184. *Id.*

185. *Id.*

186. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2844 (Kagan, J., dissenting).

187. *Id.* at 2845.

188. *Id.* Justice Kagan went on to say that "[w]hen a law is otherwise constitutional — when it either does not restrict speech or rests on an interest sufficient to justify any such restriction — that is the end of the story." *Id.*

189. *Id.*

190. *Id.* at 2844–45.

191. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2845.

192. *Id.* at 2825–26 (majority opinion).

opportunities" between candidates.[193] However, basing this decision on similarities drawn between the trigger mechanism in *Arizona Free Enterprise* and the Millionaire's Amendment in *Davis* is troubling.[194] By drawing such an analogy between a scheme that imposed mandatory contribution limits on one candidate while increasing the limits of another, and a scheme that merely subsidized publicly-financed candidates, Chief Justice Roberts went too far in his reasoning.[195]

And while Chief Justice Roberts made an interesting comparison between the two schemes, the comparison, in effect, stretched the *Davis* logic too thin.[196] As Justice Kagan's dissent asserted, the differences between the two schemes greatly outweighed any similarities.[197] It is not an exaggeration to think that, through his decision, the Chief Justice has made it nearly impossible for future attempts at controlling campaign finance to withstand constitutional attack if they even remotely display the goal of equalizing opportunities between candidates.[198] If every such attempt is seen as leveling the playing field and that goal continues to be seen as a "dangerous enterprise" that "cannot justify burdening protected speech,"[199] then the only way to avoid the rejection of every attempt to enact serious change into the current campaign finance climate, it seems, would be to find that leveling the playing field is a compelling state interest. However, the majority in *Arizona Free Enterprise* seemed to close the door entirely on this future possibility.[200]

This is not to say that Justice Kagan's dissenting opinion is entirely correct. In her opinion, assuming a campaign finance regulation burdens speech, leveling the playing field cannot stand on its own as a compelling state interest against constitutional attack.[201] By taking this position, Justice Kagan made it easier for future campaign finance reform measures, similar to the one enacted in Arizona, to be struck down if they can be de-coupled from an interest in combating corruption.[202] As was shown in the Chief Justice's opinion, that position seems to be ground easily gained.[203] Thus, by making

193. *See id.*

194. *See id.* at 2839–41 (Kagan, J., dissenting).

195. *See id.*

196. *Id.* at 2839–40 (Kagan, J., dissenting).

197. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2839.

198. *See id.* at 2826 (majority opinion) ("'Leveling the playing field' can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom . . . not whatever the State may view as fair.").

199. *Id.*

200. *Id.* at 2825–26.

201. *Id.* at 2844 (Kagan, J., dissenting).

202. *Id.* at 2844–45 (Kagan, J., dissenting).

203. *See id.* at 2825–26 (majority opinion).

leveling a secondary interest, one that can only be legitimized if placed in the shadow of combating corruption, for example, Justice Kagan renders any state interest in solely leveling the playing field impotent.[204] However, as will be discussed below, a state's interest in leveling the playing field by reducing the amount of money all candidates can spend on elections is a compelling, necessary, and constitutional interest.[205]

B. Why Recognizing "Leveling" as a Compelling State Interest is Needed

A troubling realization for campaign finance reform advocates is that the modern campaign finance system, along with the current campaign finance jurisprudence, has been unable to put a stop to the massive amounts of money being spent on campaigns.[206] Unless continually rising campaign costs are seen as beneficial to all citizens in a democracy (both the candidates and the voters), such costs should lead one to conclude that leveling the playing field, by finding a way to curb the massive political spending currently prevalent in high-profile campaigns, is a compelling state interest that serves First Amendment principles.[207]

In response to the current campaign finance landscape, numerous authors have proposed some form of a leveling the playing field approach to campaign finance reform.[208] The proposals range from voucher systems to public

204. *See* Michael C. Dorf, *Who Could Oppose a Level Playing Field? The Supreme Court, That's Who*, VERDICT (July. 5, 2011), http://verdict.justia.com/2011/07/05/who-could-oppose-a-level-playing-field-the-supreme-court-that%e2%80%99s-who. Professor Dorf notes the distinction between "leveling up," or giving more money to less-wealthy candidates to spend on a level equal to that of wealthier ones, and "leveling down," or capping the amount a wealthy candidate may spend on an election. *Id.* Importantly, he notes that "[u]nfortunately, the current Supreme Court appears unlikely to change its mind about leveling down. Although the dissenters in the Arizona case disagreed with the majority about the purpose and effect of the Arizona law, they too accepted the proposition that leveling down to preserve political equality is not a compelling interest." *Id.*

205. *See infra* Part III.B–C.

206. *See supra* notes 1–3 and accompanying text. *See also infra* note 211 and accompanying text.

207. *See infra* note 218 and accompanying text.

208. *See, e.g.*, Walter M. Frank, *Individual Rights and the Political Process: A Proposed Framework for Democracy Defining Cases*, 35 S.U. L. REV. 47, 83 (2007) (mentioning that public financing of campaigns and mandatory debates are two examples of "other less constitutionally questionable ways of leveling the electoral playing field to reduce the role of the wealthy without infringing on their right to make their voices heard); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1388 (1994) (mentioning promoting equality by substituting public, tax-raised money for voluntary expenditures); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 21–27 (1996) (proposing a "voucher plan" that would give individual voters a set amount to contribute to candidates each election cycle); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM.

financing systems similar to the one struck down in *Arizona Free Enterprise*.[209] There have also been recent calls for a constitutional amendment to place more regulations on campaign finance, undoing *Buckley* and its progeny.[210] Reforms that make a substantial change in campaign spending may be a moving target. But whatever the cost, implementing new approaches to campaign finance reform to further the interests of the American public, as well as those candidates that stand to benefit from a more equal playing field would be a worthy endeavor.[211]

Furthermore, evidence shows that in the current political climate, where campaign spending has been rising seemingly uncontrollably,[212] an egalitarian approach to campaign finance reform is ripe for enactment.[213] For example, in Presidential campaigns alone, since 1976, cumulative spending has doubled to

L. REV. 1390, 1411–13 (1994) (proposing an incentive-based plan of public financing of candidates and, in the alternative, a voter-voucher system for campaign contributions). Notably, in a chat on the website "Reddit," President Barack Obama, while not arguing for a leveling approach per se, advocated for some type of change to current campaign-finance rules. *President Obama*, REDDIT (Oct. 4, 2012, 7:51 PM), http://www.reddit.com/user/PresidentObama. He stated that the "no-holds barred flow of seven and eight figure checks, most undisclosed . . . fundamentally threaten[s] to overwhelm the political process over the long run and drown out the voices of ordinary citizens." *Id.* The President also argued for the need to pass the Disclose Act, currently in Congress, that would "at least force disclosure of who is giving to who." *Id.* He also noted that Congress should pass legislation "prohibiting the bundling of campaign contributions from lobbyists." *Id.* Lastly, he wrote that "we need to seriously consider mobilizing a constitutional amendment process to overturn Citizens United" and that even if that process "falls short, it can shine a spotlight of the super-PAC phenomenon and help apply pressure for change." *Id.*

209. *See supra* note 208 and accompanying text.

210. Jeremy Paul, *Campaign Reform for the 21st Century: Putting Mouth Where the Money Is*, 30 CONN. L. REV. 779, 782–84 (1998) (noting that the amendment should require candidates to appear jointly in front of voters to "express their concerns at regularly scheduled events that occur in close (but not too close) proximity to the election."); *but see* Elizabeth Drew, *Can We Have a Democratic Election?*, N.Y. REV. OF BOOKS, Feb. 23, 2012, at 46 (describing a constitutional amendment to allow restrictions on spending in favor of or against a specific candidate as "[t]he most popular and most wrongheaded proposal" of those created to reform campaign finance).

211. *See* Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1058, 1068–69 (2005); *see also* Paul, *supra* note 210, at 813.

212. *See* Eric H. Wexler, *A Trigger Too Far?: The Future of Trigger Funding Provisions in Public Financing After* Davis v. FEC, 13 U. PA. J. CONST. L. 1141, 1143 (2011); *see also* Drew, *supra* note 210, at 45–46 (pointing out the rise of the "Super PAC" in the wake of Citizen's United, resulting in large campaign expenditures by wealthy individuals through Super PACs, which have spent millions of dollars in support of candidates in the 2012 Republican Primary race). In his concurring opinion from *Buckley v. Valeo*, Justice White made a seemingly ominous prediction by saying "[w]ithout limits on total expenditures, campaign costs will inevitably and endlessly escalate." 424 U.S. 1, 264 (1976) (White, J., concurring).

213. *See* Drew, *supra* note 210, at 46.

over one billion dollars in 2008 and eclipsed that number again in the 2012 election.[214] Indeed, recent polling suggests that a majority of Americans favor limiting how much campaigns,[215] as well as Political Action Committees, can spend on an election.[216]

The current Supreme Court, with its recent rulings favoring a seemingly unrestricted campaign finance environment,[217] no doubt has contributed to skyrocketing expenditures in campaigns across the country.[218] In light of these developments, it stands to reason that new proposals for campaign finance reform should be considered, ones that better equalize opportunities for all candidates and satisfy the public's desire for change.[219] And while states have experimented with different types of schemes,[220] the bottom line is that recognizing leveling the playing field as a compelling state interest is essential to making substantial campaign finance reform a reality.

214. Center for Responsible Politics, *Presidential Fundraising and Spending, 1976 – 2008*, OPEN SECRETS: CTR. FOR RESPONSIVE POLITICS, http://www.opensecrets.org/pres08/totals.php?cycle= (last visited Apr. 19, 2013). *See also supra* notes 1–3 and accompanying text.

215. Megan Thee-Brenan, *Americans Want Disclosure and Limits on Campaign Spending*, N.Y. TIMES: THE CAUCUS (Oct. 28, 2010, 4:51 PM), http://thecaucus.blogs.nytimes.com/2010/10/28/americans-want-disclosure-and-limits-on-campaign-spending/ (stating that in an October 2010 poll, "nearly 8 in 10 Americans say it is important . . . to limit the amount of money campaigns can spend").

216. Brian Montopoli, *Poll: Most want limits on campaign spending*, CBS NEWS (Jan. 18, 2012, 6:32 PM), http://www.cbsnews.com/8301-503544_162-57361428-503544/poll-most-want-limits-on-campaign-spending/ (stating that in a January 2012 poll sixty-seven percent of those polled favored lawfully limiting the amount of money that Political Action Committees could spend in an election cycle); *see also 2012 survey: Public opposes unlimited campaign spending*, FIRST AMENDMENT CENTER (Jul. 17, 2012), http://www.firstamendmentcenter.org/2012-survey-public-opposes-unlimited-campaign-spending (stating that in a recent poll, when asked whether corporations and unions should be able to spend as much as they want in support of or in opposition to political candidates, 63 percent of those polled answer "No," 30 percent answered "Yes," and 7 percent were undecided).

217. *See supra* Part I.D–II.

218. *See e.g.*, Ronald Dworkin, *The Decision that Threatens Democracy*, N.Y. REV. OF BOOKS (May 13, 2010), http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/; Timm Herdt, *Herdt: High court Embraces the Worst of State Politics*, VENTURA COUNTY STAR (Jan. 26, 2010, 6:29 PM), http://www.vcstar.com/news/2010/jan/26/high-court-embraces-the-worst-of-state-politics/; *see also* Justin Levitt, *Confronting the Impact of* Citizens United, 29 YALE L. & POL'Y REV. 217, 219 (2010).

219. *See* Ognibene v. Parkes, 671 F.3d 174, 201 (2d Cir. 2011) (Calabresi, concurring); *see* Drew, *supra* note 210, at 46.

220. *See e.g.*, The Arizona Citizens Clean Elections Act, ARIZ. REV. STAT. ANN. § 16-940 (2011) (overturned in part by Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2813 (2011)).

C. Making "Leveling the Playing Field" A Compelling State Interest

The majority and dissenting opinions from *Arizona Free Enterprise* make one thing clear: the current Court does not believe that leveling the playing field should ever stand alone as a constitutionally compelling state interest.[221] This idea is predicated on the fact that such an approach necessarily involves restricting the speech of some for the benefit of others.[222] While it may be true that current precedent agrees with this conclusion,[223] it is also true that the Court has the ability to reverse that trend and overrule prior decisions.[224] And in light of the massive spending occurring in high-profile campaigns across the country, as well as the mood of the citizenry, the Supreme Court should consider reversing their current course in campaign finance cases and find leveling to be a compelling state interest capable of withstanding constitutional attack on its own and curtailing out-of-control campaign spending.[225] Not doing so will ignore a "variable of critical constitutional importance," that is, the ability of all citizens to express their feelings during a campaign, regardless of the amount of money one has available to spend.[226]

Whatever the leveling approach may be it will need to overcome First Amendment free speech concerns that have plagued the leveling approach since the *Buckley* decision.[227] This can be done, however, if the Court would consider such an approach as serving First Amendment principles, rather than abridging them, especially in an era where, in campaigns, money has spoken louder than words.[228]

221. *See Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2825–26 (noting that the Court has "repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field'"); *see also id.* at 2844.

222. *See id.* at 2820–21 (stating that even if the matching funds provision increased the speech of the publicly-funded candidates in Arizona, it would do so only at the "expense of impermissibly burdening" the speech of the privately-financed candidates and independent expenditure groups).

223. *See supra* note 13.

224. *See e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010); Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 500 (2006) (Scalia, J., concurring) ("This Court has not hesitated to overrule decisions offensive to the First Amendment.").

225. *See* Ognibene v. Parkes, 671 F.3d 174, 199–200 (2d Cir. 2011) (Calabresi, concurring); *see also* Bruce Ackerman & Ian Ayres, *How Congress Can Overrule* Citizens United, THEHUFFINGTON POST (Feb. 8, 2012, 2:11 PM), http://www.huffingtonpost.com/bruce-ackerman/how-congress-can-overrule_b_1263384.html (noting that "[t]he Court should be given a second-chance to engage in a collaborative effort with the president and Congress to define the meaning of free speech after confronting the hard truths of American politics.").

226. *See Ognibene*, 671 F.3d at 201 (Calabresi, concurring).

227. *See* Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

228. *See Ognibene*, 671 F.3d at 197–98 (Calabresi, concurring).

1. "Leveling" in the Courts: How the Approach Serves the First Amendment

Jurists have argued, both implicitly and explicitly, that leveling the playing field serves the First Amendment in a way that should permit it to be deemed a compelling state interest in order to withstand constitutional scrutiny.[229] These arguments revolve around the idea that leveling avoids gross inequities amongst speakers' resources in campaigns and those speakers' ability to express their ideas to the same extent as their opponent.[230]

Perhaps the most explicit example of this argument came from Judge Calabresi, of the Second Circuit, in his concurrence in *Ognibene v. Parkes*.[231] In his defense of leveling the playing field, or as he also called the approach, the "antidistortion interest," he argued that leveling by limiting campaign expenditures serves the First Amendment in two ways.[232] First, the approach "prevents some speakers from drowning out the speech of others."[233] Second,

229. *See infra* notes 231–42 and accompanying text.

230. *See infra* notes 231–42 and accompanying text. Scholars have also noted problems with the current campaign finance system and, in so doing, implicitly argued for a different approach that would mitigate the damage done by too much money in campaigns. *See, e.g.*, Dorf, *supra* note 204 (implying that leveling is an even more important interest than an anti-corruption rationale, by stating that leveling seeks to preserve "democracy as a domain in which each citizen has an equal voice" and "[i]t is hard to imagine an interest more compelling than the interest in preserving democracy as a domain of political equality[.]"); Fred Wertheimer & Susan W. Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126 (1996), *reprinted in* THE CONSTITUTION AND CAMPAIGN FINANCE REFORM: AN ANTHOLOGY 93, 100–01 (Frederick G. Slabach ed., 1998) (deploring the "arms race mentality" that unlimited spending creates in campaigns); Vincent Blasi, *Free Speech and the Widening Gyre of Fund Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994), *reprinted in* THE CONSTITUTION AND CAMPAIGN FINANCE REFORM: AN ANTHOLOGY 215, 219–24, 238–40 (Frederick G. Slabach ed., 1998) (arguing that spending limits help to reduce the amount of time those candidates will have to devote to campaign fundraising and noting that exempting personal expenditures from regulation will only place more of a premium on candidate wealth as a "political credential"); Ronald Dworkin, *Free Speech and the Dimensions of Democracy*, *in* IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS 63, 100 (E. Joshua Rosenkranz ed., 1999); Thompson, *supra* note 11, at 1058 (noting that it is important to "moderate the influence of money," and in order to do so, "we may need to place greater restrictions . . . on the kinds of activities and communications for which campaign funds may be spent."); *but see* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996), *reprinted in* THE CONSTITUTION AND CAMPAIGN FINANCE REFORM: AN ANTHOLOGY 113, 114 (Frederick G. Slabach ed. 1998) (arguing that scholars advocating for greater equality have made incorrect assumptions about the political system, and that campaign finance reform measures actually work to undermine democratic principles of equality).

231. Ognibene v. Parkes, 671 F.3d 174, 197 (2d Cir. 2011) (Calabresi, concurring).

232. *Id.* at 197–98.

233. *Id.* at 198.

it "safeguards something of fundamental First Amendment importance — the ability to have one's protected expression indicate the intensity of one's political beliefs."[234] He went on to state that "there is perhaps no greater a distortive influence on the intensity of expression than wealth differences."[235] And while such differences in wealth are inevitable, Judge Calabresi argued, "the only way to ensure a truly 'unfettered interchange of ideas'— an interchange, that is, where each voice is heard in reasonable proportion to the intensity of the beliefs it expresses — is to give the government some freedom to mitigate the fettering impact of these inequalities."[236]

In his concurring opinion in *Landell v. Sorrell*, Judge Calabresi sounded similar sentiments of equalizing campaign expenditures by way of regulation.[237] In that opinion, Judge Calabresi posited that a state could have an interest in giving all candidates and contributors an equal opportunity to "express intensity of political desire."[238] Importantly, in this context, Calabresi noted that the idea of leveling the playing field would be a "more fruitful one . . . were it able to be brought out from under *Buckley*'s corruption mantle and into a framework that more honestly reflects the issues at play."[239]

Supreme Court Justices have also pointed in the direction of a need for leveling the playing field to be considered a compelling state interest. In his concurring opinion in *Buckley v Valeo,* for example, Justice White noted that expenditure limitations do not serve an interest in combating corruption, but they do serve "salutary purposes related to the integrity of federal campaigns."[240] He continued, saying that by limiting "the importance of personal wealth," limitations on campaign expenditures help to "assure that only individuals with a modicum of support from others will be viable candidates."[241] Also, in his dissent in *Davis*, Justice Stevens echoed Justice

234. *Id.* Judge Calabresi continued his attack on unlimited campaign expenditures through his "intensity of expression" argument by saying that "where speech takes the form of a monetary expenditure, the link between intensity of beliefs and intensity of expression, as measured by the amount contributed, can too easily break down. This is a result of the unequal distribution of wealth, which makes the amount of money an individual spends on behalf of a political cause an unreliable measure of the intensity and depth of that individual's support for the cause." *Id.*

235. *Id.* at 199.

236. *Ognibene*, 671 F.3d at 200 (Calabresi, concurring).

237. Landell v. Sorrell, 406 F.3d 159, 164 (2d Cir. 2005).

238. *Id.*

239. *Id.*

240. Buckley v. Valeo, 424 U.S. 1, 266 (1976) (White, J., concurring).

241. *Id.* Justice White also pointed out that the limitations on expenditures tend to "equalize access to the political arena, encouraging the less wealthy, unable to bankroll their own campaigns, to run for political office." *Id.*

White's argument that equalizing electoral opportunities by enacting a leveling approach in campaigns may serve a compelling state interest.[242]

2. What "Leveling" As a Compelling State Interest Would Mean for Campaign Finance Reform

As these jurists argue, the state has a compelling interest in avoiding inequities between candidates' abilities to express themselves during campaigns, and can do so by relying on the idea of leveling the playing field.[243] This effectively would turn the outcome of *Arizona Free Enterprise* on its head by viewing leveling as a conduit, rather than a barrier, to First Amendment free speech principles.[244] With an eye cast towards the current campaign finance climate,[245] the idea that leveling abridges the First Amendment becomes less persuasive.[246]

As was previously discussed, considering the campaign finance reform approach of leveling, standing alone, to be an abridgement to First Amendment rights has helped to enable campaign expenditures to reach unprecedented heights.[247] Such spending has had the unfortunate effect of linking the ability of candidates to speak freely and powerfully with the amount of money they have in their pockets.[248] To avoid this, it is time to start thinking of "leveling" as an approach that can help inject First Amendment principles—i.e. the ability of all candidates, rich or poor, to have their voice heard, no matter the amount of their campaign resources or the number of connections they have to wealthy independent spending groups—into the current campaign landscape.[249]

242. *See* Davis v. Fed. Election Comm'n, 554 U.S. 724, 751 (2008) (Stevens, J., dissenting); *see also supra* Part I.F. There have been other instances where Supreme Court opinions have raised an argument that favored the idea of leveling through campaign expenditure limitations. Though they did not speak as explicitly as Judge Calabresi, the arguments posed nonetheless point to expenditure limitations as a solution to the problem of too much money being spent in campaigns for elected office. *See e.g.*, Randall v. Sorrell, 548 U.S. 230, 274 (2005) (Stevens, J., dissenting) (arguing that it is time to reconsider *Buckley*'s stance on limiting campaign expenditures in order to curb the "pernicious effects of endless fundraising[.]") Through his argument, Justice Stevens implied that a leveling approach, one that would equalize resources for candidates in campaigns, could be recognized as constitutional. *Id.*

243. *See supra* notes 230–41 and accompanying text.

244. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2825–26; *id.* at 2844 (Kagan, J., dissenting).

245. *See supra* notes 1–3 and accompanying text; *see also supra* note 211 and accompanying text.

246. *See* Ognibene v. Parkes, 671 F.3d 174, 200 (2d Cir. 2011) (Calabresi, concurring).

247. *See supra* notes 1–3; *see also supra* note 213 and accompanying text.

248. *Ognibene*, 671 F.3d at 198 (noting that "[i]f an external factor, such as wealth, allows some individuals to communicate their political views too powerfully, then persons who lack wealth may, for all intents and purposes, be excused from the democratic dialogue.").

249. *Id.* at 198–99.

Allowing leveling to be introduced into campaign finance reform as a compelling state interest will help moderate the "influence of money" and will "restore a balance in the process so that other resources—political talent, ideas, and experiences—could be deployed more regularly and more effectively."[250] This would redefine modern campaign finance jurisprudence, which originated in *Buckley*.[251] Seen in this new light, leveling could be legitimately recognized as a compelling state interest, as it will help to serve First Amendment principles as they apply to modern campaigns.[252]

IV. CONCLUSION

At a time when the political-campaign system has increasingly received criticism for being and displaying a tendency to be beholden to special interests and the almighty dollar, serious campaign finance reform should not be brushed away in fear of limiting what some may see as political speech (i.e. the amount of money spent on a campaign). Existing limitations on campaign contributions may do well in helping to shore up inequities in the money coming into campaigns. However, regulating the money being spent by campaigns is just as important if campaign finance reform is to be taken seriously. Instead of favoring an approach that attempts to regulate inequities in campaign expenditures, *Arizona Free Enterprise*, in both its majority and dissenting opinions, continued the work of past decisions by helping to construct a hurdle that is, and will be, perhaps too high for future campaign finance regulation to overcome.[253]

While eliminating the reality or appearance of corruption is and should be a compelling state interest in limiting campaign expenditures, the Court should reconsider its approach to the interest of leveling the playing field.[254] As long as the latter interest is not given serious consideration as a compelling one, there persists a danger that moneyed interests, whether individual or otherwise, will continue to have a substantial and unfair influence on elections.[255] Unfortunately, that danger was not curtailed by the recent decision in *Arizona Free Enterprise*.[256]

Campaign finance reform is not a recent development, yet precedent has helped to determine which shape it should take.[257] Perhaps it is time to

250. Thompson, *supra* note 211, at 1058.
251. *See* Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).
252. *Ognibene*, 671 F.3d at 198–99; *see* Thompson, *supra* note 211, at 1058.
253. *See supra* Part III.A.
254. *Supra* Part III.C.
255. *See Ognibene*, 671 F.3d at 199.
256. *See supra* Part III.A.
257. *See generally supra* Part I.C–I.E.

reconsider the mold that has been cast.[258] Allowing money to talk louder than individual voices during campaigns should not become a mainstay in electoral politics.[259] In a democracy, equality, especially as it pertains to campaigning for elected office, should be an interest recognized as constitutional—as well as one that is desired, not one that is feared.

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258. *See supra* Part III.B–III.C.

259. *See Ognibene*, 671 F.3d at 200–01.

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