

MAKING ARIZONA FREE ENTERPRISE KICK THE BUCKET: A NEW PATH FORWARD FOR PUBLIC FINANCING

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ABSTRACT

The success of any law designed to publicly finance campaigns depends upon the incentives for candidates to opt in to the campaign finance system. Until 2011, Arizona’s system for public financing of political campaigns provided the proper incentives to motivate individual candidates to participate in the system. Specifically, Arizona’s public campaign finance law included a provision that provided matching funds for participating candidates who were outspent by traditional candidates, essentially guaranteeing a level playing field. The Supreme Court’s decision in *Arizona Free Enterprise v. Bennett* eliminated this incentive by striking down Arizona’s triggered matching fund provision, thereby undermining the public campaign finance laws in nine states. In the wake of this decision, policymakers and advocates seeking to repair the damage done by *Arizona Free Enterprise* should consider an alternative approach proposed in this article—the “bucket provision”—which will accomplish many of the original policy goals set out by the Arizona law by creating a system more likely to induce candidate participation.

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INTRODUCTION

Imagine Ms. Smith, a local community leader with an impressive background and career, is considering running for the State Senate in her home community. But Ms. Smith is not independently wealthy. The longtime incumbent regularly spends \$500,000 each cycle, far more than any challenger can manage to raise or spend. Ms. Smith wants to run in part because the incumbent raises all this money from special interests, and then prioritizes those interests over the community’s needs. If Ms. Smith decides to run despite these obstacles, she would quickly realize that, in order to be competitive, she would need to spend most of her time raising money—and *not* talking to voters or

working on issues of public policy. Imagine Ms. Smith somehow won. To win re-election and fulfill her obligations to her political party, she would still need to devote most of her time to fundraising, leaving her little time to craft laws or serve her constituents.

This is the sad reality of politics today. Political leaders and commentators from across the political spectrum agree that the seemingly ever-growing influence of money on the American political system damages our democracy.¹ Political scientists view the pervasive role of fundraising in the American political system as the leading cause of both legal and illegal corruption.² The money that finances American political campaigns undermines the public's faith in democracy.³ Political fundraising erodes the quality of governance⁴ and creates structural barriers to new entrants into the political system.⁵

1. See, e.g., Barack Obama, President of the United States, 2010 State of the Union Address (Jan. 27, 2010) (criticizing the *Citizens United* decision, stating "I don't think American elections should be bankrolled by America's most powerful interests."); John McCain, JFK LIBRARY, <http://www.jfklibrary.org/Events-and-Awards/Profile-in-Courage-Award/Award-Recipients/John-McCain-1999.aspx> (last visited Mar. 20, 2016) (awarding John McCain the Profile in Courage Award for leading on campaign finance reform); Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL'Y REV. 21, 21–23 (2014); MICHAEL G. MILLER, SUBSIDIZING DEMOCRACY: HOW PUBLIC FUNDING CHANGES ELECTIONS AND HOW IT CAN WORK IN THE FUTURE 1–3 (2014); see generally JACK ABRAMOFF, CAPITOL PUNISHMENT: THE HARD TRUTH ABOUT WASHINGTON CORRUPTION FROM AMERICA'S MOST NOTORIOUS LOBBYIST (2011); LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS – AND A PLAN TO STOP IT (2011); CNN, *Trump Open to Accepting Public Financing*, YOUTUBE (Jan. 17, 2016), <https://www.youtube.com/watch?v=bpCC8VVdFf8>; Peter Overby, *Fact-Check: Clinton And Sanders On Campaign Finance*, NPR, (Feb. 6, 2016), <http://www.npr.org/2016/02/06/465781632/fact-check-clinton-and-sanders-on-campaign-finance>.

2. See Christopher Witko, *PACs, Issue Context, and Congressional Decisionmaking*, 59 POL. RES. Q. 283, 283, 292 (2006); Matthew C. Fellowes & Patrick J. Wolf, *Funding Mechanisms and Policy Instruments: How Business Campaign Contributions Influence Congressional Votes*, 57 POL. RES. Q. 315, 315, 321–22 (2004); Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 809–15 (1990). In New York State, the level of political corruption became so severe that U.S. Attorney Preet Bharara recently observed, "a New York state senator is more likely to be arrested by the authorities than defeated in an election." James M. Odat, *Just Like Barnacles on a Boat*, ALBANY TIMES UNION (Apr. 23, 2013), <http://www.timesunion.com/local/article/Just-like-barnacles-on-a-boat-4453477.php>. There is a significant body of academic and social science literature demonstrating that large donations influence member participation or votes. See MILLER, *supra* note 1, at 19.

3. Eighty-five percent of American voters believe we need to completely rebuild or fundamentally change our system for funding political campaigns. Nicholas Confessore & Megan Thee-Brenan, *Poll Shows Americans Favor an Overhaul of Campaign Financing*, N.Y. TIMES (June 2, 2015), http://www.nytimes.com/2015/06/03/us/politics/poll-shows-americans-favor-overhaul-of-campaign-financing.html?_r=1. There is "widespread public perception that elite influence-peddling is rampant in American politics." Miller, *supra* note 1, at 20; see also BRIAN ROBERTS, DARON SHAW, TAOFANG HUANG & MIJEONG BAEK, MONEY THAT MATTERS: THE ROLE OF MONEY IN CAMPAIGNS AND ELECTIONS 6 (2010). One one-hundredth of one percent of Americans are responsible for 29% of reported federal donations. Center for Responsive Politics, *Donor Demographics*, OPEN SECRETS.ORG, <https://www.opensecrets.org/news/2015/04/the-political-one-percent-of-the-one-percent-in-2014-mega-donors-fuel-rising-cost-of-elections/>.

Supporters of campaign finance reform have argued for public financing of political campaigns as an effective and constitutional tool to combat the harmful effects of money in politics, and argue that it can be a mechanism to combat corruption, improve public faith in our political system, and increase competition and participation.⁶

Public financing of elections first gained prominence in the aftermath of the Watergate scandal.⁷ In the subsequent decades, policymakers at the federal, state, and local level experimented with a variety of approaches, often in response to high profile scandals.⁸ While these reforms each have unique characteristics, most public financing systems today are optional systems which provide public subsidies to candidates who agree to limit their campaign expenditures.⁹

This article focuses on the “Arizona model,” which was implemented in nine states throughout the 1990’s and 2000’s: Arizona,¹⁰ Connecticut,¹¹ Florida,¹² Maine,¹³ Nebraska,¹⁴ New Jersey,¹⁵ New Mexico,¹⁶ North

4. After getting elected, raising money takes so much time and is such an onerous task that experts argue it erodes the quality of governance. MILLER, *supra* note 1, at 20; David Epstein & Peter Zemsky, *Money Talks: Deterring Quality Challengers in Congressional Elections*, 89 AM. POL. SCI. REV. 295, 296–97 (1995).

5. Donors are only willing to give money to candidates who are perceived as strong and viable. However, in order to become a strong or viable candidate, one must be able to raise a significant amount of money. “Thus, these ‘low-quality’ challengers find themselves the victims of a crippling paradox, as they must raise money to be viewed as strong challengers, but the ‘strong challenger’ tag comes only when one has money in the bank. Thus, most of the time, incumbents are able to bury challengers in campaign cash.” MILLER, *supra* note 1, at 81. As a result, many high quality candidates choose not to run, knowing they won’t be able to raise enough money to get their message out. *See id.*

6. *See, e.g.,* Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett, 564 U.S. ___, 131 S. Ct. 2806, 2830–31 (2011) (Kagan, J., dissenting); Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 566–68 (1999); Spencer Overton, *Matching Political Contributions*, 96 MINN. L. REV. 1694, 1696–98 (2012); Andrew Spencer, *Cleaning Elections*, 54 ARIZ. L. REV. 277, 288–91 (2012).

7. MILLER, *supra* note 1, at 3.

8. *See* STATE ELECTIONS ENFORCEMENT COMM’N, CITIZENS’ ELECTION PROGRAM 2010: A NOVEL SYSTEM WITH EXTRAORDINARY RESULTS 1 (2011) (“Corruption among state officials bottomed out with Gov. John Rowland, who resigned in 2004 amid allegations of influence peddling and other improprieties. [The scandal] sparked public outrage . . . [compelling legislators] to work together to enact campaign finance reform.”); Julian Zelizer, *It took a Scandal to Get Real Campaign Finance Reform*, CNN (Jan. 23, 2012), <http://www.cnn.com/2012/01/23/opinion/zelizer-campaign-finance-reform/> (“The [Watergate] scandal prompted Congress to tackle these bigger issues about campaigns . . . [and pass] legislation that established contribution and spending limits, public financing of campaigns, and an independent elections commission.”).

9. Briffault, *supra* note 6, at 568.

10. *See* Citizens Clean Election Act, ARIZ. REV. STAT. ANN. §§ 16-940–61 (1998) (amended 2012).

11. *See* Citizens Election Program, CONN. GEN. STAT. ANN. § 9-700–759 (2005) (amended 2013).

12. *See* Election Campaign Financing Trust Fund, FLA. STAT. ANN. § 106.355 (West).

Carolina,¹⁷ and Wisconsin.¹⁸ All of these states followed a somewhat similar approach. Participating candidates qualified for public funds if they achieved a certain benchmark to demonstrate sufficient support (for example, raising a certain number of small donations from voters within their district).¹⁹ Participating candidates then received a lump-sum grant from the state to fund their campaigns and, in exchange, agreed to cap their campaign expenditures.²⁰ Finally, the model included the critical triggered matching fund provision: when participating candidates were opposed by “traditional” privately-funded candidates who spent more money than the public grant, the participating candidate received a supplemental grant from the state in the amount of the difference.²¹ The triggered matching fund provision created substantial incentives for virtually all candidates to participate in public financing, including those with the ability to raise large sums of private money.²²

In 2011 the Supreme Court struck down the triggered matching fund provision in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett* (“*AFE*”), thereby eliminating the most effective tool ever enacted into law to induce candidates to opt in to public campaign financing.²³ This article will seek to answer two questions. First, how did the *AFE* decision pervert the incentives placed on candidates? Second, in a post-*AFE* world, what options are available to policymakers and advocates who want to achieve the original public policy goals of the Arizona model?

This article proceeds in three parts. Part I provides an overview of public financing and explores the various incentives and disincentives in play when candidates decide whether to participate in an optional public financing system. Part II surveys recent jurisprudence relevant to public financing, focusing on the impact of the *AFE* decision, and argues that it has undermined the Arizona model’s ideal alignment of incentives and disincentives with public goals by striking down the critical triggered matching fund provision.

Part III proposes an alternative policy solution—what I call a “bucket provision”—which seeks to accomplish many of the public policy goals of the

13. See The Maine Clean Election Act, ME. REV. STAT. TIT. 21-A, § 1125 (1995) (amended 2013).

14. See NEB. REV. STAT. § 32-1606 (2006) (repealed 2013).

15. See The 2007 New Jersey Fair and Clean Elections Pilot Project Act, N.J. P.L. 2007, CHAPTER 60.

16. See N.M. STAT. ANN. § 1-19A-14 (West 2007).

17. See N.C. GEN. STAT. ANN. § 163-278.67 (2006) (repealed 2013).

18. See WIS. STAT. ANN. § 11.512 (West 2010) (repealed 2011).

19. See, e.g., Conn. Gen. Stat. Ann. § 9-704 (2013).

20. See, e.g., Conn. Gen. Stat. Ann. § 9-711 (2013).

21. See, e.g., Conn. Gen. Stat. Ann. § 9-713 (2005) (repealed 2013).

22. See *infra* Part II.B.2.

23. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813, 2828-29 (2011).

triggered matching fund provision struck down in *AFE*. Under a bucket provision, a set amount of funding (the “bucket”) would be designated for each race. If two major party candidates opt in, they would split the bucket. If only one major party candidate opts in, that candidate would receive the entire bucket. This article argues that a bucket provision can properly realign the incentives for individual political actors with the original public policy goals of the Arizona law by providing an additional incentive for all candidates to participate in public financing beyond the initial grant. Furthermore, a bucket provision is consistent with current campaign finance jurisprudence and the Supreme Court would likely affirm the constitutionality of the provision if challenged.

I.

SYSTEMS OF PUBLIC FINANCING

A. *Public financing models*

Progressive advocates and academics who support campaign finance reform tend to agree that the best constitutional mechanism available to policymakers is publicly financed elections.²⁴ Although the Supreme Court has held that policymakers cannot constitutionally place an upper limit on total campaign expenditures,²⁵ they can design systems that induce candidates to voluntarily agree to restrictions in exchange for public funds.²⁶ The difficulty with these systems is developing the proper mix of incentives to effectively induce candidates to voluntarily comply with spending limitations or other requirements.

There have been many models of public campaign financing in the United States, but two general approaches are most prominent and relevant today: small donor matching and lump sum financing.²⁷ In a small donor matching model, small contributions to participating candidates are matched by the state;²⁸ the “New York City model” is the most prominent example of a small donor matching system in use today, providing 6-to-1 matching for small donations to participating candidates.²⁹

24. See, e.g., Jill Filipovic, Op-Ed, *Time for Public Financing of Elections*, AL JAZEERA (Apr. 5, 2014, 8:00 AM), <http://america.aljazeera.com/opinions/2014/4/scotus-supreme-court-mccutcheon-v-fcc-campaign-finance-public-financing.html>; Lawrence Norden & Frederick A. O. Schwarz, Jr., *New York Public Financing More Urgent After McCutcheon*, BRENNAN CTR. FOR JUST. (Apr. 8, 2014); David Gartner, *The Future of Clean Elections*, 45 ARIZ. ST. L.J. 733, 735-39 (2013); Richard Briffault, *The Future of Public Funding*, 49 WILLAMETTE L. REV. 521, 522-23 (2013).

25. See *Buckley v. Valeo*, 424 U.S. 1, 51 (1976).

26. *Id.* at 107.

27. MILLER, *supra* note 1, at 21-28.

28. See, e.g., Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9005-13 (1971); New York City Campaign Finance Act, N.Y.C. Admin. Code §§ 3-703, 705-706 (2007).

29. New York City, N.Y., N.Y.C. Admin. Code § 3-705.

In a lump sum financing model, participating candidates receive a lump sum grant from the state to finance their campaign. Arizona was one of nine states³⁰ and a handful of cities³¹ to employ one particular form of lump sum financing (hereafter, the “Arizona model”). Although the programs were not wholly identical,³² the critical provisions that are relevant to this analysis are substantially similar. In all nine states, candidates are given the option to participate in a voluntary system of public financing. Candidates who opt in are required to qualify by reaching a certain benchmark—typically, by raising a sufficient number of small qualifying contributions.³³ Those who qualify as “participating candidates” receive a lump sum grant from the state to finance their campaign;³⁴ in exchange, candidates are subject to expenditure limitations. The expenditure limitations are usually identical to the grant amount, meaning that once they qualify, candidates stop raising and spending private funds.³⁵ Some states also impose debate participation requirements on participating candidates.³⁶

Before *AFE*, these states all had one additional component: the “triggered matching fund” provision. Under the Arizona model, each participating candidate received a lump-sum grant of public funds. The matching fund was triggered if a participating candidate’s opponent did not participate and raised or spent money in excess of the lump-sum grant amount; the participating candidate would then receive a supplemental dollar-for-dollar matching grant from the state.³⁷ Furthermore, many states using the Arizona model also triggered these

30. *See supra* notes 10–18.

31. *See* Albuquerque, N.M., Charter of The City of Albuquerque, art. XVI, § 16 (2010); CHAPEL HILL, N.C., GEN. CODE OF ORDINANCES, § 2-95(a)-(b) (2010); L.A., CAL., MUN. CODE § 49.7.22(C)-(D) (2011); NEW HAVEN, CONN., CODE OF GEN. ORDINANCES § 2-825 (2011).

32. States had different processes for qualifying for public grants, different restrictions on participating candidates, and different mechanisms for calculating and distributing grants. Additionally, some states only used the model for some of their elections.

33. Most states required qualifying contributions from voters from within the district. *See, e.g.*, N.J. P.L. 2007, ¶ 3 (“[Q]ualifying contribution means a contribution . . . [given] by an individual who is registered to vote and resides in the district.”). *But see* CONN. GEN. STAT. ANN. § 9-704 (2013) (permitting contributions from any donor who lives within any municipality which is at least partially within the district of the candidate, even if the donor doesn’t live in the part of the municipality within the district). Most states also imposed limitations on the size of qualifying contributions; for example, qualifying contributions in Connecticut must be between \$5 and \$100. CONN. GEN. STAT. ANN. § 9-704 (2013). Some states also required candidates to raise a certain sum total in order to qualify. *See, e.g.*, CONN. GEN. STAT. ANN. § 9-704(a)(3) (2013) (requiring candidates for State Senate to raise a total of \$15,000 from at least three hundred individuals).

34. *See, e.g.*, CONN. GEN. STAT. ANN. § 9-705 (2013).

35. *Id.*

36. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-956(A)(2) (2012) (“The commission shall require participating candidates to attend and participate in debates.”).

37. *See, e.g.*, NEB. REV. STAT. § 32-1606; N.M. STAT. ANN. § 1-19A-14 (2012).

matching funds when an independent group³⁸ spent money in opposition to a participating candidate or in support of a traditional candidate.³⁹ Yet the matching funds were not unlimited as many states (including Arizona) capped the size of the triggered matching fund grants at double or triple the initial grant amount.⁴⁰

B. Candidate decision-making: whether or not to opt in

Under any model of public campaign financing, all candidates face a decision point wherein they must choose whether or not to participate. This is a complex decision, as there are unique benefits and downsides to both participation and non-participation. Participating candidates benefit from public funds and, in exchange, they agree to certain restrictions, usually in the form of expenditure limits. Traditional candidates benefit from running a campaign without the restrictions imposed on their participating opponents; however, they will face an opponent who can claim to be “clean,” and who does not need to sacrifice precious time and energy to raise money.

The critical question to evaluate any model of publicly financed elections is the degree to which the system can effectively induce candidates to participate. The following sections of this Article assess the considerations relevant to candidates when making the strategic decision of whether or not to participate, using them to develop a framework to predict whether candidates will participate under a given set of assumptions.

1. Reasons to participate in public financing

a. Receiving public subsidies to finance campaign expenditures

Running for office is an extremely expensive proposition. Even modest and small campaigns for local office or a small state legislative district demand expenditures for staff, office space, multiple rounds of direct mail, office supplies, glossy palm cards, and more. Larger campaigns, such as State Senate or Congressional races, need to allocate significant sums to each of these expenses and also spend on a variety of consultants, television ads, polling, field

38. Arizona defined independent expenditures as “an expenditure by a person or political committee, other than a candidate’s campaign committee, that expressly advocates the election or defeat of a clearly identified candidate, that is made without cooperation or consultation with any candidate or committee or agent of the candidate and that is not made in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate.” ARIZ. REV. STAT. ANN. § 16-901 (2015).

39. ARIZ. REV. STAT. ANN. § 16-952 (2012).

40. In Arizona, the dollar-for-dollar match was reduced by six percent to account for fundraising expenses, and the total grant amount after triggered matching could not exceed triple the initial grant for the participating candidate. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-952 (2012) (held unconstitutional in *Ariz. Free Enter. Club’s Freedom PAC v. Bennett*, 131 S. Ct. 2806 (2011)).

operations, and a large professional campaign team. Major statewide campaigns regularly run into the tens of millions of dollars.⁴¹ Many candidates are unable to run competitive campaigns because they lack the personal wealth or donor base necessary to raise enough money to cover these considerable expenses.⁴²

The single most important determinative factor as to whether or not a candidate will participate in public financing is the amount of money candidates anticipate being able to raise and spend privately as compared to the public grant they expect to receive. Candidates who do not anticipate being able to raise and spend significant sums of money will be motivated to participate; candidates who anticipate being able to spend funds significantly in excess of the public grant may not want to participate.

b. Reducing the time spent on fundraising

Candidates spend many hours each day calling donors and asking for money—usually this is the campaign task that takes up more candidate time than any other task.⁴³ After candidates are elected, raising money continues to be a full-time job because elected officials are expected to raise money not only for their own reelection, but also for the party.⁴⁴

As a general matter, candidates hate call time.⁴⁵ They have frequently described feeling embarrassed and uncomfortable calling people to ask for thousands of dollars.⁴⁶ Candidates—especially at the local level—are constantly

41. See, e.g., Michael Pernick, Op-Ed, *Democracy, or Plutocracy*, ALBANY TIMES UNION (Nov. 24, 2012), <http://www.timesunion.com/opinion/article/Democracy-or-plutocracy-4064037.php>.

42. Adam Lioz, U.S. PIRG, *Look Who's Not Coming to Washington* 8–9 (Jan. 3, 2003), http://www.uspirg.org/sites/pirg/files/reports/Look_Whos_Not_Coming_To_Washington_2002_USPIRG.pdf; Stephanie Condon, *Why is Congress a Millionaires Club?*, CBS NEWS (Mar. 27, 2012), <http://www.cbsnews.com/news/why-is-congress-a-millionaires-club/>.

43. See, e.g., Dave Helling, *Candidates Hate Raising Money, But They Need it More Than Ever*, THE KANSAS CITY STAR (Oct. 9, 2015), <http://www.kansascity.com/news/politics-government/article38508501.html>.

44. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 372 (4th ed. 2012) (quoting a Congressman as saying “[e]ighty percent of my time, 80 percent of my staff’s time, 80 percent of my events and meetings were fundraisers.”).

45. Candidates refer to fundraising as a “loathsome chore.” MILLER, *supra* note 1, at 20. See, e.g., Chris Murphy ‘Soul-Crushing’ Fundraising http://www.huffingtonpost.com/2013/05/07/chris-murphy-fundraising_n_3232143.html (Senator Chris Murphy characterized political fundraising as “soul-crushing”) (May 5, 2013).

46. See, e.g., *60 Minutes: Dialing for Dollars* (CBS television broadcast Apr. 24, 2016), <http://www.cbsnews.com/news/60-minutes-are-members-of-congress-becoming-telemarketers/> (Congressman Rick Nolan comments that “it’s discouraging good people from running for public office. I could give you names of people who’ve said, ‘You know, I’d like to go to Washington and help fix problems, but I don’t want to go to Washington and become a mid-level telemarketer, dialing for dollars, for crying out loud.’”); “This would be a nice first step on campaign finance reform,” WASH. POST (June 10, 2016), <https://www.washingtonpost.com/opinions/this-would-be-a-nice-first-step-on-campaign-finance-reform/2016/06/10/745de05a-2e69-11e6-b5db->

rejected. Candidates also hate wasting so much of their time—they would rather be developing public policy solutions, talking to voters, going to events, or even knocking doors.⁴⁷

Public financing transforms how candidates spend their time. One study has shown that participating candidates devote significantly less time to raising money than traditional candidates.⁴⁸ Participating candidates redirect the time they would have spent on fundraising to other campaign activities, like interacting with the public.⁴⁹ In fact, one analysis demonstrated that participating candidates devoted, on average, over 1,000 additional hours to public interaction than traditional candidates.⁵⁰

c. Other benefits: messaging, engaging small donors, avoiding indebtedness to donors

Participating candidates can use their participation in public financing as a messaging opportunity. In an age where voters are cynical about politicians and believe politicians represent only the interests of their donors,⁵¹ the ability to affirmatively state that you do not accept or rely on large donations can prove to be a powerful message.⁵² Candidates can try to gain an “aura” of being clean and ethical while retaining the option to criticize their opponents as being captured by special interests and wealthy individuals.

Most public campaign finance models also increase the engagement of small donors. The Arizona model allows candidates to qualify for public financing by raising a sufficient number of small donations of \$5.⁵³ The New York City

e9bc84a2c8e4_story.html (“[Congressman David] Jolly estimates that Senate and House lawmakers spend an average of 30 hours a week at networking events and call centers. . . . During a conversation with House leadership at the National Republican Congressional Committee early in his term, Mr. Jolly said, he was instructed to raise \$18,000 every day to fill his reelection campaign coffers.”).

47. See, e.g., Mark Leibovich, *Memo to Self: Do Not Run for Office*, N.Y. TIMES MAG. (Aug. 12, 2014), http://www.nytimes.com/2014/08/17/magazine/memo-to-self-do-not-run-for-office.html?_r=0.

48. Peter L. Francia & Paul S. Herrnson, *The Impact of Public Finance Laws on Fundraising in State Legislative Elections*, 31 AMERICAN POLITICS RESEARCH 520, 531–535 (2003).

49. MILLER, *supra* note 1, at 6–7, 46–47.

50. MILLER, *supra* note 1, at 62.

51. See Emily Ekins, *Americans Say 75 Percent of Politicians Are Corrupted*, REASON (Apr. 3, 2014, 9:16 AM), <http://reason.com/poll/2014/04/03/americans-say-75-percent-of-politicians>.

52. See, e.g., Rick Hasen’s quote that “Sanders’ . . . shunning of super PACs has worked so far.” Sean Braswell, *The Fundraising Guru Behind Bernie Sanders’ 27 Dollars*, OZY (Mar. 17, 2016), <http://www.ozy.com/2016/the-fundraising-guru-behind-bernie-sanders-27-dollars/68015>; see also Clare Foran, *Bernie Sanders’s Big Money*, THE ATLANTIC, (Mar. 1, 2016), <http://www.theatlantic.com/politics/archive/2016/03/bernie-sanders-fundraising/471648/>; Jason Horowitz & Amy Chozick, *Small Gifts to Bernie Sanders Challenge Hillary Clinton Fund-Raising Model*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/2016/02/14/us/politics/small-gifts-to-bernie-sanders-challenge-hillary-clinton-fund-raising-model.html?login=email&_r=0.

53. See, e.g., CONN. GEN. STAT. ANN. § 9-704(3) (2013).

model is designed to “supercharge” small donors by providing a six-to-one match for all donations up to \$175.⁵⁴ Regardless of its merit as a public policy matter, engaging regular voters and small donors by giving their contributions real weight—either in the form of small donor matching or qualification—has intangible value to campaigns beyond the actual donation.⁵⁵ Those donors are now more engaged and personally invested, and are therefore more likely to engage with the campaign, to volunteer, and to vote.⁵⁶

Finally, after getting elected, candidates who relied on large donors need to keep those donors happy. Although quid pro quo bribery is illegal, donors still have more access to elected officials than non-donors.⁵⁷ Our system of reliance on large donors leads to a form of legalized corruption wherein elected officials pass laws clearly designed to benefit a narrow group of constituents, who also happen to be donors.⁵⁸ Candidates are often asked to make commitments or promises, whether helping a donor get a job for a loved one or taking a certain position on a political issue. Eliminating candidates’ reliance on large contributors eliminates this issue.

For all these reasons—the influx of public funds, the elimination of call time, the aura of a clean candidate, the engagement of small donors, and the freedom from a group of donors expecting favors—candidates have plenty of incentives to participate in a system of publicly financed campaigns.

2. *Reasons not to participate in public financing*

a. *Accepting limitations imposed by the public financing system*

In exchange for the money, candidates will be subject to significant restrictions, which usually take the form of expenditure limitations. This makes the decision to participate particularly difficult for candidates who intend to self-fund their campaign or know they have the ability to raise and spend money significantly in excess of the expenditure limitations.

54. See N.Y.C. Admin Code § 3-703(2)(a).

55. See ANGELA MIGALLY, SUSAN M. LISS, & FREDERICK A. O. SCHWARZ, JR., BRENNAN CTR. FOR JUST., SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE 10 (2010), <http://www.brennancenter.org/publication/small-donor-matching-funds-nyc-election-experience>.

56. *Id.* at 12, 18.

57. JOSHUA L. KALLA & DAVID E. BROOKMAN, CONGRESSIONAL OFFICIALS GRANT ACCESS TO INDIVIDUALS BECAUSE THEY HAVE CONTRIBUTED TO CAMPAIGNS: A RANDOMIZED FIELD EXPERIMENT 9–11 (2015), http://www.ocf.berkeley.edu/~broockma/kalla_broockman_donor_access_field_experiment.pdf.

58. See, e.g., Kenneth Lovett, *TV Execs Give Big Money to New York Politicians Who Hand Them Tax Cuts*, N.Y. DAILY NEWS (Oct. 10, 2013), <http://www.nydailynews.com/news/politics/tv-exec-hand-big-bucks-ny-pols-give-tax-breaks-article-1.1481164>.

b. Facing potential backlash as a conservative candidate

Some commentators have argued that additional costs are imposed upon candidates with a conservative ideology, because conservative candidates who generally oppose government spending may have a personal aversion to accepting government funds, or, more pragmatically, they may fear a backlash from the “Tea Party” wing of the party for accepting government subsidies.⁵⁹ In fact, in one survey (the “Miller survey”) of 25 candidates who opted out of public funding in Arizona, Connecticut, and Maine, 84% reported that the reason they chose not to participate was at least partially influenced by an ideological objection.⁶⁰

Although such fears may play a small role with some candidates, it is unlikely that it is a major factor in their decision. First, the Miller survey cannot be seen as an accurate indicator of conservative candidates’ preferences. It has a tiny sample size and likely suffers from a selection bias, because only those elected officials with strong feelings about the system would take the time to complete an academic survey.

Second, the data indicates that conservatives are not harmed by participation in the system. The partisan difference is often not large—for example, in Connecticut in 2008, the difference in participation rates between candidates of each party was in the single digits.⁶¹ Historically, Ronald Reagan, regarded as an ardent opponent of unnecessary government spending, was a participant in public financing. He benefited from public financing more than any other Presidential candidate in history, as he remains the “only candidate to ever reach the public funding primary campaign maximum” under the Presidential Election Campaign fund.⁶²

Third, in Arizona, many Republicans confessed to running as participating candidates during their first election, but after winning their first election, they might abandon public financing and run as traditional candidates in subsequent elections.⁶³ This suggests that nonparticipation among Republicans is likely based on pragmatic rather than ideological concerns—only after gaining the leverage as an elected official to raise large sums of money would they forgo public financing.⁶⁴

59. MILLER, *supra* note 1, at 108.

60. MILLER, *supra* note 1, at 110.

61. In Connecticut in 2008, 74% of Democrats participated and 66% of Republicans participated, a difference of 8%. MILLER, *supra* note 1, at 119.

62. See Brief for Anthony Corrado, Thomas Mann & Norman Ornstein as Amici Curiae Supporting Respondents at 16–17, *Ariz. Free Enter. Club’s Freedom PAC v. Bennett*, 131 S. Ct. 2806 (2011) (Nos. 10-238, 10-239), 2011 WL 661708, at *16–17.

63. MILLER, *supra* note 1, at 116.

64. One participant in the Miller survey was quite frank, stating: “When I was elected to the senate, most of us [Republicans] who were elected ran Clean. So are we hypocrites, or are we

Finally, there is no support for the notion that there might be a backlash against conservative candidates or elected officials for participating in a system of public financing. Voters generally have no knowledge of campaign finance law, and pay no attention to it.⁶⁵ One study of states with public financing showed that almost no voters knew whether their elected officials participated in the system.⁶⁶ No survey or study has yet revealed a single example of a participating candidate who suffered politically because of a conservative backlash.

C. *A framework to determine whether or not to opt in*

Candidates make these decisions with a sole focus on maximizing their chances of victory. Public financing has the potential to alter the strategic framework in which campaigns are conducted.⁶⁷ The presence of a public financing option forces candidates to think strategically about the costs and benefits of participation and nonparticipation, and use those evaluations to determine whether or not to participate.

Based on all of the factors discussed above, we can construct a framework to determine approximately how much money a rational candidate would need to anticipate being able to spend in order to forgo public funding. This framework helps explain how *AFE* gutted the Arizona model. In Part III.B, this framework will explain how the bucket provision will help restore candidate incentives to opt in.

Let us assume we are in a sufficiently robust⁶⁸ lump sum financing system without triggered matching funds, as exists in Arizona today. We will compare the lump sum grant amount (G) plus the intangible benefits of public funding (B)⁶⁹ minus the qualification costs (Q)⁷⁰ against the expected amount of private money the candidate anticipates being able to raise (M) minus the intangible downsides of forgoing public funds (D).⁷¹ Finally, we will account for the

taking advantage of the system? We're grabbing the lowest fruit on the tree." MILLER, *supra* note 1, at 116.

65. MILLER, *supra* note 1, at 36; *see also* David M. Primo, *Public Opinion and Campaign Finance: Reformers Versus Reality*, 7 IND. REV. 207, 217 (2002).

66. MILLER, *supra* note 1, at 36.

67. MILLER, *supra* note 1, at 8.

68. The size of the subsidies matters a great deal. Subsidies that are too small will not provide a sufficient incentive to motivate candidates to participate. MILLER, *supra* note 1, at 5.

69. Such as the ability to spend more time engaging with voters, the "clean candidate aura" and engaging small donors.

70. Typical statutes require candidates to raise a certain number of small donations in order to qualify; for example, Arizona requires candidates to raise 250 five-dollar contributions from donors within the district. *See supra* note 33. While candidates recognize that qualification can sometimes be challenging, it is well accepted that qualifying is much easier than funding an entire campaign privately. *See* MILLER, *supra* note 1, at 34.

71. Such as the downside of being seen as a candidate captured by special interests or the downside of actually being indebted to donors.

opportunity costs of private fundraising, such as the time spent raising money or the actual costs associated with raising money, such as fundraising consultants or staff and the overhead for a fundraising operation (*c*).⁷² Based on these factors, a rational candidate will forgo public financing if the following is true:

$$M - (M \times c) - D > G + B - Q$$

or

$$M > \frac{G + B - Q + D}{1 - c}$$

To illustrate how this framework operates, we can make some assumptions about a hypothetical candidate and substitute in some numerical placeholders. Let's take our candidate, Ms. Smith,⁷³ who is deciding whether or not to participate in a system of public financing with lump sum grants, as exists in Arizona today. Assume the system grants a lump sum of \$100,000 to participating candidates. Furthermore, assume Ms. Smith would receive intangible benefits in the form of small donor engagement, positive press, and the aura of clean funding. Ms. Smith values those benefits with a utility equivalent to \$30,000. Assume the qualification costs (typically a sufficient number of small \$5 donations from voters within the district) are valued at \$10,000.

On the other hand, if Ms. Smith decides to privately fund her campaign, assume she would expect to devote 15% of her campaign budget to fundraising expenses. Furthermore, for every \$1,000 she raises personally, she would be forced to forgo a certain amount of time spent on other campaign activities such as talking to voters or attending events. Assume she values this loss at \$100, or 10% of the money she would raise. Finally, Ms. Smith is understandably concerned about being labeled as corrupt or captured by special interests should she decide to forgo public financing. Assume she valued the negative utility of these potential optics problems at \$25,000. Using these hypothetical values in the formulation described above, we would have the following result:

$$M > \frac{\$100,000 + \$30,000 - \$10,000 + \$25,000}{1 - (0.15 + 0.1)} \text{ or } M > \$193,333$$

In other words, based on these assumptions, Ms. Smith would need to be prepared to raise at least \$193,333 in order for it to be preferable for her to

72. This analysis will assume that these costs will expand based on the amount of money raised (*M x c*).

73. See, e.g., MR. SMITH GOES TO WASHINGTON (Columbia Pictures Corporation 1939).

choose to privately fundraise rather than participate in public financing. Notably, this figure is approximately double the hypothetical public grant of \$100,000.

Obviously, no candidate would ever use this framework to analyze her decision of whether or not to participate.⁷⁴ Many candidates make decisions based on emotion, and some will be governed by political considerations beyond these purely strategic concerns. The purpose of this analysis is not to model how candidates think, but to demonstrate that when deciding whether or not to participate, a candidate must anticipate being able to raise significantly more than the expected public grant in order for it to be worthwhile to forgo public funds.

Unfortunately, this analysis is complicated by realities of political spending in the modern era. Campaigns operate in an environment flush with independent expenditures both on behalf of and in opposition to candidates.⁷⁵ It is often impossible to predict the extent of these expenditures. Democratic candidates might, for example, fear a large unexpected influx of independent expenditures from the National Rifle Association (NRA), the Koch Brothers (known for spending on behalf of conservative candidates and causes), or Karl Rove's PAC. Republicans may fear an attack from a union or a progressive PAC, or perhaps an unexpected tea party challenge from the right. Even if the incentives to opt in properly align at the decision point when candidates are making this determination, there is a risk that circumstances could change, and a candidate's participation would be an error in retrospect.

However, because candidates should be able to incorporate *foreseeable* independent expenditures into their decision to opt in, the subset of candidates who make a rational decision to participate and later regret that choice due to third party expenditures should be fairly small. The only scenario where a rational candidate who chose to participate would regret that choice is a situation in which a change in circumstances, like a significant independent expenditure, is unforeseen. This could happen if a non-competitive race unexpectedly becomes hotly contested, for example, and the publicly funded candidate receives offers of financial support that she is forced to decline. Similarly, it could happen if a controversial group (say, the NRA) decides to target a participating candidate, and the candidate would have been able to benefit from

74. Michael Miller engaged in a similar analysis of the opt-in decision-point and identified five strategic factors candidates consider when they evaluate whether or not to participate: (1) How public funding affects the costs of raising sufficient funds; (2) the effort associated with qualifying for public funding programs; (3) the consistency of public funding with a candidate's political ideology; (4) the candidate's estimated probability of victory; and (5) the candidate's desire to avoid entanglements with contributors. MILLER, *supra* note 1, at 32. While these factors are all relevant, Miller does not include the most important factor: how much money a candidate anticipates being able to privately raise at the time she is deciding whether to participate.

75. See CHISUN LEE, BRENT FERGUSON & DAVID EARLEY, BRENNAN CTR. FOR JUSTICE, AFTER *CITIZENS UNITED: THE STORY IN THE STATES 5-7* (Oct. 9, 2014), http://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United_Web_Final.pdf.

large contributions from Everytown for Gun Safety had it not been for the expenditure limitations imposed by public financing.

Even in these cases, it is worth noting that in the event of unforeseen independent spending in the race, a candidate's supporters and allies might very well respond with independent spending of their own. If the NRA makes a large ad buy, Everytown for Gun Safety might do the same; if the Democratic Senatorial Campaign Committee decides to target a race with independent expenditures, the National Republican Senatorial Committee might respond in kind. These are all factors outside of a candidate's control, and, because these organizations often get involved independently, it is unlikely these independent actions would significantly alter a candidate's ability to raise additional retaliatory funds on her own. As a result, except in the isolated and rare instances where a candidate's fundraising ability is significantly altered by unforeseen factors, it is unlikely a rational candidate will later come to regret the initial choice to participate.

The takeaway from this analysis is straightforward. Rational candidates who lack the ability to raise or spend more than the expected public grant will almost always participate. Candidates who anticipate being able to spend somewhat more than the public grant will often participate, but some might be on the cusp: it will depend on how much they anticipate being able to raise and how they value the intangible variables in the analysis. Finally, candidates who anticipate being able to spend significantly more than the public grant will rarely participate.

D. The framework applied: the Presidential Election Campaign Fund

The most high profile example of this framework applied in practice is evidenced by the decline of the Presidential Election Campaign Fund.⁷⁶ This system was successful for decades.⁷⁷ In 2000, however, George W. Bush became the first major candidate to opt out of public funding for the primary,⁷⁸ which provides a 1:1 match of up to \$250 of an individual's contribution but caps candidate expenditures.⁷⁹ In 2004, the leading Democratic candidates—John Kerry and Howard Dean—similarly opted out of primary public funding.⁸⁰

76. The declining utilization of public funds for Presidential primaries is not a perfect analogy, because this framework contemplates a lump-sum system as opposed to the small donor matching system used in Presidential primaries. The framework is directly applicable to the public financing system for Presidential general elections, which is a lump sum financing system.

77. James Sample, *The Last Rites of Public Campaign Financing?*, 92 NEB. L. REV. 349, 371–72 (2014).

78. Kate Pickert, *Campaign Financing, A Brief History*, TIME (June 30, 2008), <http://content.time.com/time/nation/article/0,8599,1819288,00.html>.

79. *Public Funding of Presidential Elections*, FED. ELECTION COMM'N, <http://www.fec.gov/pages/brochures/pubfund.shtml#anchor688095> (last updated Feb. 2016).

80. Pickert, *supra* note 78.

Strategically, this made sense: in 2004, the Presidential Election Campaign Fund had a spending limit on participating candidates of \$37.31 million for the primary, and both Kerry and Dean significantly exceeded this limit, with Kerry raising over \$170 million and Dean raising over \$51 million.⁸¹ Contrast this with the six other serious Democratic candidates in the 2004 primary, all of whom raised between \$7 million and \$22 million and all of whom participated.⁸² However, the spending limit for the general election in 2004—\$74.62 million—was significantly higher than that of the primary, and all candidates still participated that year.

The death knell to the program came in 2008, when Barack Obama chose not to participate in public financing for either the primary or general election.⁸³ The decision was his only logical move. Barack Obama, who expected to raise many hundreds of millions of dollars in 2008—he ultimately raised \$659 million⁸⁴—could not rationally restrict himself to the PECEF's spending limits of \$42.05 million for the primary and \$84.1 million for the general election.⁸⁵ By the 2012 election, when the general election limits had risen to only \$91.2 million, it was a foregone conclusion that no general election candidate would participate, especially with both Obama and Romney topping \$1 billion in spending.⁸⁶

The demise of the Presidential Election Campaign Fund is a powerful illustration of this framework. The single most important determinative factor of whether or not candidates participated was their anticipated ability to raise and spend funds in significant excess of the cap imposed by the public financing system.⁸⁷ Candidates who could not spend in excess were rational to opt in. Yet those candidates who anticipated being able to raise and spend significantly more than the relevant limits for their respective primaries or general elections,

81. *2003-2004 Election Cycle Data Summaries through 6/30/04*, FED. ELECTION COMMISSION, http://www.fec.gov/press/summaries/2004/ElectionCycle/18m_PresCand.shtml (last visited Jan. 19, 2016).

82. *Id.*

83. Pickert, *supra* note 78.

84. *2007-2008 Election Cycle Data Summaries through 12/31/08*, FED. ELECTION COMMISSION, http://www.fec.gov/press/summaries/2008/ElectionCycle/24m_PresCand.shtml (last visited Jan. 19, 2016).

85. *Presidential Spending Limits for 2008*, FED. ELECTION COMMISSION, http://www.fec.gov/pages/brochures/pubfund_limits_2008.shtml (last visited Jan. 19, 2016); Fredreka Schouten, *Obama Opts out of Campaign Finance System*, USA TODAY (June 19, 2008), <http://abcnews.go.com/Politics/story?id=5206643>.

86. Kenneth P. Vogel, Dave Levinthal & Tarini Parti, *Barack Obama, Mitt Romney Both Topped \$1 Billion in 2012*, POLITICO (Dec. 7, 2012, 5:05 AM), http://www.politico.com/story/2012/12/barack-obama-mitt-romney-both-topped-1-billion-in-2012-84737_Page2.html.

87. See Overton, *supra* note 6, at 1702 (“[S]tronger candidates have opted out of the presidential public financing system because of inadequate funding and low spending limits imposed on participants.”).

including George Bush, John Kerry, Howard Dean, Mitt Romney, and Barack Obama, chose to forgo public financing.⁸⁸

The fundamental problem with the Presidential Election Campaign Fund was simple—over the years, the expenditure caps did not keep pace with candidate fundraising. The caps were reasonably aligned with the expected fundraising totals for candidates in the 1980's and 1990's, but as campaign spending began to skyrocket, fueled in large part by the influx of independent expenditures, the caps became insufficient.⁸⁹ There is widespread agreement that the Presidential Election Campaign Fund is broken and is no longer able to effectively incentivize candidates to participate.⁹⁰

II.

JURISPRUDENTIAL BACKGROUND AND THE IMPACT OF *AFE*

A. *The history of AFE*

1. *Buckley v. Valeo*

The first statement from the Supreme Court on public campaign financing came in the seminal *Buckley v. Valeo* decision.⁹¹ In *Buckley*, the Court considered a variety of constitutional challenges to the Federal Election Campaign Act, including challenges to the new system that provided public subsidies to Presidential campaigns.⁹² The *Buckley* decision explicitly affirmed the constitutionality of the system,⁹³ but struck down expenditure limits as an unconstitutional burden on the First Amendment.⁹⁴ The only state interest that the *Buckley* Court recognized as sufficient to permit campaign finance regulation

88. See Josh Israel, *The \$288 Million in Campaign Funds That Candidates Aren't Using*, THINK PROGRESS (Oct. 21, 2015), <http://thinkprogress.org/justice/2015/10/21/3713676/public-finance-three-dollar-checkoff/>. Another example of this point in a different context was the 2009 New York City Mayoral race. The incumbent, Michael Bloomberg, chose not to participate because he planned to spend over \$100 million on his reelection campaign.

89. James Sample, *The Last Rites of Public Campaign Financing?*, 92 NEB. L. REV. 349, 376–82 (2014) (noting that the presidential campaign finance system has remained largely unaltered since 1974, and public funding rates have not kept up with private fundraising capabilities since the election of 2000).

90. See JOSEPH CANTOR, CONG. RESEARCH SERV., RL32786, THE PRESIDENTIAL ELECTION CAMPAIGN FUND AND TAX CHECKOFF: BACKGROUND AND CURRENT ISSUES (2005); see also N.Y. Times Editorial Board, *An Idea Worth Saving*, N.Y. TIMES (May 5, 2012), <http://www.nytimes.com/2012/05/06/opinion/sunday/an-idea-worth-saving.html>.

91. *Buckley v. Valeo*, 424 U.S. 1 (1976).

92. *Id.* at 1–2.

93. *Id.* at 108.

94. *Id.* at 2.

that burdened the First Amendment was the interest in combating corruption and its appearance,⁹⁵ a rule that persists to this day.⁹⁶

Using funds allocated by individual taxpayers on income tax returns, the Presidential Election Campaign Fund helped finance Presidential campaigns in two ways: (1) for general elections, the Fund provided a lump sum grant of \$20 million (adjusted for inflation) to participating Presidential candidates; (2) for primary elections, the Fund provided a dollar for dollar match for the first \$250 of any private contribution.⁹⁷ For the general election, major party candidates automatically qualified for the full grant and minor party candidates received a percentage of the grant based on their party's vote share in the previous election.⁹⁸ For the primary, candidates could qualify by raising \$5000 in each of 20 states, counting only the first \$250 from each contributor.⁹⁹ In exchange for this supplemental funding, participating candidates agreed to expenditure caps.¹⁰⁰

The *Buckley* Court easily dismissed the First Amendment challenge to public financing. The majority opinion explained that a system of publicly-financed campaigns is not an effort “to abridge, restrict, or censor speech [in violation of the First Amendment], but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.”¹⁰¹ Because publicly-financed campaigns increased the total quantity of political speech, it could not be seen as an effort to limit or burden speech.

The focus of the constitutional analysis rested on whether the disparate treatment of major party and minor party candidates violated Equal Protection.¹⁰² The Court dismissed this claim because the disadvantage suffered by third party candidates was quite minimal—the only harm third party candidates suffered was the “denial of the enhancement of opportunity to communicate with the electorate.”¹⁰³

95. *Id.* at 25–27 (recognizing that preventing corruption and its appearance is a “constitutionally sufficient justification” for contribution limitations).

96. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 241–50 (2006) (reaffirming *Buckley*'s rule that preventing corruption and its appearance can be a valid state interest, and declining to recognize a new state interest in protecting candidate time).

97. *Id.* at 88–89. The Presidential Election Campaign Fund also had a provision to defray the cost of funding Presidential nominating conventions, which was recently repealed. *Id.* at 88; *see also* Peter Overby, *Say Goodbye to the Taxpayer-Funded Political Convention*, NPR (Mar. 26, 2014, 12:36 PM), <http://www.npr.org/2014/03/26/294383506/say-goodbye-to-the-taxpayer-funded-political-convention>.

98. *Buckley*, 424 U.S. at 88.

99. *Id.* at 89.

100. *Id.* at 88–89.

101. *Id.* at 92–93.

102. *Id.* at 93–94.

103. *Id.* at 94–95.

Although the Court affirmed the constitutionality of publicly financed elections as well as the constitutionality of individual contribution limits, the Court struck down expenditure limits as unconstitutional, dealing a major blow to attempts to regulate money in politics at both the federal and state level.¹⁰⁴ The Court found expenditure limits imposed “direct and substantial restraints on the quantity of political speech,” which limited the “core of our First Amendment freedoms.”¹⁰⁵ The governmental interest in preventing corruption and the appearance of corruption was insufficient to justify the burden imposed by placing an expenditure ceiling.¹⁰⁶ The Court explicitly rejected an argument that there was a governmental interest in “equalizing the relative ability of individuals and groups to influence the outcome of elections” and was therefore unable to articulate a compelling governmental interest sufficient to outweigh the clear burdens on the expression of First Amendment speech imposed by these limits.¹⁰⁷

2. Davis v. FEC

In an attempt to balance the playing field between independently wealthy candidates who “self-funded” their campaigns and candidates who were forced to raise money, Congress passed § 319(a) of the Bipartisan Campaign Reform Act of 2002 (the “Millionaires’ Amendment”), which eased fundraising limitations on candidates opposed by self-funders.¹⁰⁸ Under the Millionaires’ Amendment, when a candidate for the House of Representatives spent in excess of \$350,000 of her own money, her opponent was permitted to receive contributions at up to three times the previous limit.¹⁰⁹ Contribution limits for the self-funded candidate remained the same.¹¹⁰ In *Davis v. FEC*, however, the Court struck down the Millionaires’ Amendment, finding it to be an impermissible violation of the First Amendment.¹¹¹ The Court emphasized that spending money on political speech was a “robust[] exercise” of an individual’s First Amendment right.¹¹² Burdening that choice by inducing a “penalty” (in this case, looser restrictions for an opponent), was a “drag on First Amendment rights.”¹¹³ The Court found the Millionaire’s Amendment unconstitutional

104. See Linda Greenhouse, *State Campaign Fund Law Now Faces Sharp Revision*, N.Y. Times (Jan. 31, 1976), at 1 (“Campaign finance law in New York, New Jersey, Connecticut and 32 other states will require drastic revision in the wake of yesterday’s Supreme Court decision that struck down nearly all limits on campaign spending by candidates for Federal office.”).

105. *Buckley*, 424 U.S. at 39.

106. *Id.* at 45.

107. *Id.* at 48.

108. *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 729 (2008).

109. *Id.*

110. *Id.*

111. *Id.* at 744.

112. *Id.* at 739.

113. *Id.*

because it provided candidates with only two choices: to either abide by a personal expenditure limit (which was struck down as unconstitutional in *Buckley*), or to endure the burden of running against a candidate with higher contribution limits.¹¹⁴ The Court argued that this burden was not justified by “any governmental interest in eliminating corruption or the perception of corruption.”¹¹⁵ In fact, the Court noted that the use of personal funds actually reduced the threat of corruption, again rejecting any potential government interest in leveling electoral opportunities as a legitimate interest.¹¹⁶

In addition, the Court was careful to reaffirm *Buckley*’s determination that contribution limits are permissible, but stressed that the limits must be identical for all candidates.¹¹⁷ The Court also noted, again, that publicly financed campaigns did not impose a drag on First Amendment rights.¹¹⁸ The Court observed that “a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures.”¹¹⁹ Unlike the Millionaire’s Amendment, which imposed a penalty on self-funders, providing public funding allowed candidates to choose to privately fund without suffering any repercussions.

3. Arizona Free Enterprise (“AFE”)

In the 2011 *AFE* decision, the Court crippled the Arizona model—the most effective post-*Buckley* public financing system—by striking down the “triggered matching fund” provision in the Arizona Citizens Clean Elections Act.¹²⁰ A group of Arizona candidates and independent organizations had challenged the constitutionality of the provision, arguing that triggered matching funds penalized their speech by burdening their ability to fully exercise their First Amendment rights. The Supreme Court agreed.

The Court relied heavily on *Davis* in its decision. In *Davis*, the Millionaire’s Amendment was struck down because it forced a candidate to “choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.”¹²¹ Similarly, the Court in *AFE* concluded that matching funds triggered by an exercise of free speech were a burden on First Amendment rights.¹²² In fact, the Court found the First Amendment burdens imposed by the Arizona law to be even more

114. *Id.* at 740.

115. *Id.*

116. *Id.* at 740–41.

117. *Id.* at 738.

118. *Id.* at 739–40.

119. *Id.*

120. *Ariz. Free Enter. Club’s Freedom Club PAC (AFE) v. Bennett*, 131 S. Ct. 2806, 2813, 2828–29 (2011).

121. *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 739 (2008).

122. *AFE*, 131 S. Ct. at 2818.

constitutionally problematic than the burdens imposed by the Millionaire’s Amendment in *Davis*, because the benefit to the participating candidate was the direct and automatic release of money rather than merely relaxed contribution limits.¹²³

The Court also found other elements of the law more problematic than the law struck down in *Davis*. The Arizona law had a “multiplier” effect—if there were more than two candidates in an election and one candidate spent above the limit, the law would provide matching funds for each other participating candidate.¹²⁴ For example, if there were five participating candidates and one traditional candidate in the race, for every dollar the traditional candidate spent in excess of the limit, the state would distribute five dollars—one to each participating candidate.¹²⁵

The Court was disturbed by the fact that independent expenditures could also trigger matching funds to participating candidates. A traditional candidate could suffer the consequences of facing an opponent with supplemental matching funds even if the traditional candidate never individually spent over the limit.¹²⁶

The Court saw these rules as unduly burdening the decision of individual candidates (or independent organizations) to make the First Amendment decision to spend money, as these actors might choose not to spend knowing that expenditures would result in additional funding to political adversaries.¹²⁷

The Court conceded that a single lump-sum payment is constitutional.¹²⁸ Furthermore, the Court observed that the “State [correctly] reasoned that providing all of the money [including triggered payments] up front would not burden speech.”¹²⁹ The constitutionally problematic component of the law was not the expenditure of public funds, but rather the fact that the law burdened the decision of actors as they were making the decision of whether or not to spend an additional dollar.

Like in *Davis*, the Court in *AFE* found no compelling state interest that could justify the constitutional burdens imposed by the triggered matching fund provision.¹³⁰ While the Court observed that the Arizona law did a good job of “leveling the playing field,” the Court reaffirmed its view that equalizing campaign resources was not a legitimate state purpose.¹³¹ Furthermore, the Court believed that the provision did not further the interest of alleviating

123. *Id.* at 2818–19.

124. *Id.* at 2819.

125. ARIZ. REV. STAT. ANN. § 16-952 (2012).

126. *Id.*

127. *Id.* at 2823.

128. *Id.* at 2824.

129. *Id.*

130. *Id.* at 2825.

131. *Id.* at 2825–26.

corrupting influences, noting that Arizona already had very strict contribution limits.¹³²

B. The AFE decision undermined the effectiveness of the Arizona model

1. The AFE decision had adverse public policy ramifications

In the wake of the widely criticized¹³³ AFE decision, triggered matching fund provisions were quickly eliminated in all jurisdictions that employed them, either by judicial order or as the result of legislative action.¹³⁴ Other states used the AFE decision as an excuse to repeal public financing altogether.¹³⁵

In addition, the AFE decision provided a motivation for conservative legislators to push to increase contribution limits in jurisdictions that had previously had a system of public financing with triggered matching funds. In these jurisdictions, laws imposing contribution limits had played a relatively small role in the decision-making process of candidates choosing whether or not to participate. It really did not matter all that much whether the limits were high or low, because candidates knew that all private contributions in excess of the grant—large and small—would be matched. After AFE, however, conservative legislators knew that by raising contribution limits they could further weaken the remaining public financing system, as higher contribution limits would make it easier for traditional candidates to raise money.¹³⁶

Thus in 2013, Republican lawmakers in Arizona enacted H.B. 2593, significantly increasing campaign contribution limits for traditional candidates.¹³⁷ The Arizona Citizens Clean Election Commission filed for a preliminary injunction against its implementation, arguing that the legislature lacked the authority to alter contribution limits which were fixed by voter referendum,¹³⁸ but the Arizona Supreme Court held that the new higher

132. *Id.* at 2827.

133. *See, e.g.*, Stephen Ansolabehere, *AFE and the Problem of Campaign Finance*, 2011 SUP. CT. REV. 39, 77 (2011); Conor M. Dowling, Ryan D. Enos, Anthony Fowler & Costas Panagopoulos, *Does Public Financing Chill Political Speech? Exploiting a Court Injunction as a Natural Experiment*, 11 ELECTION L.J. 302, 304–06 (2012); Ellen D. Katz, *Election Law's Lochnerian Turn*, 94 B.U. L. REV. 697, 699, 701–02, 705, 707–08 (2014); Timothy Kuhner, *Consumer Sovereignty Trumps Popular Sovereignty: the Economic Explanation for AFE*, 46 IND. L. REV. 603, 637–41 (2013); David Mann, *Out Of The Penalty Box: Why Supreme Court Precedent Should Have Saved State Matching Fund Triggers*, 42 U. TOL. L. REV. 991, 1011–18 (2011); Sample, *supra* note 77; Spencer, *supra* note 6.

134. *See, e.g.*, *Green Party of Conn. v. Garfield*, 616 F.3d 213, 218, 245–46 (2d Cir. 2010) (declaring that Connecticut's Citizens Election Program's trigger provisions violated the first amendment).

135. *See, e.g.*, 2011 Wis. Sess. Laws 138 (eliminating all public financing in the state).

136. *See supra* Part I.C.

137. 2013 Ariz. Sess. Laws 507, 508.

138. *Ariz. Citizens Clean Elections Comm'n v. Brain*, 322 P.3d 139, 141 (Ariz. 2014); *see also* Bob Bauer, *Arizona and Its Conflicts Over Public Financing*, MORE SOFT MONEY HARD L.

contribution limits could go into effect.¹³⁹ This change made it easier for traditional candidates to raise money, thus reducing the incentives (and relative benefits) of participating in public financing. If Arizona had been able to retain its triggered matching funds provision, H.B. 2593 would have been relatively toothless; traditional candidates who had an easier time raising money due to higher limits would simply see their opponents receive a larger match. But in a post-*AFE* world, H.B. 2593 and laws like it further diminished the incentives to participate in public financing.

The *AFE* decision had an immediate and significant impact on candidate participation rates. In the 2008 election in Arizona—the last election where Arizona had triggered matching funds—67% of general election candidates participated in Arizona’s Citizens Clean Elections system.¹⁴⁰ In the lead-up to the 2010 election, the Ninth Circuit issued a temporary restraining order prohibiting the distribution of matching funds.¹⁴¹ After the TRO was issued, just 49% of general election candidates participated, a significant drop from the participation rate when matching funds were intact.¹⁴² In 2012, after the *AFE* decision made the prohibition on matching funds permanent, the participation rate dropped even further—to 37%.¹⁴³ In 2014, it fell to an all-time low of 28%.¹⁴⁴

Even in those states with the Arizona model that had preserved the core of their public financing system through the 2010 election, *AFE* led to major drops in candidate participation. For example, in the 2008 general election in Maine over 81% of major party legislative candidates participated; in the 2010 election, 77% of candidates participated.¹⁴⁵ After *AFE*, participation dropped to 63% in the 2012 election and 53% in the 2014 election.¹⁴⁶

This data is hardly surprising. The primary purpose of the triggered matching funds provision was to incentivize candidates to participate in publicly financed campaigns; thus it is no surprise that removing this powerful incentive

(Oct. 28, 2013), <http://www.moresoftmoneyhardlaw.com/2013/10/arizona-and-its-conflicts-over-public-financing/>.

139. *Brain*, 322 P.3d at 145.

140. CITIZENS CLEAN ELECTIONS COMM’N, 2008 ANNUAL REPORT 8 (2009). <https://repository.asu.edu/attachments/80050/content/2008AnnualReport.pdf>.

141. CITIZENS CLEAN ELECTIONS COMM’N, 2010 ANNUAL REPORT 29 (2011), <http://www.azcleelections.gov/CmsItem/File/32>.

142. *Id.*

143. CITIZENS CLEAN ELECTIONS COMM’N, 2012 ANNUAL REPORT 7 (2013), <http://www.azcleelections.gov/CmsItem/File/30>.

144. CITIZENS CLEAN ELECTIONS COMM’N, 2014 ANNUAL REPORT 11 (2015), <http://www.azcleelections.gov/CmsItem/File/28>.

145. Maine Clean Election Act Overview 2000-2014, http://www.maine.gov/ethics/pdf/mcea_overview_2000-2014.pdf

146. *Id.*

caused significant drops in participation rates.¹⁴⁷ One Arizona candidate who participated in public financing summed up his perception of *AFE*'s impact: "the lawsuit, by gutting the engine of the program, has effectively killed Clean Elections."¹⁴⁸ The loss of triggered matching funds will likely continue to degrade participation rates in future elections.

Despite the precipitous drop in participation rates, at least two academics have strangely concluded that the harm of the *AFE* decision has been "greatly exaggerated."¹⁴⁹ It is certainly true that there remains an incentive for candidates who completely lack the ability to raise sizeable sums of money on their own to participate. However, both simple logic as well as the actual data demonstrate that jurisdictions that employ traditional lump sum financing without triggered matching funds are unable to effectively induce candidates who *do* have the ability to raise significant sums of money to participate.¹⁵⁰

2. *The AFE decision changed candidate decision-making*

The pre-*AFE* Arizona model was very effective at inducing candidates to participate. Arizona's law was recognized as "the most comprehensive and sophisticated in the country."¹⁵¹ Because the provision provided supplemental funds for up to double the initial grant amount, in order for a rational candidate to forgo public funds, that candidate would need to anticipate being able to spend several times the grant amount. Because so few candidates had the ability to raise and spend this much, the provision expanded the pool so that virtually all rational candidates were incentivized to participate. Furthermore, this law had a network effect: once participation rates became high enough, the stigma of non-participation further increased the downsides of traditional financing.¹⁵²

Under the framework elaborated in Part I.C., the Arizona law can be understood as having limited the maximum amount of triggered matching funds to double the initial grant amount ($2 \times G$); therefore, a participating candidate could conceivably receive as much as three times the initial grant amount.¹⁵³ Accordingly, a rational candidate operating under this system would only forgo public financing if she could anticipate spending M , illustrated as follows:

147. See MILLER, *supra* note 1, at 141.

148. *Id.*

149. See MILLER, *supra* note 1, at 141; see also Robert Steele, *AFE v. Bennett: Taking the Government's Finger off the Campaign Finance Trigger*, 28 GA. ST. U. L. REV. 467, 492 (2012).

150. See *supra* Part I.C.

151. Stephen Ansolabehere, *Arizona Free Enterprise v. Bennett and the Problem of Campaign Finance*, 2011 SUP. CT. REV. 39, 54 (2011).

152. This network effect will increase the downsides, now represented as D' , where $D' > D$.

153. See ARIZ. REV. STAT. ANN. § 16-952(E) (1998) (establishing a cap on matching funds at three times the original spending limit for a particular election).

$$M - (M \times c) - D' > G + B - Q + (2 \times G)$$

or

$$M > \frac{(3 \times G) + B - Q + D'}{1 - c}$$

In order to demonstrate how the triggered matching fund provision changed this analysis, let us assume that Ms. Smith was running in the same jurisdiction and had the same preferences as she did in the example from Part I.C¹⁵⁴ with one exception: here, the triggered matching fund provision is intact as it existed before *AFE*. Now, if Ms. Smith privately fundraised, she would know that her money would be matched dollar for dollar in a grant to her opponent until she hit \$300,000. Under this system, Ms. Smith would only forgo public financing if she could anticipate spending M , calculated as follows:

$$M > \frac{\$300,000 + \$30,000 - \$10,000 + \$50,000}{1 - (0.15 + 0.1)}$$

$$\text{or } M > \$493,333$$

In other words, under the original Arizona model with triggered matching funds, Ms. Smith would only forgo public funding if she could expect to raise approximately five times the grant amount. In the Arizona model as it exists today, Ms. Smith would forgo public funding if she could expect to raise a much lower sum: \$193,333, or roughly double the grant amount.

Of course these figures are based entirely on placeholders for candidates' perceptions of the benefits and costs of participation—each candidate will undoubtedly have a unique view of these factors. Regardless of the specific differences in utility for each candidate, the point still stands: before *AFE*, candidates would have to expect to be able to raise far more money in order to rationally forgo public funding than they do today.

This analysis might even understate the degree to which the triggered matching fund induced candidate participation. First, when candidates start spending significant sums that are many times the grant amount, there are

154. In Part I.C, the grant amount was \$100,000. Ms. Smith valued the intangible benefits of participation at \$30,000 and expected qualification to cost her \$10,000. If Ms. Smith ran as a traditional candidate, she expected to devote 15% of her campaign budget to fundraising and forgo 10% of her funds as an opportunity cost. Additionally, we now assume she values the downsides of participation at \$50,000 (as opposed to \$25,000 in Part I.C), due in part to the network effects of higher participation rates. *See supra* note 152.

significant diminishing returns to the value of those campaign expenditures.¹⁵⁵ Second, as more candidates participate and participation becomes the norm, the decision to traditionally finance may begin to carry even more of a stigma than it would when participation rates are low.¹⁵⁶ Given these two additional factors, it is possible that no amount of money would ever be enough to make it worthwhile for a rational candidate to forgo public funds when the triggered matching fund provision was intact.

Unless states enact a legislative solution to the public financing systems broken by *AFE*, it is likely participation rates will continue to decline over time as candidates better understand the various incentives and downsides of participating in public financing in a post-*AFE* world.

III.

THE BUCKET PROVISION

The bucket provision is a new policy prescription introduced in this article that is designed to offer a path forward in the wake of *AFE*. This Part will describe how the bucket provision would work and discuss how it addresses the policy problems caused by *AFE*, before turning to analyze why it can survive judicial review in light of *Buckley*, *Davis* and *AFE*.

It is important to note that the bucket provision is not a perfect fix, and it does not solve all problems—most importantly, unlike the original Arizona law, the bucket provision does not disincentivize third party expenditures. Additionally, although there are adaptations that can be created for primaries and third party candidacies, the concept is intended for application in the most common type of election in the United States: a general election with one serious candidate from each major party. That being said, despite its limitations, the bucket provision, if enacted, will go a long way to reverse the adverse consequences of *AFE*.

155. See Chris W. Bonneau & Damon M. Cann, *Campaign Spending, Diminishing Marginal Returns, and Campaign Finance Restrictions in Judicial Elections*, 73 J. POL. 1267, 1267 (2011); see also Walter Shapiro, *Let's Demystify the Power of Money in Politics*, BRENNAN CTR. FOR JUST. (Apr. 17, 2014), <http://www.brennancenter.org/blog/lets-demystify-power-money-politics>. In any campaign, the difference between one piece of direct mail and three is significant. The difference between ten pieces of mail and twelve will be far less significant. Likewise, the ability to run an hourly TV commercial on the local channel in the last two weeks can be pivotal, but the ability to run TV ads every ten minutes as opposed to every hour will only have a marginal impact.

156. For instance, in Connecticut, Republican gubernatorial candidate Tom Foley, who is independently wealthy, chose not to participate in public financing in 2010 when the program was relatively new, but he did choose to participate when he ran for governor a second time in 2014. Mark Pazniokas, *GOP's Tom Foley Commits to Public Financing*, CONNECTICUT MIRROR, June 3, 2014, <http://ctmirror.org/2014/06/03/gops-tom-foley-commits-to-public-financing/>.

A. *How the bucket provision would work*

The basic idea of the bucket provision is simple. A set amount of public funds (the “bucket”) is designated for each race. If two major party candidates opt in, they split the bucket. If only one major party candidate opts in, that candidate receives the entire bucket.

Traditional lump sum financing systems allocate money on a per-candidate basis; the statutes specify how much each participating candidate will receive.¹⁵⁷ The bucket provision replaces this per-candidate approach with a per-race approach. Rather than designating a funding level for individual candidates, the state will create a “bucket” of money that is intended for expenditure in a particular race and distribute the entire bucket each cycle.

The critical innovation of the bucket provision is the means of distributing the grant to candidates. Assuming both major party candidates choose to participate, the grant (or the bucket) will be evenly distributed between them. However, if only one major party candidate chooses to participate, that candidate will receive the entirety of the bucket.

The size of the bucket could be determined in any number of ways. For example, states could set an inflation-adjusted spending level for each type of campaign (e.g. \$200,000 for State Senate seats and \$100,000 for State House seats). Alternatively, states could set funding levels on a district-by-district basis by calculating the bucket size using a formula based on population or historical campaign expenditure levels. Regardless of the specific mechanism, it is critical that the bucket size is reflective of the typical amount necessary to finance two competitive, major party, general election campaigns—if the bucket is too small, it will be ineffective.¹⁵⁸

In states that already have lump sum public financing, the bucket provision can easily be adopted without disturbing other elements of the state’s campaign finance law. The bucket provision does not require a particular mechanism for identifying qualifying candidates, so states could continue to use pre-existing qualifying mechanisms.¹⁵⁹ States could also preserve their fundraising and expenditure limitations on participating candidates, as well as the sections of their campaign finance law governing enforcement and oversight, debate

157. See, e.g., Citizens Clean Election Act, ARIZ. REV. STAT. ANN. §§ 16-940–61 (2012); Citizens Election Program, CONN. GEN. STAT. ANN. § 9-700–759 (2013); New York City Campaign Finance Act, New York City Campaign Finance Act, N.Y.C. Admin.Code §§ 3-703, 705–706 (2007); Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9005–9013.

158. MILLER, *supra* note 1, at 5.

159. For example, they could deem all major party general election candidates automatically qualified with no additional petitioning or fundraising requirements, as in the Presidential Election Campaign Fund, 26 U.S.C. § 9003, or they could impose a requirement that candidates raise a certain number of donations from donors within the district, raise a certain total sum of money, or collect a sufficient number of petition signatures from voters within the district.

requirements, and provisions to withhold or return money in uncompetitive races.¹⁶⁰

The bucket provision as described in this article is designed for the most common type of election in our country: a general election between two major party candidates. Although the bucket provision could be expanded for use in both primaries and general elections, it is not a legal requirement that states do so, because it is permissible to impose different forms of financing for primary and general elections,¹⁶¹ as well as different structures for major party and minor party candidates.¹⁶² If states implementing the bucket plan *do* choose to expand it to apply to third party candidacies or primaries, it is critical that the system avoids creating incentives for straw candidates to enter the race simply to “water down” the bucket in order to benefit a traditionally funded candidate. Adjustments could easily be made to the bucket provision so that it could include primaries¹⁶³ and third party candidacies¹⁶⁴ while avoiding these perverse incentives.

160. See, e.g., ARIZ. REV. STAT. ANN. § 16-952 (2012) (including provisions for one-party-dominant legislative districts).

161. See, e.g., Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9005–9013.

162. See *Green Party of Connecticut*, 616 F.3d 213, 248 (2d Cir. 2010).

163. States could simply preserve traditional lump-sum public financing for primaries, and grant each participating candidate a grant of the same size. Additionally, states could increase the size of the grant for all participating candidates in any primary if one participant chooses to forgo public funds.

Another more complex option would be to distribute the “primary” bucket to participating candidates based on the number of signatures from voters within the district they receive during a designated “petitioning period.” For example, let us assume that four candidates, A, B, C, and D, are on the ballot for the primary and the bucket size is \$100,000. Of the four candidates, three (A, B, and C) opt in by the specified date. During the petitioning period, A collects 2500 signatures and spends \$5000, B collects 3500 signatures and spends \$10,000, and C collects 4000 and spends \$20,000. Combined, all three candidates received 10,000 signatures. A would receive 25% of the grant (\$25,000) minus the \$5000 she already spent, totaling \$20,000. B would receive 35% of the grant (\$35,000) minus the \$10,000 she already spent, totaling \$25,000. C would receive 40% of the grant amount (\$40,000), minus the \$20,000 she already spent, totaling \$20,000. A, B, and C would face an expenditure limit equal to their grant. D would not face any expenditure limit, but by foregoing the petitioning process, D increased the proportion of the grant given to A, B, and C.

164. As the Court made clear in *Buckley*, the state has an interest in not funding hopeless candidacies. *Buckley v. Valeo*, 424 U.S. 1, 96 (1976). States that wish to provide public financing to third party candidates could simply limit the bucket to the major party candidates and use the current model employed in traditional lump-sum financing states, where third party candidates receive smaller lump sum grants.

Another more complex method would be to grant third party candidates a percentage of the bucket based on their party’s historical vote total. For example, if a third party candidate for governor received 10% of the vote, during the subsequent election, participating candidates from that party would be entitled to 10% of the bucket, with the remaining 90% split among participating major party candidates.

B. The bucket provision would effectively incentivize candidates to participate

The underlying public policy purpose for the bucket provision is the same as that of the triggered matching funds provision: incentivizing more candidates to participate. Although the Arizona model still provides some incentive for candidates to participate even without the triggered matching funds provision, candidates who are able to raise any modest amount in excess of the grant amount are unlikely to participate.

The bucket provision addresses the post-*AFE* reduction in participation incentives by effectively auto-doubling the standard lump sum grant in situations in which participating candidates are opposed by traditional candidates. A candidate considering whether to participate will no longer merely weigh the benefits of the grant against the costs. With the bucket provision the candidate must consider the additional downside of seeing their opponent's war chest instantly doubled.

Recalling the analysis from Part I.C, under the bucket provision, a rational candidate would only forgo public financing if she could anticipate being able to raise the total amount of the bucket ($2 \times G$), adjusted by the same variables discussed previously (the intangible benefits of public funding (B), the qualification costs (Q), the expected amount of private money the candidate anticipates being able to raise (M), and the intangible downsides of forgoing public funds (D), adjusted for the costs of private fundraising (c). As a result, a rational candidate will forgo public financing if the following is true:

$$M - (M \times c) - D > (2 \times G) + B - Q$$

or

$$M > \frac{(2 \times G) + B - Q + D}{1 - c}$$

Using the same assumptions as were used in the Ms. Smith hypothetical in Part I.C, we can similarly evaluate the effectiveness of the bucket provision. Assuming the total size of the bucket is \$200,000 (in other words, if both candidates participated, they would each receive \$100,000), Ms. Smith would only forgo public financing if she could anticipate spending M , calculated as follows:

$$M > \frac{\$200,000 + \$30,000 - \$10,000 + \$25,000}{1 - (0.15 + 0.1)}$$

$$\text{or } M > \$326,667$$

Because a rational candidate would only forgo public financing if she could anticipate being able to raise \$326,667, the bucket provision would shrink the pool of candidates who would rationally opt out, and induce participation more effectively than the lump sum financing system as it currently exists in states like Arizona, Connecticut, and Maine.

The bucket provision could further induce participation through a Prisoner's Dilemma effect. Consider a competitive general election between two candidates, both of whom anticipate being able to raise and spend roughly \$85,000. Let us further assume that the state would invest a total of up to \$100,000 in public funds. If the state used the Arizona model in a post-*AFE* world, it is possible neither candidate would participate—they could anticipate being able to privately spend \$85,000, significantly more than the \$50,000 they would each receive from the state. However, assuming the state implemented the bucket provision, if either candidate chose not to participate, the other candidate would be incentivized to participate and receive the \$100,000, more than either candidate could privately raise. As a result, both candidates would almost certainly participate. In Prisoner's Dilemma terms, they would both “betray” each other (i.e. participate) and publicly finance their campaign with the sub-optimal portion of the bucket rather than “cooperate” by privately financing and risk facing an opponent funded with the full bucket.

The bucket provision is not a perfect fix, nor does it resolve as many problems as the original triggered matching fund provision. Most importantly, it does not deter independent expenditures, as the original law in Arizona and most similar laws did.¹⁶⁵ In the wake of *AFE*, it was clear that the Supreme Court would not tolerate any law that placed a burden on the decision of an independent entity to exercise political speech by spending money on a campaign. However, unless the Court revisits the limitations currently imposed by its campaign finance jurisprudence,¹⁶⁶ neither the bucket provision nor any other model of public campaign financing can fully replicate the disincentives placed on independent expenditures by the original triggered matching fund provision.

Although the bucket provision does not deter independent expenditures, the bucket provision (assuming it is adequately funded) will provide enough resources to ensure candidates can effectively communicate with voters.

165. See, e.g., ARIZ. REV. STAT. ANN. § 16-952 (1998) (repealed 2012).

166. It is possible the Court may revisit some of these issues in light of Justice Scalia's passing.

Guaranteeing candidates a sufficiently large campaign budget is more important than providing a dollar-for-dollar match for privately raised money.¹⁶⁷ After the total spending in a race exceeds a certain amount, the effectiveness of each additional dollar will diminish—in other words, an additional \$10,000 of campaign spending on top of the first \$2 million will have less of an effect on election outcomes than the first \$10,000 a candidate spends.¹⁶⁸

Despite the fact that the bucket provision cannot match independent expenditures, it is nevertheless nearly as effective at equipping participating candidates as the original Arizona law with triggered matching funds. Under the original Arizona law, if a participating candidate ran against a traditional candidate and was also opposed by overwhelming independent expenditures, the participating candidate would receive at most triple the original grant amount. Under the bucket provision, that candidate would still receive double the original grant amount. Admittedly three is bigger than two. But, ultimately, a participating candidate facing large independent expenditures will be nearly as well equipped as she would have been under the original Arizona law.¹⁶⁹

The bucket provision would not necessarily cost more than other models of public financing. The bucket provision would not commit any additional money beyond what states currently commit in simple lump-sum financing systems, and it commits less money than the triggered matching fund provision. Furthermore, assuming both the original law and the bucket provision successfully accomplish their shared goal—incentivize participation—the cost would be identical under both models.

Given the plummeting participation rates in public campaign financing systems, states that currently use lump sum financing systems, such as Arizona, Connecticut, and Maine, must create new incentives for candidates to participate. The bucket provision provides an easy path forward for those states.

Additionally, since *AFE*, many states have repealed or undermined their systems of publicly financed elections.¹⁷⁰ In some of those states, the repeals may have been motivated by a belief that publicly financed elections can no longer function in a post-*AFE* world. In other states, the motivation was based on a partisan desire to advantage candidates who have the ability to raise large sums of money. Regardless of the motivations behind repeals of public campaign financing, good government advocates have been unable to effectively defend laws hobbled by the *AFE* decision. The bucket provision provides a new working model that advocates can point to as a viable path forward.

167. The effect of diminishing returns is even more pronounced when candidates are opposed by independent expenditures. Due to coordination issues and higher costs for media buys, one dollar spent by an independent organization is less effective than one dollar spent by a campaign.

168. *See supra* note 154.

169. *Id.*

170. *See supra* note 134.

C. *There are strong arguments to support the constitutionality of the bucket provision*

There are strong arguments to defend the bucket provision's constitutionality, and these arguments should be more than sufficient to justify its implementation.

As an initial premise, it is clear that the Court does not intend to disturb its long-accepted holding as articulated in *Buckley* that traditional lump-sum public financing systems are permissible.¹⁷¹ The *Buckley* Court rejected a First Amendment objection to public financing, noting that public financing furthers a significant governmental interest: “[Public financing] is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.”¹⁷² The Court also rejected an Equal Protection challenge premised on the fact that major party candidates receive more support than minor party candidates, because Congress had an interest in “not funding hopeless candidacies with large sums of public money.”¹⁷³

In *Davis*, the Court was careful to distinguish the permissible system of public financing upheld in *Buckley* from the constitutionally problematic Millionaire's Amendment, explaining that “[i]n *Buckley*, a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures. . . . [T]he choice imposed [by the Millionaire's Amendment] is not remotely parallel to that in *Buckley*.”¹⁷⁴

The constitutionality of public financing was again noted by the Court in *AFE*.¹⁷⁵ Although *AFE* did not include a facial challenge to the constitutionality of public financing in general, the same logic that the *Buckley* Court used to uphold the Presidential Election Campaign Fund was used to describe the core of the Arizona lump-sum financing model.¹⁷⁶

Perhaps the most telling sign that the Court does not intend to question the constitutionality of public financing came in its denial of certiorari of the *Green Party of Connecticut* case shortly after *AFE*.¹⁷⁷ In *Green Party of Connecticut*, there was a facial challenge to the constitutionality of Connecticut's Citizens

171. *Buckley v. Valeo*, 424 U.S. 1, 91 (1976) (holding that “Congress was legislating [public financing] for the ‘general welfare’ to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising. Whether the chosen means appear ‘bad,’ ‘unwise,’ or ‘unworkable’ to us is irrelevant; Congress has concluded that the means are ‘necessary and proper’ to promote the general welfare.”).

172. *Id.* at 92–93.

173. *Id.* at 96.

174. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 740–41 (2008).

175. *AFE v. Bennett*, 131 S. Ct. 2806, 2827 (2011).

176. *Id.*

177. *Green Party of Conn. v. Lenge*, 131 S. Ct. 3090, 3090 (No. 10–795) (2011).

Election Program, which was substantially similar to the Arizona model.¹⁷⁸ The Second Circuit struck down Connecticut's triggered matching fund provision, but did not strike down its public financing system.¹⁷⁹ If the Court had any interest in reconsidering the constitutionality of public financing, the *Green Party of Connecticut* case would have provided a perfect opportunity.

Although the constitutionality of public financing is well established, we have nonetheless seen rapid changes in campaign finance jurisprudence over the last decade.¹⁸⁰ The current doctrinal distinctions between the treatment of expenditures and contributions that the Court established in *Buckley* continue to persist not because a majority of the Court agrees with them, but because no 5-vote majority can agree on a better approach.¹⁸¹ Recent campaign finance decisions have left the Court sharply divided.¹⁸² In light of Justice Scalia's passing, there is a substantial degree of uncertainty with respect to the direction the Court might take on these issues,¹⁸³ and it is impossible to predict with any degree of certainty how the Court would respond to any new form of campaign finance regulation.

Although the bucket provision is distinct from the forms of public financing considered in previous cases, it faces at least three potential constitutional obstacles: (1) the First Amendment; (2) the Equal Protection Clause; (3) the doctrine of unconstitutional conditions. This section explains the arguments that

178. *Green Party of Conn. v. Garfield*, 616 F.3d 213, 223–24 (2d Cir. 2010).

179. *Id.* at 248–49.

180. *Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (striking down individual contribution limits seen as too low); *Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 365–66 (2010) (striking down regulations barring third party associations from making independent election expenditures); *McCutcheon v. Fed. Elec. Comm'n*, 134 S. Ct. 1434, 1462 (2014) (striking down aggregate contribution limits).

181. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 372 (4th ed. 2012) (“[A] clear majority of Justices seemed prepared to overturn *Buckley*. They were divided, however, between the group represented by Justice Thomas, who sought to overturn *Buckley*'s restrictions on contributions, and the group represented by Justice Stevens, who would have overturned *Buckley*'s protections of expenditures. Both of the anti-*Buckley* wings are united by rejecting the core insight of *Buckley* that different First Amendment regimes should govern the contributions and expenditures side of electoral regulation. But they are divided by an inability to agree on the direction in which the *Buckley* edifice should fall.”).

182. *Randall*, 548 U.S. 230 (three-vote plurality; three separate concurrences and three justices dissenting); *Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008) (four Justices dissenting in part); *Citizens United*, 558 U.S. 310 (five-four decision); *AFE*, 131 S. Ct. 2806 (2011) (five-four decision); *McCutcheon*, 572 U.S. (four-vote plurality with four-vote dissent).

183. There are many different directions a new Court might take. For example, in light of a decision holding that the First Amendment requires unique treatment of candidate debates due to their special role in democratic politics, *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 669, 675–76 (1998), some scholars have argued that other aspects of electoral politics—like campaign financing—should be subject to election-specific First Amendment principles. See Richard H. Pildes, *Elections as a Distinct Sphere Under the First Amendment*, MONEY, POLITICS, AND THE CONSTITUTION: BEYOND CITIZENS UNITED 19 (M. Youn ed. 2011).

could be used to defend the constitutionality of the bucket provision against each of these potential challenges.

I. First Amendment

A First Amendment challenge to the bucket provision would argue that the bucket provision burdens the free speech of traditional candidates in the same manner as the triggered matching fund provision at issue in *AFE*. Challengers would argue that the bucket provision simply relocates the same unconstitutional incentive that was struck down in *AFE*. Any defense of the bucket provision must, therefore, distinguish it, in a constitutionally meaningful way, from the triggered matching fund provision.

a. The decision to participate does not trigger strict scrutiny.

The Court in *AFE* drew a sharp line between “expenditure triggers,” which raise strict scrutiny,¹⁸⁴ and lump sum grants, which do not place burdens on the First Amendment and do not warrant strict scrutiny.¹⁸⁵ Unlike *Davis* and *AFE*, which prohibit the state from creating a triggered response to a private decision to spend campaign funds, the bucket provision distributes funds in a lump sum without any trigger.

The absence of any mechanism triggered by private expenditures is critical to the constitutionality of the bucket provision. In *Davis*, when a candidate spent money, the state responded by raising contribution limits on the opponent.¹⁸⁶ Similarly, in *AFE*, when a traditional candidate spent money, the state responded by giving matching funds to the opponent.¹⁸⁷ However, under the bucket provision, when a traditional candidate spends money, the state does nothing.

Timing plays an important role in the analysis of public financing systems. During the *AFE* oral argument, Justices Ginsburg¹⁸⁸ and Alito¹⁸⁹ both described

184. Spencer, *supra* note 6, at 303-04; *AFE*, 131 S. Ct. 2806, 2817–20, 2824, 2828; *see also Davis*, 554 U.S. 724, 743–44.

185. *AFE*, 131 S. Ct. at 2824 (“It is not the amount of funding that the State provides to publicly financed candidates that is constitutionally problematic in this case.”).

186. *Davis*, 554 U.S. at 741 (the Millionaire’s Amendment was struck down because it forced candidates “to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.”).

187. *AFE*, 131 S. Ct. at 2818 (candidates were forced to choose between their First Amendment right to engage in unfettered free speech or suffer the burden imposed by a dollar for dollar match on those expenditures).

188. Transcript of Oral Argument at 4–5, *AFE*, 131 S. Ct. 2806 (2011) (Nos. 10-238, 10-239) (“JUSTICE GINSBURG: Mr. Maurer, you—you don’t have any objection, you wouldn’t have any objection, if Arizona trebled the amount at the outset? In other words, there was a maximum amount, the so-called matching funds; if it were given all in one lump and the publicly funded candidate was told, give it back if you don’t use it, that would be okay? Mr. Maurer: That would be constitutional under *Davis*, Your Honor.”).

hypothetical “lump sum” laws with some characteristics similar to the bucket provision. In both hypothetical scenarios posed, the Justices suggested that timing is critical to the constitutional analysis: lump-sum grants distributed at the outset of an election cycle are permissible, and only matching funds directly triggered by an act of protected speech unconstitutionally burden the First Amendment.

Under the bucket provision, the decision point for the private candidate comes not when the candidate is making the constitutionally-protected decision of whether to exercise free speech, but when the candidate is choosing whether to participate in public financing. Unlike the triggered matching fund provision, where private candidates’ decisions to spend are constantly burdened by the knowledge of the trigger, under the bucket provision, after a candidate decides to forgo public financing, that candidate is *free* of any constraints or burdens. Although the bucket provision is not identical to the models described by Justices Ginsburg and Alito, their analysis suggests the bucket provision would be permissible because it provides funds at the outset rather than in response to a private expenditure made during the campaign.

b. The bucket provision does not include the specific aspects of the Arizona model that the Court found most problematic.

The Court’s majority opinion in *AFE* addressed three specific aspects of the Arizona model which made it particularly constitutionally problematic.¹⁹⁰ The bucket provision is designed specifically to avoid these three issues.

First, the Court explained that “[t]he benefit to the publicly financed candidates is the direct and automatic release of the public money.”¹⁹¹ The bucket provision eliminates this concern. By the time a traditional candidate exercises free speech by spending money, the grant would have already been distributed and there will be no additional benefit to the participating candidate triggered by traditional candidate’s expenditure.

189. *Id.* at 15–16 (“JUSTICE ALITO: Would there be anything unconstitutional about a system that worked roughly like this? At the beginning—at some point prior to each election cycle, the commission that supervises this law would make a calculation about how much money would be needed for a candidate in a gubernatorial race or a State senate race or an assembly race, if that’s what it’s called in Arizona, to get that candidate’s message out to the electorate, and that would be the amount of the public funding, period. Mr. Maurer: That would be a constitutional system, Your Honor. There is no constitutional objection or at least we’re not raising any constitutional objection to the idea that there is a - that public financing means that people can’t run effective races. You can have a public financing system with sufficient funds to run an effective race. But what you cannot do is exactly what Arizona has done, which is turn my act of speaking into the vehicle by which my political opponents benefit.”).

190. *AFE*, 131 S. Ct. at 2818–19. See Part II.A.3 for additional discussion of these issues.

191. *AFE*, 131 S. Ct. at 2818–19.

Second, the Court explained that “the matching funds provision can create a multiplier effect.”¹⁹² In other words, because the provision applied with equal force in races with three or more candidates, it granted dollar-for-dollar matches to each participating candidate every time a traditional candidate spent money over the limit. The Court expressed the view that this multiplier effect was highly problematic because it could allow public funds to balloon.¹⁹³ The bucket provision also eliminates this concern. There is no multiplier effect under the bucket provision because there would be a predetermined and specific bucket available for each race, rather than an undetermined sum triggered only when a traditional candidate chooses to spend money.

The Court’s final concern was that “[a]ll of this is out of the privately financed candidate’s hands.”¹⁹⁴ The Court was concerned that triggered funds would be distributed when an independent expenditure was made on behalf a traditional candidate.¹⁹⁵ Because the traditional candidate had no control over the independent expenditure, the decision to engage the trigger would be out of the hands of the traditional candidate.¹⁹⁶ This is also not an issue with the bucket provision because there is no matching or trigger for independent expenditures. The decision of whether or not to participate is solely in each candidate’s hands.

c. The decision to participate is an administrative decision not afforded First Amendment protection.

The decision of whether to participate in public financing is no different than the decision of an organization to select a particular tax status; for example, filing as a nonprofit under I.R.C. § 501(c)(3). In both cases, the actor signs away certain constitutional rights: the participating candidate waives the right to make unlimited expenditures, and the § 501(c)(3) waives the right to engage in political campaign speech. In both cases, the actor also receives certain pecuniary benefits: the participating candidate receives the grant of public funds, and nonprofit receives a subsidy in the form of tax deductible contributions.

Courts have repeatedly held that the decision to file as a nonprofit under the provisions of § 501(c) does not burden the First Amendment.¹⁹⁷ Likewise, the

192. *Id.* at 2819.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *See, e.g.,* Bob Jones Univ. v. United States, 461 U.S. 574, 602–04 (1983) (revocation of university’s tax exempt status because it utilized discriminatory policies did not violate First Amendment); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548 (1983) (tax exemption for nonprofits that do not engage in substantial lobbying activities does not violate the First Amendment); *Church of Scientology of Cal. v. C.I.R.*, 823 F.2d 1310, 1320–21 (9th Cir. 1987) (express conditions of § 501(c)(3) do not violate the First Amendment); *Taxation With Representation v. United States*, 585 F.2d 1219, 1223 (4th Cir. 1978) (nonprofit corporation’s freedom of speech and right to petition Congress were not impaired by lobbying proscriptions in

analogous decision to voluntarily participate in public financing should not be seen as an act that implicates the First Amendment.

d. Evidence demonstrates that triggered funds have no chilling effect on speech.

The Court does not *need* empirical evidence to determine that a law burdens the First Amendment.¹⁹⁸ It may, however, have trouble finding a First Amendment burden when faced with affirmative evidence demonstrating the absence of any such burden.

After *AFE*, a group of social scientists studied the impact of triggered matching funds by quantifying and comparing the degree to which the provision chilled speech both before and after the *AFE* decision.¹⁹⁹ This study concluded that the triggered matching funds provision did not have a chilling effect on speech.²⁰⁰

Although it is unlikely this Court would revisit its holding in *AFE* based on this study, statistical evidence like this could be persuasive in the defense of future models of campaign financing. Advocates can argue that the *AFE* decision gave us the opportunity to quantify the effect that public financing models have in deterring candidates from engaging in free speech, and now that we are equipped with this information, the Court no longer needs to speculate as to whether triggered funds actually have a chilling effect.

e. The bucket provision serves a compelling state interest.

Despite the structural differences between the bucket provision and the triggered matching funds provision at issue in *AFE*, it is still possible that the bucket provision could be seen by this Court to burden the First Amendment because, like the triggered matching fund provision, the amount of funds received by the participating candidate hinges on the decision of the traditional candidate. Although any constitutional defense of the bucket provision should argue that the decision of the traditional candidate to opt out does not burden the First Amendment, the Court simply might not accept that argument, thus shifting

§ 501(c)); *Christian Echoes Nat. Ministry, Inc. v. United States*, 470 F.2d 849, 856–57 (10th Cir. 1972) (withholding tax exempt status from religious and educational organizations involved in substantial activity intended to influence legislation does not burden the free exercise clause); *Marker v. Shultz*, 485 F.2d 1003, 1006–07 (D.C. Cir. 1973) (grant of tax exemption to union did not constitute kind of establishment of political support that is prohibited by the First Amendment).

198. *AFE*, 131 S. Ct. at 2823 (“As in *Davis*, we do not need empirical evidence to determine that the law at issue is burdensome.”) (citing *Davis*, 554 U.S. at 738–40).

199. See Dowling, Enos, Fowler & Panagopoulos, *Does Public Financing Chill Political Speech?*, *supra* note 133, at 12.

200. *Id.*

the burden to the state to identify a “compelling state interest” to justify the burdens imposed by the bucket provision.²⁰¹

In *AFE*, the Court emphasized that it has “repeatedly rejected the argument that the government has a compelling state interest in leveling the playing field.”²⁰² The Court examined the mechanism of the triggered matching fund provision: it ensures that campaign funding is equal, and even refers to the funds distributed by the trigger as “equalizing funds.”²⁰³ The Court explained that leveling electoral opportunities is a “dangerous enterprise” that cannot justify burdening protected speech.²⁰⁴

The mechanism of the bucket provision serves a different purpose than the mechanism of the triggered matching fund provision. Unlike the triggered matching fund provision, the bucket provision is not designed to equalize funds. Rather, it is designed to roughly calibrate the grants to reflect when a particular race is competitive.

In uncompetitive elections, both candidates would almost certainly participate, and the bucket would be split. However, in extremely competitive elections, it becomes increasingly possible that one candidate will not participate. In a traditional lump sum financing system, the state is unable to distinguish between uncompetitive and competitive elections. However, the bucket provision does distinguish between uncompetitive and competitive elections by injecting additional funds into competitive elections. In other words, the mechanism of the bucket serves as a proxy or placeholder for a competitive election.

The state’s purpose in enacting the bucket provision is not to equalize spending, as it was under the triggered matching fund provision. Rather, the state’s purpose is to create a constitutionally permissible lump-sum financing system that is cognizant (albeit roughly) of the competitiveness of an election. Even if the bucket provision is found to impose some burden on the First Amendment,²⁰⁵ the burden could be justified by a permissible state interest in appropriately calibrating the public financing system rather than an impermissible interest in equalizing campaign funds.

2. *Equal Protection*

An Equal Protection challenge will argue that the bucket provision treats different groups of candidates differently, and that such disparate treatment is

201. *See, e.g., AFE*, 131 S. Ct. at 2824.

202. *Id.* at 2825 (internal quotation marks omitted).

203. *Id.* at 2825.

204. *Id.* at 2826.

205. There are many reasons to believe that the burden, if present, would be significantly less severe than the burdens imposed by the triggered matching fund provision. *See supra* Part III.C.1.b, d.

unsupported by any rational basis.²⁰⁶ This claim would likely fail, however, because the Court in *Buckley* explicitly affirmed a system of publicly financed elections that affords different treatment, in the form of different levels of funding, to different groups of candidates.²⁰⁷ The Presidential Election Campaign Fund established three distinct categories of candidates, each of which received different treatment.²⁰⁸ Category 1 contained participating major party candidates, who received the full statutory grant.²⁰⁹ Category 2 consisted of participating minor party candidates, who received a percentage of the grant given to major party candidates.²¹⁰ Category 3 consisted of traditional candidates.

The Court stated that “the Constitution does not require Congress to treat all declared candidates the same for public financing purposes.”²¹¹ Instead, the Court only required the government to articulate a rational basis for affording different levels of public support to different categories of candidates.²¹² The Court accepted the rational basis that Congress had an “interest in not funding hopeless candidacies with large sums of public money.”²¹³

The bucket provision similarly groups candidates into three categories: Category 1 contains participating candidates who are opposed by other participating candidates. Category 2 contains participating candidates who face traditional opponents. Category 3 contains traditional candidates. Like the Presidential Election Campaign Fund, each category receives a different level of funding: category 1 receives a grant of ½ of the bucket; category 2 receives the entire bucket; and category 3 receives nothing. Many state interests could be put forward sufficient to justify the bucket provision under rational basis review, including the anticorruption interest,²¹⁴ the equality interest,²¹⁵ and the participation interest.²¹⁶

206. Because no protected class is disadvantaged by the bucket provision, the provision would only be subjected to rational basis review under Equal Protection analysis. *See, e.g.,* *Romer v. Evans*, 517 U.S. 620, 631 (1996) (explaining rational basis review).

207. *Buckley v. Valeo*, 424 U.S. 1, 94–95 (1976).

208. Note that Courts and commentators addressing the Presidential Election Campaign Fund have not explicitly labeled each of the three possible treatments of candidates as “categories” This categorical characterization is consistent with the structure of the Presidential Election Campaign Fund. *See* 26 U.S.C. § 9004(a)(1)–(2).

209. 26 U.S.C. § 9004(a)(1).

210. *Id.* at § 9004(a)(2)(A) (The percentage is equal to the ratio of the popular vote received by that minor party in the previous election).

211. *Buckley*, 424 U.S. at 97.

212. *Id.* at 94–96.

213. *Id.* at 96.

214. *See* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 387–97 (2009).

215. *See* Richard L. Hasen, *Political Equality, the Internet, and Campaign Finance Regulation*, FORUM, Apr. 2008, <http://electionlawblog.org/archives/hasen-forum-final.pdf>; *Jocelyn*

3. *Doctrine of unconstitutional conditions*

The unconstitutional conditions doctrine is a rule that limits the government's ability to condition a person's receipt of a governmental benefit on the waiver of a constitutionally protected right.²¹⁷ This doctrine could be used to attack most public financings systems in the United States by arguing that public financing unconstitutionally coerces candidates to participate, because it conditions public funds on their waiver of their right to unlimited campaign expenditures. The claim might be slightly more robust in the context of the bucket provision because the provision constitutes a greater inducement than simple lump-sum financing.

The Court has never considered whether public financing violates the doctrine of unconstitutional conditions; however, three appellate courts have rejected this theory.²¹⁸ The Court has only applied this doctrine within other First Amendment contexts when the government required recipients of public subsidies to engage in specific speech.²¹⁹ The Court has chosen *not* to apply the doctrine to content-neutral First Amendment restrictions.²²⁰ Because the expenditure cap in the bucket provision and other forms of public financing is content-neutral, it is unlikely this constitutional attack would be successful.

D. *Good government reformers and advocates for public financing should embrace the bucket provision.*

1. *The bucket provision is preferable to small donor financing systems.*

In the wake of *AFE*, the political momentum within the reform community has moved away from lump sum public financing and coalesced in support of

Benson, Saving Democracy: A Blueprint for Reform in the Post-Citizens United Era, 40 *FORDHAM URB. L.J.* 723, 726–29.

216. See Spencer Overton, *The Participation Interest*, 100 *GEO. L.J.* 1259, 1273–76 (2012).

217. See Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism*, 70 *B.U. L. REV.* 593, 593–94 n.2 (1990); see also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 *Harv. L. Rev.* 1413, 1422–23 (1989) (explaining the unconstitutional conditions doctrine)

218. See *Daggett v. Comm'n on Gov't Ethics & Election Practices*, 205 F.3d 445, 472 (1st Cir. 2000); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552–53 (8th Cir. 1996); see also *Green Party of Conn. v. Garfield*, 616 F.3d 213, 230 (2d Cir. 2010).

219. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2330–32 (2013) (an Act requiring organizations receiving grants to employ a policy expressly opposing prostitution violated the doctrine of unconstitutional conditions, because the requirement was not a content-neutral imposition of the First Amendment).

220. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (holding that Solomon Amendment, which required law schools to permit military recruiters on campus, did not violate the doctrine of unconstitutional conditions partially because “[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything”).

small donor matching programs like the New York City model.²²¹ Moving forward, progressive reformers should stop advocating for small donor financing and should instead embrace lump sum financing with a bucket provision.

In particular, in 2014, a robust coalition of advocates embarked on an ultimately unsuccessful campaign to enact a New York City-style public financing system at the state level in New York.²²² In the proposed state law, up to \$250 of each individual's donations to participating candidates would be matched 6:1.²²³ Like most forms of publicly financed elections, participating candidates would adhere to an expenditure cap.²²⁴ The legislature and governor ultimately agreed to implement a small "pilot" program: an optional small donor matching system for candidates for the position of State Comptroller.²²⁵ The program was widely criticized²²⁶ and is unlikely to become a successful model for broader implementation.²²⁷

2. *Small donor matching systems do not effectively incentivize competition.*

Studies have shown that systems which fully fund campaigns, like lump sum financing systems, lead to heightened competition, whereas models that

221. See generally NY LEAD, <http://nylead.org/> (last visited Jan. 21, 2016); *Public Financing*, BRENNAN CTR. FOR JUST., <http://www.brennancenter.org/issues/public-financing>; MILLER, *supra* note 1, at 2, 153 ("New York system is a viable reform tool in the post-McComish era since its matching funds are triggered by the activities of participating candidates—regardless of the activities of those who opt out."); Briffault, *supra* note 24; Overton, *supra* note 6; Steele, *supra* note 149, at 496–97 (2012); Holly Anderson, *How To Reach The Goldilocks Solution Without Feeding The Alligators: Why The Multiple-Matching Provision Is The Key To Public Campaign Financing*, 15 T.M. COOLEY J. PRAC. & CLINICAL L. 169, 170–71 (2014); Sample, *supra* note 77, at 395; Janos Marton, *A National Model Faces New Challenges: the New York City Campaign Finance System and the 2013 Elections*, 40 FORDHAM URB. L.J. 673, 674–76 (2012); Benson, *supra* note 215, at 750–57 (2012); Mark Schmitt, *John Roberts Didn't Kill Campaign Finance Rules. Modern Politics Did.*, NEW REPUBLIC (Apr. 14, 2014), <http://www.newrepublic.com/article/117269/mccutcheon-ruling-politics-blew-campaign-finance-not-court>.

222. NY LEAD, *supra* note 221.

223. Press Release, Assembly Speaker Sheldon Silver, Assembly Passes 2013 Fair Elections Act (May 7, 2013, 7:06 AM), <http://assembly.state.ny.us/Press/20130507/>.

224. *Id.*

225. *Public Campaign Finance Limited to Comptroller*, POLITICO N.Y. (Mar. 29, 2014), <http://www.politico.com/states/new-york/albany/story/2014/03/public-campaign-finance-limited-to-comptroller-011944>.

226. See, e.g., Ian Vandewalker, *Albany's Whiff at Public Campaign Financing*, BRENNAN CTR. FOR JUST. (Apr. 13, 2014), <http://www.brennancenter.org/analysis/albanys-whiff-public-campaign-financing> ("'[P]ilot' is how the plan for public campaign financing in the 2014 state comptroller election is being characterized. Unfortunately, it's destined to fail.")

227. The current Comptroller, an avid supporter of public financing, chose not to participate during the 2014 elections because he thought the program was ineffective. Susanne Craig, *Comptroller to Opt out of Public Financing System*, N.Y. TIMES (Apr. 6, 2014), <http://www.nytimes.com/2014/04/07/nyregion/comptroller-to-forgo-financing-by-public.html>.

only partially fund campaigns, like small donor matching systems, are less effective at inducing candidates to run for office.²²⁸

In New York City, public financing has extremely high participation rates—in the most recent election, 92% of eligible candidates participated.²²⁹ But the high participation rates have not translated to competitive elections or high turnout; in fact, local elections in New York City are notably uncompetitive²³⁰ and voter turnout is anemic.²³¹ Critics of New York City's law argue that small-donor matching is nothing more than a form of incumbency protection, because challengers lack the institutional network of small donors that incumbents and members of the party establishment can easily access.²³²

Unlike small donor matching systems, the bucket provision cannot be attacked as a form of incumbency protection. A candidate's ability to finance her campaign would not be predicated on the support of an institutional network of small donors.

3. *Small donor matching systems do not reduce the amount of time that candidates must spend raising money.*

The considerable amount of time that candidates spend raising money is one of the most problematic aspects of our campaign finance system.²³³ Small donor matching systems do not ameliorate this problem. In fact, because candidates are forced to solicit a greater number of donors for money, small donor financing might actually increase the amount of time that candidates devote to fundraising. In New York City's 2013 local elections, even though nearly every candidate

228. MILLER, *supra* note 1, at 37.

229. NEW YORK CITY CAMPAIGN FINANCE BOARD, 2013 POST ELECTION REPORT 5 (2014).

230. In 2009, only 5 of 51 winning City Council candidates won by less than a 2-to-1 margin. See General Election Results – November 3, 2009, BOARD OF ELEC., <http://vote.nyc.ny.us/html/results/2009.shtml>. In 2013, that number increased to 7. See General Election Results - November 5, 2013, BOARD OF ELEC., <http://vote.nyc.ny.us/html/results/2013.shtml>.

231. Sam Roberts, *New York: Voter Turnout Appears to be Record Low*, N.Y. TIMES (Nov. 6, 2013), http://www.nytimes.com/news/election-2013/2013/11/06/new-york-turnout-appears-headed-for-record-low/?_r=0.

232. See, e.g., Celeste Katz, *Document Drop: George McDonald Vs. The CFB*, N.Y. DAILY NEWS, Jan. 8, 2013, <http://www.nydailynews.com/blogs/dailypolitics/document-drop-george-mcdonald-cfb-blog-entry-1.1693237> (quoting former Republican mayoral hopeful George McDonald arguing that under the New York City model, "Without a personal fortune or an preexisting base of donor support, it's impossible to raise the funds necessary to compete for the Mayor's office in New York.>").

233. See *supra* Part I.B.1.b.

participated in the City's small donor matching program,²³⁴ over 70% of the \$121 million spent by local candidates was still raised privately.²³⁵

Any successful system of public financing must significantly reduce the amount of time candidates devote to fundraising. Unlike small donor matching systems, the bucket provision does this: once a candidate qualifies, that candidate stops fundraising and focuses all of her time on what matters—talking to voters, developing policy prescriptions, meeting with community leaders, and attending events.²³⁶

4. *Small donor matching systems will exacerbate political hyper-polarization.*

Professor Richard Pildes argues that the current dysfunction in American democracy is caused by a form of polarization he calls “political fragmentation,” wherein power has been diffused away from the political parties as a whole and towards extreme fragments within each party.²³⁷ As a result we lack a “majority government,” making it difficult, if not downright impossible, to “generate the kind of concerted political action required for legislation.”²³⁸ Professor Pildes believes this phenomenon is caused, at least in part, by the polarizing impact of ideologically extreme individual donors.²³⁹

Professor Pildes relies on an extensive body of social science literature²⁴⁰ to demonstrate that individual donors are more ideologically extreme and more polarized than non-donors. In fact, small donors who contribute to individual candidates are even more ideologically extreme than “active partisans” who identify with a political party or donors to other entities like PACs or political parties.²⁴¹ As a result, Professor Pildes argues that New York City's system of small donor matching will “only exacerbate polarization,”²⁴² and he concludes that public financing systems through general revenues are far less likely to fuel partisan hyper-polarization and political fragmentation.²⁴³

234. NEW YORK CITY CAMPAIGN FINANCE BOARD, *supra* note 229, at 5.

235. *Campaign Finance Summary 2013 Citywide Elections*, N.Y.C. CAMPAIGN FINANCE BOARD, http://www.nycfb.info/VSAApps/WebForm_Finance_Summary.aspx?as_election_cycle=2013 (last updated Mar. 25, 2016).

236. *Cf. supra* Part I.B.1.b.

237. Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 809 (2014).

238. *Id.*

239. *Id.* at 825.

240. *Id.* at 825 n.62.

241. *Id.* at 825.

242. *Id.* at 850.

243. *Id.* at 827–28.

Unlike small donor matching, lump sum financing with the bucket provision will not aggravate polarization because financing will not be directly tied to contributions from small donors.

5. *Small donor matching systems do less to combat corruption and its appearance than other forms of public financing.*

Like all forms of public financing, small donor matching systems seek to limit the influence of wealthy donors. However, small donor matching systems only provide a portion of each campaign's budget and do not actually prevent candidates from continuing to solicit large contributions from wealthy donors.²⁴⁴ In contrast, lump sum financing with the bucket provision eliminates all large donations to participating candidates, allowing it to more effectively combat the undue influence of wealthy donors as well as the appearance of corruption.

Additionally, the New York City model is particularly prone to actual corruption and abuse.²⁴⁵ Conservative critics of small donor financing programs have repeatedly attacked small donor financing as a system that causes, rather than limits, corruption.²⁴⁶ Lump sum financing with the bucket provision cannot be abused in the same manner.

244. For example, under New York City's system, a candidate who receives a \$175 contribution will actually receive \$1050, and a candidate who receives a \$1000 contribution will actually receive \$1875. See N.Y.C. Admin. Code § 3-705.

245. This author has personally witnessed a perverse form of corrupt manipulation of small donor financing in New York City that is not possible under the bucket provision. Bad actors (for example, shady consultancies or corrupt political operatives and candidates) find "straw" candidates and "straw" donors to illegitimately extract public funds.

The bad actors hire straw donors to engage in nominal labor (for example, one day of canvassing). These individuals receive a sizeable payment from the bad actor for their services (perhaps \$300), and are expected to donate the maximum matchable amount to a straw candidate (\$175 in New York City). The donation qualifies for the six-to-one match and the straw candidate receives \$1050. The bad actor then extracts significant fees from the straw candidate. For each straw donor, the bad actor might receive as much as \$700 in public funds, the straw donor might walk away with \$100 or \$125 for one day of nominal work, and the straw candidates—who were never serious contenders and simply tools of the bad actors—pocket whatever is left.

A single bad actor could replicate this scheme with hundreds of canvassers across multiple campaigns, potentially pocketing millions of dollars each election cycle. To date, this unethical scheme has been subject to only limited investigation, prosecution, and press coverage. See Errol Louis, *The Matching Funds Free Money Hustle*, N.Y. DAILY NEWS (Aug. 14, 2014, 4:20 AM), <http://www.nydailynews.com/opinion/matching-funds-free-money-hustle-article-1.1902634>; see also Chris Glorioso, *Candidates Who Take Public Funds Rarely Pay Back Taxpayers*, NBC N.Y. (Apr. 1, 2011, 11:15 PM), <http://www.nbcnewyork.com/news/local/Candidates-Who-Take-Public-Funds-Rarely-Pay-Taxpayers-Back-119099959.html> (explaining another perverse mechanism in which small donor financing was misused for personal profit beyond legitimate campaign expenditures).

246. See David M. Mason, *No Cure for Corruption: Public Financing under Constitutional Constraints*, 10 ENGAGE 89, 91-92 (2009), <https://www.fed-soc.org/publications/detail/no-cure-for-corruption-public-financing-under-constitutional-constraints>; Stephen Edie, *The Phony Cure for New York Corruption*, N.Y. POST (Sept. 10, 2014, 2:15 AM), <http://nypost.com/2014/09/10/the-phony-cure-for-new-york-corruption/>.

Systems of lump sum financing with a bucket provision are not prone to the same forms of corruption that have plagued small donor financing systems.

6. *Reformers' critiques of lump sum financing are not applicable to the bucket provision.*

The reform community's critiques of lump sum financing are not applicable to the bucket provision. Academics and advocates within the reform community have criticized lump sum financing as ineffective at attracting candidates to participate.²⁴⁷ Unlike traditional lump sum financing, the bucket provision will be very effective at inducing candidate participation.²⁴⁸ The reform community ignored the many serious flaws with small donor financing and prematurely abandoned lump sum financing without considering ways to repair the model.²⁴⁹ In the wake of their defeat in the New York State Legislature, the campaign finance reform community should consider embracing the bucket provision.

7. *Other recent proposals for public financing are undesirable, unviable, or unconstitutional.*

Reformers in Maine attempted to fix the problems caused by *AFE* by championing a "requalifying" option.²⁵⁰ The proposal built on the original Maine law, which was substantially identical to the Arizona law and similarly lost its triggered matching fund provision after *AFE*.²⁵¹ The requalifying option would allow participating candidates to earn additional public grants beyond their initial allocation by collecting a sufficient number of \$5 donations from supporters within their district.²⁵²

While this proposal allows participating candidates who are outspent by private candidates to try to level the playing field, it does so at the expense of the core elements of the law itself. Participating candidates, who are supposed to be free of the burden of fundraising, are forced to continue fundraising in order to requalify. Rather than talking to voters, participating candidates are forced to

247. See, e.g., Overton, *supra* note 6, at 1718.

248. See *supra* Part III.B.

249. See, e.g., Overton, *supra* note 6, at 1718.

250. Press Release, Maine Citizens for Clean Elections, Clean Election Advocates Support "Requalifying" Proposal as Alternative to Matching Funds (Oct. 18, 2011), https://www.maineCLElections.org/sites/default/files/press_releases/2011/2011_10_18_MCCE_Press_Release_VLAHearingCEAmendment.pdf; see also Report on Maine Clean Election Act: Proposals to Improve Maine's Public Campaign Financing Program 2011, Maine Commission on Governmental Ethics and Election Practices, at A16 (Sept. 26, 2011), http://digitalmaine.com/cgi/viewcontent.cgi?article=1012&context=ethics_docs.

251. ME. REV. STAT. TIT. 21-A, § 1125.

252. See Edward Erikson, *Remember the Clean Elections Act*, HUFFINGTON POST (Dec. 28, 2013), http://www.huffingtonpost.com/edward-erikson/remember-the-maine-clean-_b_4505750.html; Ed Youngblood, *How to repair clean elections*, BANGOR DAILY NEWS (Oct. 14, 2011), <http://bangordailynews.com/2011/10/14/opinion/how-to-repair-clean-elections/>.

continue raising money. Furthermore, although this may provide some additional incentive for candidates to participate, it would not induce participation as effectively as the bucket provision.

One commentator has suggested sidestepping the *AFE* decision by tying triggered matching funds to individual contributions rather than campaign expenditures.²⁵³ Under this approach, after a traditional candidate raises a certain amount of money, any additional contributions to that candidate trigger a supplemental grant of funds to the participating candidate. Although this proposal does not burden the free speech of candidates like the triggered matching fund provision struck down in *AFE*, it still pushes the same unconstitutional burdens onto the free speech of the individual donors who choose to contribute to candidates. Therefore, it is unlikely it would pass constitutional muster in light of *Buckley* and *AFE*.

Unlike any alternative model, the bucket provision is politically viable.²⁵⁴ States that already employ lump-sum financing like Arizona, Connecticut, and Maine can “tweak” their system and enact the bucket provision as a routine amendment, rather than a new sweeping form of public financing. States without any form of public financing can point to the long history of effective lump sum financing to justify the efficacy of implementing this model. Unlike other forms of public financing, legislators would not need to start from scratch.

IV.

CONCLUSION

For decades, policymakers have attempted to implement public financing, but struggled to find constitutionally permissible mechanisms to effectively induce candidates to participate. When designing any system of public financing, policymakers need to carefully consider the benefits and downsides that play into the decision-making process of individual candidates.

The bucket provision is a constitutionally defensible, politically viable solution that accomplishes many of the policy goals set out by the reformers who champion public financing. It provides a powerful incentive for candidates to participate. It eliminates all fundraising activities for qualified candidates. It fosters political competition. Policymakers and advocates championing public financing should consider embracing the bucket provision.

253. Andrew Spencer, *Finding Goldilocks after AFE*, 48 ARIZ. ATT’Y 24, 28 (2012).

254. Another proposal for public financing is a “voucher” system, in which all voters receive a publicly funded voucher to donate to the campaign of their choice. Lawrence Lessig, *More Money Can Beat Big Money*, N.Y. TIMES (Nov. 16, 2011), <http://www.nytimes.com/2011/11/17/opinion/in-campaign-financing-more-money-can-beat-big-money.html>. This innovative approach has, however, been criticized as both unfeasible and unconstitutional. See Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550, 562-63 (2012); Sample, *supra* note 77, at 402; Pildes, *supra* note 237, at 825-28.