A TRIGGER TOO FAR?: THE FUTURE OF TRIGGER FUNDING PROVISIONS IN PUBLIC CAMPAIGN FINANCING AFTER DAVIS V. FEC

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INTRODUCTION

There are few sure things in life except death, taxes, and, it seems, skyrocketing political campaign costs.1 With each election cycle, campaign spending reaches new highs.2 Total election spending for

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1 I have contemporized a famous quote by Benjamin Franklin. See Letter from Benjamin Franklin to Jean Baptiste Le Roy (Nov. 13, 1789), in 10 THE WRITINGS OF BENJAMIN FRANKLIN, 1789–1790, at 68–69 (Albert Henry Smyth ed., Norwood Press 1907) (“[I]n this world nothing can be said to be certain, except death and taxes.”).

the 2010 midterms was enough to provide every American with a Big Mac and french fries. The increasing need for fundraising is problematic because, as the Supreme Court held in *Buckley v. Valeo* in 1976, candidate reliance on private contributions raises the specter of corruption, in which large contributors seek favors in return for their donations. It is no wonder that polls suggest Americans believe money is corrupting the political system and that they support public financing systems.

The *Buckley* Court provided a way to avoid the potentially corrupting influence of private campaign financing by upholding the constitutionality of public financing systems. But as private campaign spending keeps hitting new highs, public campaign financing becomes less and less of an attractive option for candidates. Publicly financed candidates, who are subject to expenditure limitations, risk not being heard in the face of high spending by an opponent. In 2008, Barack Obama became the first presidential candidate to decline to participate in public financing during the general election.

Election 2010, supra note 2.

424 U.S. 1, 26–27 (1976) (per curiam).

See, e.g., Stan Greenberg et al., Strong Campaign Finance Reform, GREENBERG QUINLAN RODNER RESEARCH, tbl.1 (Feb. 8, 2010), http://www.greenbergresearch.com/articles/2425/5613_Campaign%20Finance%20Memo_Final.pdf (finding a large majority of voters believe that “[m]embers of Congress are controlled by groups that fund campaigns” at the expense of ordinary citizens); Page, supra note 2, (discussing poll in which nearly three out of four Americans support maintaining the presidential election financing system with either voluntary or mandatory participation by candidates); Celinda Lake et al., Election Week Polling on Fair Elections Act and Money in Campaigns, LAKE RESEARCH PARTNERS (Nov. 4, 2010), http://fairelectionsnow.org/sites/default/files/11-2010-fairelections-polling.pdf (explaining that around three out of four voters believe that it is “very or somewhat urgent . . . to take action . . . to reduce the influence of wealthy special interests on our elections” and that the amount of money spent on political ads in 2010 “poses a real threat to the fairness of our elections and the ability of Congress to get results on our most important issues”) (internal quotation marks omitted).

*Buckley*, 424 U.S. at 96, 108.
since the system’s creation. Many have suggested that the presidential public financing system upheld in *Buckley* has simply become obsolete, at least for credible candidates; there are currently efforts seeking the system’s repeal.

In an era of ever-increasing campaign spending, states have also faced the challenge of structuring public financing systems for state elections which attract candidate participation. The solution relied upon by a number of states has been to include “trigger” (also known as “rescue” or “matching”) funding provisions in their public financing systems. Designed to enable a publicly financed candidate to remain competitive against a high-spending opponent, these critical provisions typically provide for the distribution of an additional subsidy to a participating candidate when his opponent crosses certain spending thresholds.

In the past, privately financed candidates brought challenges to rescue provisions on the grounds that they served as a burden on their speech in violation of the First Amendment. Such challengers argued that they were chilled from speaking because doing so could trigger the distribution of an additional subsidy to their opponent under a rescue provision. Almost uniformly, every circuit that considered this claim rejected it.

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9 Weintraub & Levine, supra note 2, at 475 (“Serious candidates will not return to the public financing system unless and until the program provides sufficient funding to enable participating candidates to be competitive with the amount of money a non-participating candidate can raise and spend.”); cf. FEC Press Release, supra note 2 (“The Obama campaign’s total receipts of $745.7 million for the 2008 election are equivalent to more than half of the $1.49 billion provided in public funds to all presidential candidates, parties, and conventions since the inception of the public funding program.”).
11 See discussion infra Part II-A.
12 Id.
13 Id.
14 Id.
15 Id.
This Comment explores the constitutionality of trigger provisions after the Supreme Court’s 5-4 decision in 2008 in *Davis v. FEC*.

The *Davis* case concerned the constitutionality of the “Millionaire’s Amendment” to the Bipartisan Campaign Reform Act of 2002. Under this provision, the contribution limits for a candidate for Congress were relaxed when the candidate faced an opponent who chose to self-finance his campaign. The self-financing candidate’s contribution limit, however, remained the same. The *Davis* Court found that the scheme imposed an “unprecedented penalty” on a self-financing candidate’s campaign speech because his spending would result in higher contribution limits for his opponent.

*Davis* was not a public financing case, but both courts and commentators have argued that its logic compels the conclusion that trigger provisions are now unconstitutional. In the aftermath of *Davis*, two circuits, the Second and the Eleventh, have found trigger provisions unconstitutional. The Ninth Circuit found Arizona’s trigger provision constitutional in *McComish v. Bennett*, but the Supreme Court has now agreed to hear the case, with many suggesting that the decision will be overturned.

There is much at stake, as matching funding is critical to ensuring the financial viability of, and participation in, public financing systems.

The Comment is divided into five main parts. The first part outlines the Supreme Court’s seminal decision in *Buckley*; its analysis is essential to any consideration of issues relating to campaign finance law. The second part discusses the lower court case law on rescue

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17 Id. at 728–29.
18 Id. at 729 & n.4.
19 Id.
20 Id. at 739.
21 See discussion *infra* Part IV.
22 Id.
23 *McComish v. Bennett*, 611 F.3d 510, 525 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 644 (Nov. 29, 2010) (mem.).
funding prior to *Davis*, which almost universally found such provisions to be constitutional. The third part looks at the Supreme Court’s decision in *Davis v. FEC*. The fourth part discusses the lower court case law after *Davis*. The fifth part closely analyzes the *Davis* decision to suggest that in fact, it does not make rescue provisions constitutionally problematic, and the Supreme Court should decide as much in *McComish*.

I. *Buckley’s First Principles: The Constitutionality of Contribution Limits, Expenditure Limits, and the Public Financing of Elections*

A. Background on *Buckley* and *FECA*

The Watergate scandal of the early 1970s illustrated the need for comprehensive campaign finance reform to eliminate political corruption. In 1974, Congress addressed “national cries for change” by substantially amending the Federal Election Campaign Act (FECA). Originally passed in 1971, FECA, as amended, contained both campaign contribution and expenditure limitations. The expenditure limitations consisted of several restrictions: A limit on the overall amount a political candidate could spend; a limit on the amount of personal or family funds a candidate could spend; and a $1000 limit on independent expenditures that a group could make on behalf of a candidate in a given election. The contribution limitations restricted individuals or groups from giving more than $1000 to a candidate per election and capped overall annual contributions by a given individual to federal candidates at $25,000. The modifications to FECA also expanded the existing public financing system for presidential elections, which provided participants with a public subsidy in

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28 Frasco, *supra* note 25, at 737.


30 *Id.* at 7.
return for abiding by a cap on overall expenditures.\textsuperscript{31} In addition to establishing a number of candidate disclosure requirements, the amended Act also created the Federal Election Commission, a bipartisan agency with the mandate to oversee the enforcement of campaign finance law.\textsuperscript{32}

In 1976, only two years after the passage of the amended version of the Act, the constitutionality of FECA was challenged in \textit{Buckley v. Valeo} on both First Amendment and equal protection grounds.\textsuperscript{33} The \textit{Buckley} decision by the Supreme Court established several critical precedents with lasting impact in the area of campaign finance law. First, the \textit{Buckley} Court held that the contribution of money to, and expenditure of money on, political campaigns is speech, not conduct, rejecting the holding of the Court of Appeals below.\textsuperscript{34} By regulating campaign spending, the contribution and expenditure limits at issue raised First Amendment concerns: “The Act’s contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”\textsuperscript{35}

\textbf{B. Expenditure Limits}

The Court then proceeded to discuss what level of scrutiny the expenditure and contribution limits should be subject to. Here, the Court drew a distinction between the two types of restrictions. Expenditure limitations place a “substantial” restriction on political speech.\textsuperscript{36} This is because, as the Court recognized, communicating information in society via any medium almost invariably requires the spending of money.\textsuperscript{37} A restriction on expenditures therefore limits the amount of discussion on political issues and the “size of the audience reached.”\textsuperscript{38} Here, the expenditure limit of $1000 on independent expenditures would prevent the use of the most “effective” forms of communication by those seeking to make such expendi-

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\textsuperscript{31} Public Funding of Presidential Elections, FED. ELECTION COMM’N (Aug. 1996), http://www.fec.gov/pages/brochures/pubfund.shtml (explaining that the presidential public financing system was expanded to include funding for primary elections and nominating conventions).
\textsuperscript{32} \textit{Buckley}, 424 U.S. at 7.
\textsuperscript{33} \textit{Id.} at 11.
\textsuperscript{34} \textit{Id.} at 16.
\textsuperscript{35} \textit{Id.} at 14.
\textsuperscript{36} \textit{Id.} at 39.
\textsuperscript{37} \textit{Id.} at 19.
\textsuperscript{38} \textit{Id.}
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turers, while the expenditure limit on campaigns would force candidates to spend less than they could raise. Furthermore, the limitation on personal expenditures by candidates imposed a “substantial restraint” on the candidate’s ability to engage in free speech. Candidates must be able to spend their own money without restriction to communicate their views on political issues to members of the public, who can then decide on which candidate for whom to vote. Therefore, the Court found that because the expenditure limits struck at the heart of political speech, they would need to be justified by a government interest that could satisfy “exacting scrutiny.”

C. Contribution Limits

Contribution limits, on the other hand, do not place as significant a burden on First Amendment rights as expenditure limits and therefore deserve a lower level of scrutiny. When an individual makes a campaign contribution, he is expressing his support for the candidate and the candidate’s views. But this expression of support consists of a “symbolic act” that is not dependent on the size of the contribution. A contribution limit still allows for the symbolic expression of support by the contributor; thus, such limits, unlike expenditure limits, only place a “marginal restriction” on the contributor’s speech. Of course, contribution limitations could be so low as to restrict the overall amount of political speech, but the Court found no evidence that the limits at issue would have such an effect. Instead, candidates would have to seek money from a larger number of contributors; contributors who gave the maximum amount allowed to a particular candidate could also continue to spend money on direct

39 Id. at 19–20.
40 Id. at 52.
41 Id. at 52–53.
43 Buckley, 424 U.S. at 20.
44 Id. at 21.
45 Id.
46 Id.
47 Id. at 20.
48 Id. at 21.
political expression in support of the candidate.\footnote{Id. at 22.} Therefore, contribution limits need only satisfy an intermediate level of scrutiny: They must be “closely drawn” and justified by a “sufficiently important interest.”\footnote{Id. at 25.}

D. State Interests Under Heightened Scrutiny: Preventing Corruption is Legitimate, Equalizing Speech is Not

The Court then went on to look at the two types of limits under the respective standards of scrutiny it had outlined. First, the Court found that the contribution limits could be justified by the state interest in preventing political corruption or its appearance.\footnote{Id. at 26, 38.} An effective political campaign requires large sums of money, and a candidate without extraordinary wealth must rely on others to raise this money.\footnote{Id. at 26.} Thus, if a candidate were allowed to take in large contributions from individual contributors, there would be a danger such contributions would be “given to secure a political quid pro quo from current and potential office holders, [undermining] the integrity of our system of representative democracy.”\footnote{Id. at 26–27.} Even if large contributions did not secure such political favoritism, there was just as great a danger that the public would believe improper influence was being exerted, undermining public confidence in the electoral system.\footnote{Id. at 27.} Therefore, the contribution limits struck the appropriate balance of addressing the threat of corruption or its appearance posed by large campaign contributions, while not significantly undermining political dialogue.\footnote{Id. at 28–29}

As for the expenditure limitations, the Court found these could not be justified by the state’s interest in preventing corruption or its appearance.\footnote{Id. at 45, 53, 56.} The $1000 limitation on independent expenditures did not serve the anticorruption interest because such expenditures were not coordinated with the candidate and did not raise the risk of improper arrangements between the candidate and the individual or group making the expenditure.\footnote{Id. at 47.} Furthermore, the Court rejected the state’s other asserted interest: “[E]qualizing the relative ability of
individuals and groups to influence the outcome of elections.\textsuperscript{58} As the Court explained, “the concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources.”\textsuperscript{59} Similarly, the Court rejected the limit on a candidate’s personal expenditures.\textsuperscript{60} Such a limit actually increased a candidate’s dependence on potentially corrupting campaign contributions, and the equalizing interest was also unavailing because the First Amendment mandates that a candidate have the opportunity for unlimited speech on behalf of his candidacy.\textsuperscript{61} Finally, the Court rejected the overall expenditure limit as not justified by either the anticorruption or equalizing interest.\textsuperscript{62} The proper means to restrict a campaign’s dependence on large contributions was through contribution limitations, not expenditure limitations.\textsuperscript{63}

E. The Presidential Public Financing System

Buckley also upheld the presidential public financing system under the First Amendment.\textsuperscript{64} Recognizing that Congress has the power to spend money to promote the general welfare under the Constitution,\textsuperscript{65} the Court found that the public financing of elections “furthers” the First Amendment:\textsuperscript{66} “[The system] 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.”\textsuperscript{67} The Court found analogies to the Establishment Clause of the First Amendment to be inapposite.\textsuperscript{68} While the government may not aid one religion at the expense of others under the Establishment Clause, the goal of the Speech Clause is in fact to increase public debate.\textsuperscript{69} Thus, the government may provide financial assistance for the

\textsuperscript{58} Id. at 48.
\textsuperscript{59} Id. at 48–49 (internal quotation marks omitted).
\textsuperscript{60} Id. at 54.
\textsuperscript{61} Id. at 53–54.
\textsuperscript{62} Id. at 55, 56.
\textsuperscript{63} Id. at 55.
\textsuperscript{64} Id. at 92–93.
\textsuperscript{65} See U.S. CONST. art. I, § 8, cl. 1.
\textsuperscript{66} Buckley, 424 U.S. at 93.
\textsuperscript{67} Id. at 92–93.
\textsuperscript{68} Id. at 92.
\textsuperscript{69} Id. at 92–93, 93 n.127.
exercise of free speech under the Speech and Press Clauses—and the “statute books are replete” with such laws.\textsuperscript{70} Furthermore, the financing system serves a significant governmental interest in preventing corruption by “eliminating the improper influence of large private contributions.”\textsuperscript{71} In addition, the Court noted that while expenditure limitations were unconstitutional as applied to privately financed candidates, such limitations could be constitutional as applied to candidates opting for public financing, so long as the choice to enroll in public financing remained voluntary: “Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.”\textsuperscript{72}

In \textit{Republican National Committee}, the district court upheld the presidential election financing system from further constitutional challenge.\textsuperscript{73} As the RNC court explained, a candidate makes a strategic choice whether to participate in public funding and submit to expenditure limitations, presumably doing so only if public funding would “enhance” his ability to communicate with the electorate.\textsuperscript{74} There is nothing coercive about such a scheme: “[A]s long as the candidate remains free to engage in unlimited private funding and spending instead of limited public funding, the law does not violate the First Amendment rights of the candidate or supporters.”\textsuperscript{75} Furthermore, the expenditure limits were justified because they were part of a public financing system that served the government’s compelling interest in preventing corruption stemming from large campaign contributions.\textsuperscript{76} If the candidate could opt for public funding and still expend unlimited private funds, the system would fail to serve the purpose of eliminating a candidate’s dependence on private contributions.\textsuperscript{77} \textit{RNC} was summarily affirmed by the Supreme Court without opinion.\textsuperscript{78}

\textsuperscript{70} \textit{Id.} at 93 n.127.
\textsuperscript{71} \textit{Id.} at 96.
\textsuperscript{72} \textit{Id.} at 57 n.65.
\textsuperscript{74} \textit{Id.} at 285.
\textsuperscript{75} \textit{Id.} at 284.
\textsuperscript{76} \textit{Id.} at 285.
\textsuperscript{77} \textit{Id.}
II. THE LOWER COURT CASE LAW ON TRIGGER FUNDING PROVISIONS

A. The Rise of Trigger Funding Provisions

Following Buckley’s pronouncement of public financing systems as constitutional, states began to put in place their own public financing systems for state elections.79 Currently, sixteen states offer some form of public financing.80 The Buckley decision, however, had a profound impact on the way such systems could be structured. Because Buckley held that privately financed candidates could not be subject to campaign expenditure limitations, several states have included trigger provisions in their public financing systems to ensure that participating candidates can remain competitive when running against a high-spending opponent.81 Without such provisions, candidates would be hesitant to participate in public financing because a non-participating candidate could drown out the participating candidate’s message by spending potentially unlimited funds.82

Trigger funding typically consists of the distribution of a subsidy to a participating candidate when his opponent’s spending (or independent expenditures on his opponent’s behalf or against him) crosses a certain threshold.83 It may also involve the removal of cer-

79  Crosland, supra note 26, at 1278.
80  R. Sam Garrett, Cong. Research Serv., Public Financing of Congressional Campaigns: Overview and Analysis 92 (2010) (referring to states providing public financing directly to a participating candidate’s campaign).
81  See discussion infra notes 86–87 (listing states with trigger provisions). Trigger funding usually make up a part of state public financing systems that have been referred to as “Clean Elections” schemes. See Crosland, supra note 26, at 1279.
82  See, e.g., Respondent’s Brief in Opposition to Petition for a Writ of Certiorari at 7, Ariz. Free Enter. Club’s Freedom Club Pac v. Bennett, No. 10–238, 2010 WL 4163753 (U.S. Nov. 29, 2010) (explaining that in Arizona without trigger funding “[i]t would be too easy to outspend the [participating] candidate and no one would run as a . . . [publicly financed] candidate”) (internal quotation marks and citation omitted); Emily C. Schuman, Davis v. Federal Election Commission: Muddying the Clean Money Landscape, 42 Loy. L.A. L. Rev. 737, 740 (2009) (“The trigger mechanism is one component that is not only attractive but necessary . . . . Without designated triggers few, if any, candidates would choose to participate.”); Hasen, supra note 24 (“[R]ational politicians . . . will not opt into the public financing plan unless they think they will be able to run a competitive campaign under the public financing system. The whole point of the extra matching funds . . . is to give candidates assurance they won’t be vastly outspent in their election.”).
tain expenditure and private contribution limits that the participating candidate was originally subject to. Rescue provisions may offer unlimited funds to a participating candidate or they may cap the maximum distribution of funds to a participating candidate. Three states have or until recently had trigger provisions for the public financing of campaigns for all statewide and legislative offices: Arizona, Maine, and Connecticut. Several other states have or until recently had trigger provisions for the public financing of campaigns for certain political offices.

B. Challenges to the Constitutionality of Trigger Funding Provisions

Opponents of rescue funding have argued that the provisions violate the First Amendment. They claim that a non-participating candidate’s speech will be chilled if he knows that his spending will trigger the distribution of a subsidy to his opponent’s campaign. However, several courts have considered the constitutionality of rescue funding under the First Amendment, and until recently, only one court, the Eighth Circuit in *Day v. Holahan*, found trigger funding unconstitutional.

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88 See, e.g., *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008) (“The plaintiffs argue that their political speech is chilled because spending in excess of the specified trigger results in public funds being disbursed to a participating candidate whom the plaintiffs do not support.”).

1. Eighth Circuit

The Minnesota rescue funding provision considered by the Eighth Circuit in *Day* was triggered when an independent expenditure was made against a participating candidate. The provision provided the participating candidate with a subsidy equal to one-half the amount of the independent expenditure and raised the participating candidate’s expenditure limit by the amount of the expenditure. According to the court, the result of such a scheme was that the individual making an independent expenditure in opposition to a participating candidate “bec[am]e[] directly responsible” for increasing the funding available to the participating candidate. Armed with this “knowledge,” individuals seeking to make an independent expenditure in opposition to a participating candidate would be chilled from doing so. Such “self-censorship” was no less “susceptible to constitutional challenge than is direct government censorship.”

The court then proceeded to analyze whether the scheme could be justified as narrowly tailored and in service of a compelling state interest. The state argued that the provision served the interest of encouraging participation in the public financing system, which in turn increased public confidence in the electoral system. The court said it was not certain this interest could ever be “sufficiently compelling” to justify the provision at issue, but in any event, participation in the state’s public financing system was already close to 100%, and so the provision was unnecessary to encourage participation. Thus, the provision was not justified by a compelling state interest and was in violation of the First Amendment.

Despite its holding in *Day*, the Eighth Circuit seemed to revisit its own decision in *Rosenstiel*. The *Rosenstiel* case concerned a Minnesota provision which lifted an expenditure limitation on a participating candidate after his non-participating opponent crossed certain expenditure or contribution thresholds. Seemingly ignoring the ra-

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90 *Day*, 34 F.3d at 1359–60.
91 *Id.*
92 *Id.* at 1360.
93 *Id.*
94 *Id.* (quoting City of Lakewood v. Plain Dealer Publ’g Co., 486 U.S. 750, 759 (1988) (internal quotation marks omitted)).
95 *Day*, 34 F.3d at 1361.
96 *Id.*
97 *Id.* (internal quotation marks omitted).
98 *Id.* at 1362.
100 *Id.* at 1547.
tionale of Day, the Eighth Circuit analyzed the rescue provision—in this case, solely the lifting of the expenditure ceiling—under a test of coerciveness.\(^\text{101}\) The court found that the expenditure limitation and initial public subsidy to a participating candidate were merely incentives to participate in the program and were not “inherently penal” vis-à-vis non-participating candidates.\(^\text{102}\) The scheme simply offered candidates another choice for financing their campaigns, and a rational candidate would decide whether accepting public funding—with its attendant burdens and benefits—made the most sense for his campaign.\(^\text{103}\) Therefore, the court found that the provision “promotes, rather than detracts from, cherished First Amendment values” and was not coercive.\(^\text{104}\)

However, the dissent argued that the waiver of the expenditure limitation under the scheme placed the same chill, if not a greater one, on the speech of a non-participating candidate as the additional subsidy at issue at Day. A non-participating candidate would refrain from exceeding the spending limits so as to not trigger the waiver of the expenditure ceiling for the participating candidate.\(^\text{105}\) Furthermore, unlike in Day, the expenditure limit on the participating candidate here would be wholly removed, as opposed to being raised by the amount of the expenditure, as in Day.\(^\text{106}\) In the view of the dissent, Day, therefore, would appear to compel the opposite conclusion as was reached in the case,\(^\text{107}\) an observation also made by other circuits in discounting Day.\(^\text{108}\)

2. First Circuit

The Day court soon found its holding explicitly rejected in two other circuits. In Daggett, the First Circuit considered the constitutio-

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\(^{101}\) Id. at 1549–50.
\(^{102}\) Id. at 1550.
\(^{103}\) Id. at 1552.
\(^{104}\) Id. at 1552–53.
\(^{105}\) Id. at 1561–62 (Lay, J., dissenting).
\(^{106}\) Id. at 1562 (Lay, J., dissenting).
\(^{107}\) Id.
\(^{108}\) See N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427, 438 (4th Cir. 2008) (”[T]he Day decision appears to be an anomaly even within the Eighth Circuit . . . . Had the Eighth Circuit employed the Day analysis in the manner the plaintiffs seek to apply it here, the court would have concluded that the provision created a danger of self-censorship.”); Daggett v. Comm’n on Govern. Ethics & Election Practices, 205 F.3d 445, 464 n.25 (1st Cir. 2000) (”[T]he logic of . . . [Rosenstiel and Day] is somewhat inconsistent . . . . We . . . agree that the continuing vitality of Day is open to question.”).
nality of Maine’s trigger funding provision. The provision at issue provided an additional subsidy to a participating candidate equal to the amount received by his opponent once the opponent raised more than the amount of the initial subsidy provided to the participating candidate. Rescue funding was also provided to a participating candidate when an independent expenditure was made advocating the participating candidate’s defeat or the non-participating candidate’s election. However, the amount of rescue funds that could be provided to the participating candidate was capped at two times the initial distribution.

As the Daggett court explained, those challenging the scheme misunderstood the nature of their First Amendment right. The provision at issue did not indirectly burden their speech because there is no right under the First Amendment to “speak free from response.” Citing Buckley, the court explained that “the purpose of the First Amendment is [instead] to ‘secure the widest possible dissemination of information from diverse and antagonistic sources.’” The scheme placed no restriction on the amount of speech that those opposing the participating candidate could make, and the speaker would not suffer a penalty for exercising his speech rights. The flaw of Day’s reasoning, the court said, was that it “equates responsive speech with an impairment to the initial speaker.” Furthermore, the provision could not be characterized as penalizing non-participating candidates by providing an “exceptional benefit” to participating candidates. The scheme provided participating candidates with matching funds only up to two times the initial disbursement, after which a non-participating candidate could “outraise and outspend her participating opponent with abandon.” Thus, the provision at issue did not violate the First Amendment.

109 Daggett, 205 F.3d at 450.
110 Id. at 451.
111 Id.
112 Id.
113 Id. at 464.
114 Id.
115 Id. (quoting Buckley v. Valeo, 424 U.S. 1, 49 (1976) (per curiam)).
116 Daggett, 205 F.3d at 464.
117 Id. at 465.
118 Id. at 468.
119 Id.
120 Id. at 472.
3. Fourth Circuit

In *N.C. Right to Life*, the Fourth Circuit considered the constitutionality of the rescue provision in North Carolina’s public financing system for judicial elections. The relevant provision offered a participating candidate an additional disbursement when the total amount of expenditures by his non-participating opponent (which included independent expenditures against the participating candidate or in support of the opponent’s candidacy) crossed a threshold amount, but the maximum additional disbursement was capped at two times the trigger amount. The *Right to Life* court found that the provision did not violate the free speech rights of non-participating candidates or those making relevant independent expenditures.

Again citing *Buckley*, the court explained that the distribution of matching funds enlarges public discussion, and in so doing, furthers “First Amendment values.” Rejecting *Day*, the court explained that the case’s “key flaw is that it equates the potential for self-censorship created by a matching funds scheme with ‘direct government censorship.’” As the *Right to Life* court noted, *Day* supported its decision by citing to *City of Lakewood*, a Supreme Court case which dealt with the potential of direct government censorship. In *Lakewood*, the Court found that individuals might chill their speech out of fear that a local ordinance containing a vague licensing standard for newsracks would be misused by the mayor to deny newsrack permits to publishers who criticized him. By contrast, non-participating candidates in North Carolina who choose not to trigger the rescue provisions do so as a result of a “strategic, political choice, not from a threat of government censure or prosecution.”

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122 *Id.* at 433. During the primary, the “trigger amount” consists of sixty times the filing fee for the office the candidate seeks. *Id.* During the general election, the “trigger amount” equals the initial general election subsidy. *Id.*
123 *Id.* at 438.
124 *Id.* at 437 (quoting *Buckley* v. Valeo, 424 U.S. 1, 92–93 (1976) (per curiam) (internal quotations marks omitted)).
125 *Right to Life*, 524 F.3d at 438 (quoting *Day* v. Holahan, 34 F. 3d 1356, 1360 (8th Cir. 1994)).
126 *Right to Life*, 524 F.3d at 438.
128 *Right to Life*, 524 F.3d at 438.
4. Sixth Circuit

The Sixth Circuit analyzed a trigger provision for Kentucky state elections in *Gable v. Patton.*[^129] The provision at issue was triggered after an opponent raised more than the expenditure limit on a participating candidate.[^130] Once triggered, the participating candidate’s expenditure limit was lifted; he could raise an unlimited amount of funds, which would be matched two to one by the state.[^131] Discussing *Rosenstiel* but failing to even mention *Day,* the court considered whether the matching fund scheme was unconstitutionally coercive, such that candidates had no choice but to participate.[^132] The court found that while “participation will be the rational choice in the large majority of cases,” this was merely the result of incentives offered by the matching funds provision, which did not rise to the level of unconstitutional coercion.[^133]

C. Summary of the Circuit Conflict on Rescue Funding Pre-Davis

The state of the circuit court decisions on trigger funding prior to *Davis* can be summarized as follows. In the Eighth Circuit, the *Day* court equated the potential for self-censorship by a non-participating candidate in a matching funds scheme with a chill on speech.[^134] But both the Fourth Circuit in *Right to Life* and the First Circuit in *Daggett* explicitly rejected *Day* and its characterization of trigger funding as a chill on speech.[^135] Instead, both courts agreed that non-participating candidates have “[no] right to speak free from response.”[^136] Furthermore, in *Rosenstiel,* the Eighth Circuit undermined its own holding in *Day,* ruling that a trigger provision waiving an expenditure limitation for a participating candidate did not penalize a non-participating candidate’s speech.[^137] The Sixth Circuit in *Gable* found that the incentives offered by trigger funding were not so overwhelming as to coerce participation by all candidates.[^138] Thus, the Eighth

[^129]: 142 F.3d 940, 947 (6th Cir. 1998).
[^130]: Id. at 944.
[^131]: Id.
[^132]: Id. at 948–49.
[^133]: Id. at 949.
[^134]: Day v. Holahan, 34 F.3d 1356, 1360 (8th Cir. 1994).
[^136]: *Right to Life,* 524 F.3d at 439 (quoting *Daggett,* 205 F.3d at 464 (internal quotation marks omitted)).
[^138]: *Gable,* 142 F.3d at 949.
Circuit’s ruling in *Day* was the only circuit court decision to have found trigger provisions unconstitutional.

### III. The Supreme Court Rules in *Davis v. FEC*

**A. Jack Davis Challenges the “Millionaire’s Amendment”**

Prior to the Supreme Court’s decision in *Davis v. FEC,* the law on trigger funding was effectively settled. Only the Eighth Circuit’s outlying decision in *Day,* itself later undermined by *Rosenstiel,* had found rescue funding to be unconstitutional. However, the *Davis* decision, in one fell swoop, seriously called into question the existing case law on matching funding provisions. *Davis* did not involve public campaign financing. Instead, it concerned a challenge to the “Millionaire’s Amendment” of the Bipartisan Campaign Reform Act of 2002. The Millionaire’s Amendment took effect when a candidate for Congress faced an opponent who had chosen to self-finance his campaign, which was defined as spending over $350,000 of his personal funds on his campaign (as well as certain other types of fundraising). Under the scheme, a candidate had his contribution limits relaxed when faced by a self-financing opponent. Most importantly, he could receive contributions at three times the normal limit per donor. He could also receive contributions from individuals whose yearly election contributions had reached the aggregate limit. The self-financing candidate, however, still faced the usual limits on contributions. In other words, a self-financing candidate’s contribution limits were not raised.

The scheme was challenged by Jack Davis, a Democrat who had run an unsuccessful self-financed campaign for Congress in New York in 2004. Running again in 2006 as a self-financing candidate, Davis filed suit, challenging the Millionaire’s Amendment on First Amendment and equal protection grounds. Davis argued that the scheme penalized his First Amendment right to unlimited personal

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141 See discussion *infra* Part V.
142 *Davis,* 554 U.S. at 728.
143 *Id.* at 728 & n.4.
144 *Id.* at 728.
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.* at 731.
149 *Id.* at 744 n.9.
campaign expenditures because by self-financing his campaign beyond a certain limit, he was triggering a scheme that would enable his opponent to raise more money. The United States District Court for the District of Columbia ruled against Davis, and he appealed directly to the Supreme Court, which was the exclusive avenue for appellate review under the statute.

B. The Supreme Court Opinion

The Davis Court began by explaining that if the provision had simply triggered an increase in the contribution limits for all candidates, the provision would be constitutional. The Court explained that under Buckley, Congress can restrict contribution limits provided they satisfy intermediate scrutiny, but it need not do so; thus a relaxation of limits across the board would clearly be constitutional. However, as the Court explained, “We have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other.” While the provision did not directly limit personal expenditures on campaign speech, which Buckley prohibited, it “impose[d] an unprecedented penalty on any candidate who robustly exercises that First Amendment right.” As the Court said, the Millionaire’s Amendment “requires a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.” Here, the Court cited Day for the proposition that candidates self-financing under the provision bear a burden if they choose to speak and activate the scheme of discriminatory contribution limits.

The Court went further, distinguishing the provision at issue from the public financing system upheld in Buckley. The scheme in Buckley offered participating candidates the opportunity to accept public funding in exchange for abiding by expenditure limits. However, a

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150 Id. at 736.
152 Davis, 554 U.S. at 732.
153 Id. at 737.
154 Id. (citing Buckley v. Valeo, 424 U.S. 1, 23–35, 38, 46–47, & 47 n.53 (per curiam)).
155 Davis, 554 U.S. at 738.
156 Id. (citing Buckley, 424 U.S. at 52–53).
157 Davis, 554 U.S at 738.
158 Id.
159 Id. at 739 (citing Day v. Holahan, 34 F.3d 1356, 1359–60 (8th Cir. 1994)).
160 Davis, 554 U.S at 739.
161 Id. (citing Buckley, 424 U.S. at 57 n.65).
non-participating candidate “retain[ed] the unfettered right to make unlimited personal expenditures.”\textsuperscript{162} The Millionaire’s Amendment did not allow such an “unfettered right” because a candidate’s personal expenditures triggered a “scheme of discriminatory contribution limits.”\textsuperscript{163} Therefore, the scheme was not “remotely parallel to that in Buckley.”\textsuperscript{164}

The provision not only burdened Jack Davis’s speech, but it could not be justified by a compelling state interest.\textsuperscript{165} As Buckley held, reliance on personal campaign expenditures reduces the likelihood of corruption, and so the provision did not further the state’s interest in preventing corruption or its appearance.\textsuperscript{166} The government’s other asserted interest—to “level electoral opportunities for candidates of different personal wealth”—was, in effect, the same equalization interest that the Buckley Court rejected as inadequate to justify the provision.\textsuperscript{167} Therefore, since the scheme burdened the First Amendment right of a self-financing candidate and could not be justified by a compelling state interest, the Court found by a 5–4 vote that the provision was unconstitutional.\textsuperscript{168}

IV. THE LOWER COURT CASE LAW ON TRIGGER FUNDING PROVISIONS AFTER DAVIS

A. Post-Davis, Challenges to Trigger Funding Provisions Begin Anew

While Davis was not a public financing case, its rationale has begun to be deployed to strike down matching funds provisions as unconstitutional. Two circuit courts have viewed rescue funding as providing a non-participating candidate with the same choice as that faced by a self-financing candidate in Davis: Abide by self-imposed expenditure limits or suffer a burden on campaign speech through the distribution of rescue funding to an opponent.\textsuperscript{169} Commentators

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{162} Davis, 554 U.S at 739–40.
\item \textsuperscript{163} Id. at 740.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Id.
\item \textsuperscript{166} Id. at 744.
\item \textsuperscript{167} Id. at 741 (internal quotation marks omitted) (citing Buckley v. Valeo, 424 U.S. 1, 56–57 (1976) (per curiam)).
\item \textsuperscript{168} Davis, 554 U.S at 744.
\end{enumerate}
\end{footnotesize}
have reached conclusions similar to those of the lower courts. As one proclaims:

Viewed through the lens of Davis, it is clear that the rescue funds provision burdens First Amendment rights. As in Davis, the rescue funds provision presents candidates with a stark choice: "[A]bide by a limit on personal expenditures or endure the burden that is placed on that right" by the provision of rescue funds.171

The Ninth Circuit, however, found trigger provisions constitutional in McComish v. Bennett,172 but its ruling will be reviewed by the Supreme Court,173 which initially stayed the decision (and reinstated the lower court’s injunction against enforcement of the trigger provisions) pending a petition for certiorari.174 This stands in stark contrast to the Supreme Court’s denial of a petition for certiorari in Right to Life in the aftermath of Davis, leaving standing the Fourth Circuit’s decision that rescue funding was constitutional.175 In Respect Maine PAC v. McKee, the Supreme Court refused to grant a request for an emergency writ of injunction enjoining enforcement of Maine’s trigger provisions late into the 2010 election cycle after the First Circuit similarly refused to grant a preliminary injunction.176 But in this case

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170 See, e.g., Richard Briffault, Davis v. FEC: The Roberts Court’s Continuing Attack on Campaign Finance Reform, 44 TULSA L. REV. 475, 493 (2009) ("Davis indicates that [the old] way of thinking about First Amendment burdens is no longer good campaign finance law."); Crosland, supra note 26, at 1509 (concluding that rescue funding is unconstitutional); Richard M. Eisenberg, The Lonely Death of Public Campaign Financing, 35 HARV. J.L. & PUB. POL’Y 283, 321-22 (2010) ("[Davis] suggests that aiding the opposition is a burden on protected speech . . . . If that is so, asymmetrical schemes of public financing that provide additional funding . . . in response to independent expenditures are presumably unconstitutional."); Schuman, supra note 82, at 741 (arguing that Davis “suggests that triggers are unconstitutional”).


172 611 F.3d 510, 527 (9th Cir. 2010), cert. granted, 130 S. Ct. 644 (U.S. Nov. 29, 2010) (No. 10-239).


the First Circuit may review its decision in *Daggett*, with the outcome likely to depend on *McComish*.

**B. The New Circuit Court Conflict on Trigger Funding Provisions**

**1. Second Circuit**

The Second Circuit took up a *Davis*-based attack on Connecticut’s trigger provisions in *Green Party v. Garfield*. The complex provision at issue provided that a participating candidate would receive an additional subsidy when a non-participating candidate’s spending exceeded the participating candidate’s expenditure limit, which was capped at an amount equal to the initial public subsidy plus a small amount of contributor funds. Specifically, the trigger funding was to be in the amount of 25% of the initial grant and could be distributed a maximum of four times: When the non-participating candidate spent either 100%, 125%, 150%, or 175% of the participating candidate’s expenditure limit. A participating candidate would also receive rescue funding in the amount by which independent expenditures against his candidacy, combined with the spending of non-participating candidates, exceeded the size of the initial grant.

At the district court level, the court overturned its previous finding that rescue funding was constitutional in the wake of *Davis*, remarking that “*Davis* has breathed new life into the legal reasoning of *Day*.” The Second Circuit reaffirmed the finding of the lower court that, like in *Davis*, under a matching funds scheme a non-participating candidate fails to retain the right to unfettered campaign speech. The court noted that the penalty in *Davis* (the imposition of an asymmetrical regulatory scheme) was different than the penalty at issue in this case (the distribution of an additional subsidy

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177 *Respect Maine PAC*, 622 F.3d at 15 (“[T]he issues raised by the challenges to Maine’s laws are difficult and will require careful analysis, on a fully developed record. Given these difficulties, we cannot forecast what our ultimate judgment on the merits will be.”).


179 *Id.*

180 *Id.* at 365.

181 *Id.* at 370.

182 *Id.* at 372.

183 *Green Party of Conn. v. Garfield*, 616 F.3d 213, 245 (2d Cir. 2010), *petition for cert. filed sub nom. Green Party of Conn. v. Lenge*, 2010 WL 5125519 (U.S. Dec. 9, 2010) (No. 10-795). The court also found that the provision was unconstitutional when triggered by independent expenditures. *Id.* at 246.
to a participating candidate). But the court found that the penalty here was “harsher” than that in *Davis* because in the latter case a candidate facing relaxed contribution limits might not be able to raise additional funding, while a participating candidate will undoubtedly receive additional money. Such a burden on speech could not be justified by a compelling state interest in preventing corruption because, according to the court, a burden on the expenditure of personal funds can never be justified in preventing corruption under *Davis*. Thus, the provision was unconstitutional.

2. Eleventh Circuit

The Eleventh Circuit considered Florida’s rescue funding provision in *Scott v. Roberts*. Florida’s system provided that a participating candidate received a fully matching subsidy for any spending by a non-participating candidate that exceeded the statutory expenditure limit. Participating candidates were also eligible to receive private contributions which the state would match on a two-to-one (for the first $150,000 in contributions) or a one-to-one basis up until the statutory expenditure limit was reached. The challenge was brought by Rick Scott, a Republican running in the primary for governor in 2010. Scott still intended to spend over the statutory expenditure limit of $24,901,170, but claimed that his speech was chilled for two reasons: He would choose to exceed the expenditure limit later in the race to avoid providing his opponents with a “competitive advantage” and spend less on his campaign than if the trigger provision did not exist.

The district court had found that the provision burdened Scott’s speech but could be justified by a compelling state interest in preventing corruption, denying Scott’s motion for a preliminary injunction. However, the Eleventh Circuit reversed. Citing *Green Party*, the court found that trigger funding was a “harsher” penalty than the
activation of the asymmetrical regulatory system in *Davis*.

To the court, *Davis*'s citation to *Day* supported the view that the salient feature of the scheme in *Davis* was its provision of a competitive advantage to a candidate’s opponents, which trigger funding also offers.

The Florida scheme was also not justified by a compelling state interest in preventing corruption. Here, the court asserted that given the strict contribution limitations already in place, expenditure limitations on participating candidates did nothing to reduce corruption. Furthermore, even assuming the anticorruption interest was served by the system, it was not the least restrictive alternative, which is required under strict scrutiny; instead of providing rescue funding, the participating candidate could merely be released from an expenditure limit, which was a step Scott did not contest. Thus, the court found Scott was entitled to an issuance of a preliminary injunction blocking enforcement of the trigger provision.

3. Ninth Circuit

The Ninth Circuit considered the constitutionality of Arizona’s rescue funding provision in *McComish v. Bennett*. The scheme, part of Arizona’s Citizens Clean Elections Act, provided a participating candidate with an initial grant and subsequent matching funds in the amount by which a non-participating candidate’s speech, or independent expenditures in support of the non-participating candidate, or in opposition to the participating candidate, exceeded the initial grant. The additional subsidies were capped at an amount equal to three times the initial subsidy. The challenge was brought by several candidates for state political offices in 2010 who did not opt for public funding, along with two political action committees which

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195 *Scott*, 612 F.3d at 1291–92.

196 *Id.* at 1293–94.

197 *Id.* at 1297.

198 *Id.* at 1294.

199 *Id.* at 1297.


201 *Id.* at 516–17. The matching funding is reduced by six percent, and by the amount of any funds raised by the non-participating candidate during the preprimary period. *Id.* at 516 n.5.

202 *Id.* at 517.
conduct independent expenditures. The parties alleged that matching funding deterred or delayed them from spending money on campaign-related speech.

The district court found that the provision was unconstitutional, equating the distribution of matching funds with the penalty at issue in Davis. The provision did not survive strict scrutiny because it placed a burden on the speech of self-financing, non-participating candidates, and Davis held that a burden on a self-financing candidate’s speech does not serve the anticorruption interest. Yet, the court noted the anomaly of finding the provision unconstitutional merely because of the “incremental nature of the awards,” stating that “[i]f the Act provided for a single lump sum award, instead of incremental awards, the law would fall squarely within the regime blessed in Buckley and reaffirmed in Davis.”

The circuit court lifted the district court’s enjoinment of the provision, finding that “Davis is easily and properly distinguished from the case at bench.” Davis concerned the imposition of an asymmetrical regulatory scheme on a self-financing candidate previously under the same regulatory scheme as his opponent. A publicly financed candidate, on the other hand, faces an entirely different regulatory scheme than his opponent, and Buckley found such differential treatment to be constitutional. Day, furthermore, was distinguishable on its facts as a case for which matching funding served no legitimate purpose, and its citation in Davis did not “sub silentio” overturn existing trigger funding case law. Though it agreed with

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203 Id.
204 Id. However, it is far from clear that the plaintiffs’ speech was in fact deterred. Id. at 523–24 (“No Plaintiff, however, has pointed to any specific instance in which she or he has declined a contribution or failed to make an expenditure for fear of triggering matching funds. The record as a whole contradicts many of Plaintiffs’ unsupported assertions that their speech has been chilled.”); see also id. at 517–19 (analyzing the plaintiffs’ contentions in detail).
206 Id. at *18 & n.14.
207 McComish, 2010 WL 2292213, at *9 (citing Davis v. FEC, 554 U.S. 724, 740-741 (2008)).
208 McComish, 2010 WL 2292213, at *8.
209 McComish, 611 F.3d at 527.
210 Id. at 521.
211 Id. at 522 (citing Davis, 554 U.S. at 738).
212 McComish, 611 F.3d at 522 (citing Buckley v. Valeo, 424 U.S. 1, 97 (1976) (per curiam)).
213 McComish, 611 F.3d at 525 n.9 (citing Day v. Holahan, 34 F.3d 1556, 1361 (8th Cir. 1994)).
Daggett that there exists “no right to speak free from response” under the First Amendment, the court nonetheless proceeded to analyze the provision under intermediate scrutiny. This standard was reaffirmed by the Supreme Court in Citizens United as the appropriate standard for provisions which pose only a minimal burden on speech, such as disclosure requirements, which theoretically may cause individuals to refrain from speaking.

Here, the trigger provision was constitutional under intermediate scrutiny: There was a “substantial relation” between the matching funds provision and a “sufficiently important government interest.” The trigger provision served the anticorruption interest by encouraging participation in the public financing system and thus preventing reliance on campaign contributions. The district court mistakenly looked at whether the provision reduced corruption among non-participating candidates, which is irrelevant to determining whether corruption among participating candidates is reduced. Without trigger funding, candidates would not be willing to opt for public financing, and “[a] . . . system with no participants does nothing to reduce the existence or appearance of quid pro quo corruption.” Thus, the provision was constitutional. The concurrence found that trigger funding should not be subjected to heightened scrutiny because it placed no limit at all on a non-participating candidate’s speech, unlike the statute in Davis.

The Ninth Circuit’s decision lifting the injunction of the district court, however, was stayed on June 8, 2010, pending a petition for certiorari, which was granted on November 29, 2010.

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214 McComish, 611 F.3d at 524 (quoting Daggett v. Comm’n on Govern. Ethics & Election Practices, 205 F.3d 445, 464 (1st Cir. 2000)).
215 Id. at 525.
216 Id. at 524–25 (citing Citizens United v. FEC, 130 S. Ct. 876, 914 (2010); Buckley, 424 U.S. at 64, 96).
217 McComish, 611 F.3d at 525.
218 Id. (citing Citizens United, 130 S. Ct. at 914).
219 Id. at 525–26.
220 Id. at 526.
221 Id. at 527.
222 Id.
223 Id. at 527–28 (Kleinfeld, J., concurring).
V. THE McCOMISH COURT’S OPPORTUNITY TO SAVE TRIGGER FUNDING PROVISIONS AFTER DAVIS

Though supporters of matching funding provisions undoubtedly face an uphill battle to prevail in McComish, the Supreme Court’s upcoming decision is far from certain. The lower court opinions finding trigger funding unconstitutional, as well as the alarmist views of commentators, interpret Davis too broadly. A closer analysis of Davis suggests that its holding is far narrower and provides the Court with an important opportunity to clarify the meaning of Davis and uphold the constitutionality of trigger provisions.

A. The Critical Distinction Between Penalties and Non-Subsidies

1. The FEC Brief and the Nature of the Speech Burden at Issue in Davis

Davis did not hold that any time a positive consequence accrues to one candidate from his opponent’s actions, the opponent’s free speech is burdened. The Davis Court was clear that had the Millionaire’s Amendment raised contribution limits for all candidates as a result of a self-financing candidate’s spending, the provision would have been constitutional. Yet, in such a case, the self-financing candidate’s spending would still have positively benefited his opponent by raising his opponent’s contribution limits along with his own. One commentator relies on the fact that the Davis Court cited the FEC’s brief to conclude that trigger funding is unconstitutional. The FEC brief conceded that “[the provision] does impose some consequences on a candidate’s choice to finance beyond certain amounts.” But, for reasons just discussed, it cannot be the case that any time a candidate simply faces “some consequences” as a result of his decision to spend money on campaign speech, his speech is pena-

226 Because the Supreme Court granted an injunction in McComish and Justices Scalia and Alito would have granted an emergency injunction in Respect Maine PAC, at least a few of the members of the Court are likely to have decided trigger provisions are unconstitutional. See Respect Maine PAC v. McKee, 131 S. Ct. 445 (2010) (mem.); McComish v. Bennett, 130 S. Ct. 3408 (2010) (mem.).


228 Crosland, supra note 26, at 1307. Crosland also discusses the limited case law in the area of trigger funding, but our analysis and conclusions greatly differ; see also Petitioner’s Brief I, supra note 173, at 32 (citing to language from the FEC Brief in Davis to suggest that trigger funding is unconstitutional).

229 Davis, 554 U.S. at 739 (quoting Brief for Appellee at 29, Davis v. FEC, 554 U.S. 724 (2008) (No. 07-320)).
lized. Otherwise, the Davis Court’s example of a provision that would be presumptively constitutional—raising the contribution limits for all candidates as a result of a self-financing candidate’s spending—would have to be found unconstitutional using this logic.

Instead, the characteristic feature of the scheme at issue in Davis was the fact that it imposed an “unprecedented penalty” on a candidate who chose to self-finance his campaign. The Court was clear that this “unprecedented penalty,” elsewhere described as a “burden,” was defined by a very specific feature: “[T]he activation of a scheme of discriminatory contribution limits.” The Court was even more explicit regarding the nature of the burden when it noted that “the unprecedented step of imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat is antithetical to the First Amendment.”

2. Situating Trigger Funding Within Supreme Court Precedent as a Permissible Government Subsidy, Not a Burden on Speech

Unlike contribution or expenditure limits, which operate as a restriction, or penalty, on speech, rescue funding—as with public election financing in general—is a subsidy to a participating candidate. Buckley itself distinguished between expenditure and contribution limits on the one hand, which were restrictions on speech that needed to be justified under heightened scrutiny, and public campaign financing which was an “effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate . . . public discussion . . . in the electoral process.” The Supreme Court has without exception cited Buckley as an example of a permissible government subsidy to a participating candidate, not as a penalty on a

230 Davis, 554 U.S. at 739.
231 Id. at 740 (emphasis added).
232 Id. at 744 (emphasis added); see also McComish v. Bennett, 611 F.3d 510, 527 (9th Cir. 2010) (Kleinfeld, J., concurring) (“The Arizona scheme does not manipulate the limits on private donors’ contributions according to whether a competing candidate is participating in the government funding scheme. Had it done so, Davis would apply by analogy.”); Respondent’s Brief, supra note 82, at 18 (“Davis is properly understood as a case about the unconstitutionality of a particular type of penalty—an ‘asymmetrical’ and ‘discriminatory’ contribution limit that treated similarly situated, privately funded candidates differently merely because of one’s personally funded expenditures.”).
233 See The Supreme Court, 2007 Term—Leading Cases, 122 HARV. L. REV. 375, 384 (2008) (“Public funding is clearly a government subsidy, whereas contribution limits are clearly government restrictions.”).
The use of trigger provisions is merely a fiscally responsible way to distribute such a subsidy—incrementally, rather than in one lump sum. Both the Daggett court and the McComish circuit court concurrence explicitly refused to apply heightened scrutiny to rescue funding because as subsidies they are different in kind than contribution or expenditure limits.

Conflating restrictions on speech and government subsidies for speech through a misreading of Davis leads to, in the words of the McComish district court, an “illogical” result. It is also inconsistent with Supreme Court precedent distinguishing between the two.

The Court’s distinction between government subsidies and government restrictions was elaborated in two abortion funding cases, Maher and Harris. As the Maher Court explained, “[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.” Just as Buckley had held that it was constitutional to exclude certain candidates from receiving public campaign financing, it was constitutional for Connecticut to refuse to fund non-medically necessary abortions for indigent women, because neither were unconstitutional restrictions on fundamental rights.


See Weine, supra note 84, at 236 (“The difference between a trigger and the presidential financing system upheld in Buckley lies simply in how the public subsidy amount is derived.”); cf. Response in Opposition to Petition for a Writ of Certiorari, Duke v. Leake, at 15 (U.S. Sept. 26, 2008) (No. 08–120), 2008 WL 4419422 (“[P]etitioners argue that their First Amendment rights are infringed merely because the [s]tate . . . provides funds to participating candidates incrementally rather than in one lump sum.”).

See McComish, 611 F.3d at 528 (Kleinfield, J., concurring) (“Because the challenged scheme imposes no contribution or spending limits, it does not restrict speech at all, so I cannot see why heightened scrutiny would apply.”); Daggett v. Comm’n on Govern. Ethics & Election Practices, 205 F.3d 445, 464 (1st Cir. 2000) (finding that expenditure limit cases are inapplicable “because they involve direct monetary restrictions on . . . expenditures, which inherently burden such speech, while the Maine statute creates no direct restriction”); see also The Supreme Court, 2007 Term—Leading Cases, supra note 233, at 384 (“Recognizing this crucial distinction between penalties and subsidies, circuit courts have refused to apply expenditure limit cases when assessing the constitutionality of asymmetrical public funding schemes.”).


Harris v. McRae, 448 U.S. 297 (1980).


Id. at 474–75 & 475 n.9 (citing Buckley v. Valeo, 424 U.S. 1, 94–95 (1976) (per curiam)).
course, as the *Maher* Court said, “[t]he State may have made childbirth a more attractive alternative [to abortion], thereby influencing the woman’s decision” but a woman who elects to have an abortion is “no[...d]” because the denial of a subsidy places “no obstacles” in her way. In another abortion subsidy case, *Harris*, the Court explicitly rejected the notion that a denial of a subsidy was equivalent to a penalty: “A refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.

In its speech subsidy cases, the Court has maintained the non-subsidy/penalty distinction by holding that the government has far more ability to discriminate when distributing a subsidy than when restricting speech. Under the unconstitutional conditions doctrine, selective government subsidies are presumptively constitutional under the First Amendment (and therefore not a penalty on non-recipients) when such subsidies are provided on a viewpoint-neutral basis, as in both *Regan* and *Buckley*. In *Regan*, a tax-exempt organization challenged a provision of the tax code denying tax-exempt status to organizations which conducted lobbying activities, with the exception of veterans’ organizations. A tax exemption is the equivalent of a cash subsidy in the amount that the exempt taxpayer would have to pay on his taxes. As the *Regan* Court explained,

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243 *Maher*, 432 U.S. at 474.  
244 *Harris*, 448 U.S. at 317 n.19.  
245 See *The Supreme Court, 2007 Term—Leading Cases*, supra note 233, at 384 (discussing the Supreme Court’s subsidy jurisprudence); see also discussion *infra* notes 246-60 and accompanying text.  
247 *Buckley v. Valeo*, 424 U.S. 1, 95 (1976) (per curiam); see Bd. of Regents of Univ. of Wis. v. Southworth, 529 U.S. 217, 241 (2000) (Souter, J., concurring) (referring to *Buckley* as a case involving constitutional viewpoint-neutral subsidies); *Pacific Gas*, 475 U.S. at 14-15 (characterizing *Buckley* as a case concerning content-neutral subsidies); see also discussion *infra* note 259 (discussing the content-neutrality of rescue funding); discussion *infra* notes 270–77 and accompanying text (analyzing *Pacific Gas*).  
248 *Regan*, 461 U.S. at 545–46.  
249 Id. at 544.
Congress had decided that it would not use the tax code to subsidize lobbying by non-profit organizations (except for veterans’ organizations), but this did not violate the First Amendment: “[A] legislature’s decision not to subsidize the exercise of a fundamental right does not infringe that right.”250 The Court pointed to <i>Buckley</i> in support of the proposition that it was constitutional for Congress to discriminate in the distribution of subsidies: <i>Buckley</i> found that Congress could decide to subsidize candidates who participated in primaries, but not subsidize those who did not.251

As the <i>Regan</i> Court explained, a discriminatory subsidy would be unconstitutional, however, if it were “aim[ed] at the suppression of dangerous ideas.”252 Government subsidies designed to “facilitate private speech,”253 as in <i>Velazquez</i>, or to “encourage a diversity of views from private speakers,”254 as in <i>Rosenberger</i>, have been struck down only when they violate viewpoint-neutrality.255 <i>Rosenberger</i> involved a university subsidy for student printing costs that was denied to a religious publication,256 while <i>Velazquez</i> concerned a statute denying subsidies for free legal assistance to organizations that sought to challenge welfare law.257

Therefore, the Supreme Court’s subsidy jurisprudence establishes that when distributing a subsidy such as rescue funding, the state may discriminate by providing such a subsidy only to a participating candidate. As long as such a subsidy is distributed to a private speaker on a viewpoint-neutral basis,258 which is the case with rescue funding,259 it

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250 Id. at 549; see also id. at 550–51 (sustaining selective subsidy with respect to veterans’ organizations). The Court went out of its way to explain that precedent involving a restrictive ordinance on speech was not relevant to the subsidy at issue in <i>Regan</i>. Id. at 546 n.7 (citing Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 292 (1981)).
251 <i>Regan</i>, 461 U.S. at 549 (citing <i>Buckley</i>, 424 U.S. at 93–108).
252 Regan, 461 U.S. at 548 (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959)).
255 See <i>Velazquez</i>, 531 U.S. at 542–43, 548–49 (finding viewpoint-based subsidy unconstitutional); <i>Rosenberger</i>, 515 U.S. at 834–35, 837 (holding subsidy distributed on basis of viewpoint unconstitutional); see also United States v. Am. Library Ass’n, 539 U.S. 194, 213 n.7 (2003) (plurality opinion) (confirming that <i>Velazquez</i> and <i>Rosenberger</i> are implicated when a subsidy for private speech is distributed in a “viewpoint-based” manner); Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 233 (2000) (sustaining student activity fee to fund extracurricular speech provided funds are distributed on a viewpoint-neutral basis).
256 <i>Rosenberger</i>, 515 U.S. at 827.
257 <i>Velazquez</i>, 531 U.S. at 538–39.
258 The <i>McComish</i> concurrence cites to <i>Rosenberger</i> when noting that a non-participating candidate could have opted for public financing. McComish v. Bennett, 611 F.3d 510, 529 & n.10 (Kleinfeld, J., concurring) (citing <i>Rosenberger</i>, 515 U.S. at 829–30).
complies with the relevant requirement for constitutionality under Supreme Court precedent. Unlike the restrictions on speech at is-

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259 Rescue funding provisions appear to be both content- or viewpoint-neutral under Supreme Court precedent because they do not “distinguish favored speech from disfavored speech on the basis of the ideas or views expressed.” Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994). Regardless of his political views, any qualifying candidate can participate in public financing and receive rescue funding. Subsidies to participating candidates thus “confer benefits . . . on speech without reference to the ideas or views expressed.” Id. The Court therefore relied on Turner to suggest that because rescue funding necessarily funds speech in support of a particular candidate, such a subsidy is by definition content-based. Day v. Holahan, 34 F.3d 1356, 1360–61 (8th Cir. 1994) (citing Turner, 512 U.S. at 643). Such a characterization of rescue funding would logically mean that any type of public financing is inherently content-based because it supports a particular candidate, but the Supreme Court has suggested quite the opposite. See discussion supra 247 (citing Supreme Court cases referring to the public financing system in Buckley as a content- or viewpoint-neutral subsidy). The Court therefore appears to be mistaken.

The Court’s speech subsidy cases can be read as requiring speech subsidies to pass an additional threshold for constitutionality beyond viewpoint-neutrality. As the Supreme Court found in FCC v. League of Women Voters of California, drawing upon Regan, speech subsidies must not forbid recipients from engaging in protected speech with private funds. See 468 U.S. 364, 399–401 (1984) (citing Regan v. Taxation with Representation of Washington, Inc., 461 U.S. 540, 544, 552–53, 546 (1983)) (finding government subsidy unconstitutional which prohibited public broadcasters from editorializing with private funds). Such an analysis has been characterized as the “alternative channels” test. Alliance For Open Soc’y Int’l v. U.S. Agency for Int’l Dev., 430 F. Supp. 2d 222, 261 (S.D.N.Y. 2006). At least one commentator has suggested that because public financing places expenditure limitations on participating candidates, such a subsidy fails the alternative channels test and is unlikely to be unconstitutional as a result. See Richard Briffault, Public Funds and the Regulation of Judicial Campaigns, 35 Ind. L. Rev. 819, 831–33 (2002). But see Grant Davis-Denny, Coercion in Campaign Finance Reform: A Closer Look at Footnote 65 of Buckley v. Valeo, 50 UCLA L. Rev. 205, 221 (2002) (concluding that expenditure limitations likely do not make public financing an unconstitutional subsidy under Supreme Court precedent).

However, public financing can arguably be distinguished from the subsidy at issue in League of Women Voters because the latter subsidy placed content-based restrictions on recipients by preventing them from editorializing. League of Women Voters, 468 U.S. at 383–84; see also Rust v. Sullivan, 500 U.S. 173, 197–199 (1991) (applying alternative channels analysis to family planning subsidy which prevented recipients from engaging in abortion counseling). Participating candidates face no content- or viewpoint-based restrictions on their campaign speech for which they require an alternative channel of speech; they can campaign on whatever platform they like. They can also conduct non-campaign related speech with private funding. Even if an alternative channels-based objection can legitimately be raised about public financing under existing precedent, the Supreme Court is unlikely to take it seriously. The Davis Court itself explicitly endorsed Buckley’s finding that voluntary expenditure limits for participating candidates was constitutional. Davis v. FEC, 554 U.S. 724, 739 (2008) (citing Buckley v. Valeo, 424 U.S. 1, 57 n.65 (1976) (per curiam)) (distinguishing the statute at issue from the constitutional voluntary expenditure limits on participating candidates in the Buckley scheme); see also Republican Nat’l Comm. v. FEC, 487 F. Supp. 280, 285 (S.D.N.Y. 1980), aff’d, 445 U.S. 955 (1980) (mem.) (rejecting unconstitutional conditions argument with respect to voluntary expenditure limitations). Based on the foregoing, I do not believe the alternative channels test poses a serious challenge to the constitutionality of rescue funding. Because public campaign funding involves the subsidization of private speakers to advocate their own views, several
issue in *Davis*, the distribution of a subsidy to a participating candidate only benefits the candidate; it is no more a penalty on the non-participating candidate’s speech than the refusal to subsidize a lobbying non-profit in *Regan*. Because a non-participating candidate is not penalized by the distribution of a subsidy to his opponent, the non-participating candidate retains the “unfettered right” to engage in campaign speech under a rescue funding provision, unlike the self-financing candidate in *Davis*, whose speech was penalized by the activation of an asymmetrical scheme of contribution limits.

Through a flawed application of *Davis*, opponents of rescue funding seek to somehow transform a subsidy to a participating candidate into a restriction on the speech of a non-participating candidate, merely because the subsidy is distributed incrementally and triggered by an opponent’s speech. But such a claim not only lacks precedent, it would require the overturning of decades of Supreme Court precedent carefully distinguishing between penalties and non-subsidies by mischaracterizing an additional subsidy as a penalty.

As other of the Supreme Court’s speech subsidy cases appear to not be directly on point, but under such precedents trigger funding would likely survive constitutional scrutiny. See, e.g., *U.S. v. Am. Library Assoc.*, 539 U.S. 194, 214 (2003) (plurality opinion) (finding that Congress may condition library subsidies on the installation of Internet filtering software); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998) (finding that the government may make content-based decisions when distributing arts grants because "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech . . . at stake"); *Rust*, 500 U.S. at 193 (finding that the government need not fund family planning services advocating abortion because in so doing "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other"); *Lyng v. Int’l Union*, 485 U.S. 360, 369 (1988) (holding refusal to provide food stamps for striking workers constitutional because it does not "‘coerce’ belief or require individuals ‘to participate in political activities or support political views with which they disagree”).

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261 *See The Supreme Court, 2007 Term—Leading Cases*, supra note 233, at 384.

262 *See Republican Nat’l Comm.*, 487 F. Supp. at 285 (noting that the “candidate remains free” to privately fund his campaign under the scheme); *Brief for The Brennan Center For Justice at NYU School of Law in Opposition to Application for Writ of Injunction as Amicus Curiae Supporting Respondents at 22, Respect Maine PAC v. McKee*, 131 S. Ct. 445 (2010) (No. 10–A302), 2010 WL 4163768 (quoting *Buckley*, 424 U.S. at 94) (“Under Buckley’s rationale, since publicly funded candidates can constitutionally be awarded benefits not afforded to privately funded ones, the award of triggered supplemental funds to participating candidates cannot be ‘discriminatory’ or ‘asymmetrical.’”).

263 *See Response in Opposition to Petition for a Writ of Certiorari, Duke v. Leake, supra note 236, at 15 (“Such an argument finds no support in the precedent of [the Supreme Court], including *Davis*, or in logic.”).

264 What the Supreme Court’s precedents have been “careful” to establish is that a clear distinction between penalties and non-subsidies exists. I have argued that as the law currently stands on speech subsidies, rescue funding does not present even a close case for which side of the line it falls on. Nonetheless, commentators analyzing the question of unconstitutional conditions from a theoretical perspective have at times struggled to determine
one commentator notes, such a step would “sub silentio wipe out subsidies as well as burdens on campaign speech without even a mention of the distinction.”265 There is a fundamental “differen[ce]” between subsidizing a candidate’s speech based on his opponent’s choice to speak and restricting a candidate’s speech based on his own decision to speak,266 a distinction which Davis affirmed.267 As the McComish circuit court concurrence noted, citing Finley, a subsidy case, there is, quite simply, no “First Amendment right to prohibit the government from subsidizing one’s opponent.”268 Any loss of a competitive advantage for the non-participating candidate occurs not because he is denied a public subsidy for which he has no constitutional right to (having chosen not to participate), but, like the non-qualifying candidates in Buckley, because he is unable to raise private contributions on his own.269 It is only restrictions on a candidate’s own speech rights that are constitutionally impermissible.

265 The Supreme Court, 2007 Term—Leading Cases, supra note 233, at 384. In response to The Supreme Court, 2007 Term—Leading Cases, Esenberg argues that the distinction between subsidies and penalties is inapplicable in the context of electoral politics because “[i]n an election, what helps one side directly and immediately harms the other. The subsidy to an opponent necessarily burdens the speaker.” Esenberg, supra note 169, at 324. But it is hard to see how such a blanket assertion squares with Buckley’s finding that public financing is constitutional.

266 The Supreme Court, 2007 Term—Leading Cases, supra note 233, at 383.

267 Davis itself distinguished between the “unfettered right” to privately-finance under Buckley and the “quite different” scheme at issue in the case. Davis v. FEC, 554 U.S. 724, 738 (2008).


269 See Buckley v. Valeo, 424 U.S. 1, 94–95 (1976) (per curiam) (“[T]he inability . . . of [non-participating candidates] to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions.”); cf. Rust v. Sullivan, 500 U.S. 173, 202 (1991) (“The difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the Government had not enacted Title X.”); Regan v. Taxation with Representation of Wash., 461 U.S. 540, 550 (1983) (“Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution ‘does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.’”) (citing Harris v. McRae, 448 U.S. 297, 318 (1980); Maher v. Roe, 432 U.S. 464, 474 (1977) (“The Connecticut regulation places no obstacles . . . in the pregnant woman’s path to an abortion. An indigent woman . . . continues as before to be dependent on private sources for the service she desires.”).
3. Opponents of Trigger Funding Misread Pacific Gas: The Davis Court’s Citation to Pacific Gas in Fact Supports the Penalty/Non-Subsidy Distinction

The distinction between the scheme at issue in Davis and matching funding provisions is further illustrated by the Davis Court’s citation to Pacific Gas. Opponents of rescue funding, including the McComish plaintiffs, have pointed to this citation in support of their claim that trigger funding is unconstitutional. A closer reading of Pacific Gas, however, suggests the opposite conclusion. The Pacific Gas case concerned a state regulation that required a private utility company to include announcements from third parties in its mailings expressing viewpoints with which it disagreed. In finding trigger funding to be constitutional, the Daggett court cited Pacific Gas for the principle that there exists “no right to speak ‘free from vigorous debate.’” In Davis, on the other hand, the Court cited Pacific Gas for the proposition that there was “[an] infringement on speech rights where if the plaintiff spoke it could ‘be forced . . . to help disseminate hostile views.’” The Pacific Gas Court made clear that the state regulation in the case was a “government restriction[] that abridge[d] [the utility’s] own rights.” It was, in other words, a case that, like Davis, fell on the penalty side of the Court’s First Amendment jurisprudence. As the Pacific Gas Court made clear, the state regulation at issue require[d] [the] appellant to assist in disseminating [the third-party’s] views . . . . This kind of favoritism goes well beyond the fundamentally content-neutral subsidies that we sustained in Buckley and in Re-

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271 See, e.g., Brief to Petition for a Writ of Certiorari, Petitioner’s Brief II at 17, McComish v. Bennett, 2010 WL 3267529 (U.S. Nov. 29, 2010) (No. 10-239) (hereinafter Petitioner’s Brief II) (“Contrary to Davis’ embrace of Pacific Gas . . . . Arizona’s matching funds trigger effectively forces traditional candidates and their supporters to disseminate hostile speech by opposing participating candidates.”); Reply Brief to Petition for a Writ of Certiorari at 7, McComish v. Bennett, 2010 WL 3267529 (U.S. Nov. 29, 2010) (No. 10-239) (“There is no question Arizona’s matching funds trigger causes privately financed candidates and their supporters to help disseminate hostile views whenever they raise or spend campaign money over a certain threshold. Davis’s reliance on Pacific Gas . . . . therefore, compels the conclusion that Arizona’s matching funds trigger infringes speech rights.”); Crosland, supra note 26, at 1301 (suggesting that the Davis Court’s citation to Pacific Gas means “a right to speak free from response does exist” in the context of trigger funding).
274 Davis, 554 U.S. at 739 (quoting Pacific Gas, 475 U.S. at 14).
Unlike these permissible government subsidies of speech, [the state] . . . forces the speaker’s opponent—not the taxpaying public—to assist in disseminating the speaker’s message.276 Thus, the Court explains that had the state regulation merely provided a subsidy to a third-party to disseminate its views, such a regulation would have been constitutionally permissible. Because the regulation instead chose to restrict the utility’s speech by forcing it to publish a view it disagreed with, it was a constitutionally impermissible restriction on speech. Unlike the provision in Davis, which restricted the speech of a self-financing candidate, rescue funding is a “permissible government subsid[y] of speech” in which “the taxpaying public” and not “the speaker’s [i.e. participating candidate’s] opponent” assists in disseminating the participating candidate’s message.277 By viewing Davis as analogous to Pacific Gas, which in turn expressly distinguished itself from Buckley, the Supreme Court implicitly suggested that public campaign financing—of which rescue funding is a part—was different in kind from the regulation at issue in Davis.

B. Reviving Old Claims About Public Financing: Participating Candidates Do Not Receive a Competitive Advantage from Trigger Funding

The Millionaire’s Amendment can also be distinguished from trigger provisions in another fundamental respect. A critical component of the Court’s analysis in Davis was that “[u]nder the usual circumstances,” candidates running for Congress faced the same contribution limits.278 Only after a candidate triggered the activation of the scheme by self-financing did the competing candidates face different contribution limits. Because the two candidates were similarly situated prior to the scheme’s activation, it was clear that a candidate’s decision to self-finance “produce[d] fundraising advantages for opponents in the competitive context of electoral politics.”279 The Scott court seized on this line from Davis to suggest that trigger funding was analogous to the scheme at issue in Davis.280

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276 Id. at 14–15 (second and third emphasis added).
278 Davis, 554 U.S. at 728.
279 Id. at 739.
280 Scott v. Roberts, 612 F.3d 1279, 1291–92 (11th Cir. 2010).
But the assertion that trigger funding provides a participating candidate with a competitive advantage misapprehends the nature of public campaign financing and revives a claim rejected long ago by the Court in *Buckley*. As the *McComish* circuit court correctly noted, citing to *Buckley*, a candidate who chooses to participate in public financing and a non-participating candidate are not similarly situated, making *Davis* “easily and properly distinguish[able]” from the case of trigger funding. Unlike the regulatory scheme in *Davis*, in which both candidates initially faced the same contribution limits, a participating candidate, in return for receiving public funds (including trigger funding), agrees to expenditure and contribution limitations not faced by a non-participating candidate. *Buckley* held such differential treatment to be constitutional: “The Constitution does not require Congress to treat all declared candidates the same for public financing purposes.”

This holding also finds theoretical support: An authoritative commentator on the Court’s subsidy jurisprudence has suggested that the distribution of a subsidy to one of two individuals who are not similarly situated does not penalize the non-recipient, but merely benefits the recipient.

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281 See, e.g., id. at 1284 (“Scott explains that he has a constitutional right to avoid providing his opponents ‘with a competitive advantage.’”); Petitioner’s Brief II, supra note 271, at 17 (asserting that by providing “competitive disadvantages” to non-participating candidates, trigger funding violates the First Amendment); Eisenberg, supra 170, at 325 (arguing that triggered subsidies are especially problematic because they “impair[] the ‘speech power’ of the non-participating candidate relative to the participating candidate”).

282 *McComish*, 611 F.3d at 521 (citing *Buckley* v. Valeo, 424 U.S. 1, 97 (1976) (per curiam)); see also Respondent’s Brief, supra note 82, at 20 (“Arizona’s system does not discriminate among similarly situated candidates.”); Paul S. Ryan, Public Financing After *Davis*: Denial of Appeal in *Duke v. Leake* Should Put to Rest Concerns Regarding the Constitutionality of Trigger Provisions, THE CAMPAIGN LEGAL CTR. (Dec. 24, 2008), http://www.voterownedhawaii.org/uploads/FF%20Triggers%20and%20Davis%2012%2024%2008.pdf (“Comparing a system in which candidates start under the same rules (e.g., the Millionaire’s Amendment system) to a system in which candidates start under different rules (e.g., a public financing system) is comparing apples to oranges.”). But see infra 348 (suggesting when the not similarly situated rationale might not apply).

283 *McComish*, 611 F.3d at 522 (citing *Buckley*, 424 U.S. at 97).

284 See, e.g., Seth Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. REV. 1293, 1363–71 (1984) (explaining that a subsidy’s constitutionality must be evaluated with reference to whether recipients and non-recipients are “similarly situated”); id. at 1374–75 (“If the purpose of the NEA is to fund good art and cubism can reasonably be considered ‘good’ art while pointillism can reasonably be considered ‘bad’ art, then pointillists and cubists are not similarly situated for the purposes of the program, and a condition excluding the pointillists from receiving benefits does not violate principles of equality.”). Notably, Kreimer finds that, after analyzing the *Buckley* scheme under his three baseline tests for unconstitutional speech subsidies, eligible but non-participating candidates were not penalized by the distribution of public funding to participating candidates. Id. at 1376–77. If the government did not have the ability to
Because candidates accepting public funding “suffer a countervailing denial” in the form of an expenditure limit, the Buckley Court explicitly rejected the claim that public campaign funding provides candidates with what the Davis court referred to as “fundraising advantages.” In the words of the Buckley Court, qualifying, participating candidates do not receive “enhancement of the opportunity to communicate with the electorate” from public funding because such subsidies are designed to “substitute[] public funding for what the [candidates] would raise privately.” This is precisely why the Court upheld the denial of such funding for minor party candidates.

Viewed in this light, trigger subsidies appear to be a more constitutionally sound means of providing campaign financing than simply distributing an initial lump grant that might prove too large if non-participating candidates spend little. Trigger funding, on the other hand, is calibrated to provide the amount of funding that a participating candidate would spend in response to his opponent’s spending if he were privately financed. The evidence suggests this was indeed the rationale behind the Arizona statute at issue in McComish. As the lead drafter of the Clean Elections Act explained, a “wide disparity” in campaign spending existed prior to the Act’s pas-

285 Buckley, 424 U.S. at 95.
286 Id.
287 Id.
288 Id. at n.129. Because public financing, which may include trigger funding, is designed to replace, not supplement, private fundraising for a participating candidate, it does not “skew[] . . . an existing distribution” of speech rights by providing funding only to the participating candidate. Sullivan, supra 264, at 1497; see id. at 1496–98 (arguing that the government has a constitutional obligation of “evenhandedness” among speakers by not favoring one group with subsidies). Trigger funding thus meets one of Sullivan’s tests for a presumptively constitutional subsidy.
289 Buckley, 424 U.S. at 95.
290 That a candidate would spend an amount equal to his opponent’s expenditures is of course speculative, but it is no less speculative than providing qualifying presidential candidates with a $20 million (adjusted for inflation) grant for their general election expenditures, an amount upheld in Buckley. See id. at 88 (discussing funding of qualifying candidates).
291 See McComish v. Bennett, 611 F.3d 510, 527 (9th Cir. 2010) (finding that trigger funding allows Arizona “to allocate its funding among races of varying levels of competitiveness without having to make qualitative evaluations of which candidates are more ‘deserving’ of funding beyond the base amounts provided to all [participating] candidates”); Respondent’s Brief, supra note 82, at 30 (“Arizona uses actual contributions and spending as a proxy for the competitiveness of a particular race, and it then adjusts its public grants in dynamic fashion (using triggered matching funds).”).

fund only those participating candidates who agreed to abide by expenditure limitations, the program would serve little purpose and likely cease to exist. Id. at 1377.
sage. In at least 80% of Arizona’s election districts, campaign spending prior to the Act’s passage amounted to only $10,000 or less. But in a small number of districts, campaign spending averaged $30,000. The use of trigger funding was therefore necessary because a single uniform subsidy would not accurately represent the amount a participating candidate would spend were he privately financed. As the drafter noted, no candidate in a high-spending district would choose public financing if he were offered a single subsidy that amounted to only one-third of average campaign spending. Providing all candidates with a $30,000 subsidy would also not approximate average campaign spending in most districts but would “waste[]” “millions of dollars.”

Furthermore, practically speaking, far from being at a fundraising advantage, publicly financed candidates are usually at a fundraising disadvantage, because public financing schemes with trigger funding like that in McComish still subject participating candidates to a maximum expenditure cap, while privately financed candidates can continue to spend as much as they wish. To quote the McComish and Buckley courts, “Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.”

Because participating and non-participating candidates are not similarly situated, but subject to different regulatory regimes, analyzing the distribution of rescue funding in isolation misses the point. Rescue funding forms only part of the package of burdens and benefits that makes up the configuration of a public financing system.

\[292\] Respondent’s Brief, supra note 82, at 7 (internal citation and quotation marks omitted).
\[293\] Id.
\[294\] Id.
\[295\] Id. at 7–8 (“[A] one-size-fits-all approach would not work in Arizona.”).
\[296\] See id. at 7 (“It would be ‘too easy to outspend the Clean Elections candidate and no one would run as a Clean Elections candidate.’” (internal citation omitted)).
\[297\] Id. (internal citation and quotation marks omitted).
\[298\] See McComish v. Bennett, 611 F.3d 510, 517 (9th Cir. 2010) (“This means that a non-participating candidate who is able to raise funds in excess of three times the amount of his or her participating candidate’s initial grant gains a potentially unlimited financial advantage in the campaign.”); see also Duggett v. Comm. on Govern. Ethics & Election Practices, 205 F.3d 445, 468 (1st Cir. 2000) (“[A] non-participating candidate retains the ability to outraise and outspend her participating opponent with abandon after [the maximum expenditure] limit is reached.”); discussion infra note 300 (arguing that independent expenditure groups are at a fundraising advantage versus participating candidates but acknowledging that the “not similarly situated” rationale has less relevance in the independent expenditure context).
\[299\] McComish, 611 F.3d at 522 (quoting Buckley v. Valeo, 424 U.S. 1, 97–98 (1976) (per curiam)).
\[300\] For example, a public financing system which provides rescue funding may provide an initial grant far smaller than a system lacking trigger provisions. Once the maximum
As the RNC court explained, a rational candidate “will opt” for the package of burdens and benefits exclusive to public funding “only if, in the candidate’s view, it will enhance the candidate’s powers of communication.”\(^{301}\) The proper analysis would focus on the earlier time period before the distribution of trigger funding when both candidates are similarly situated—that is, when they are both eligible to opt for public financing—to determine whether the entire package offered by a public financing system is so generous as to effectively penalize the choice to not participate.

Courts considering the constitutionality of public financing systems as a whole have undertaken such an analysis by insisting that they must not coerce participation: In other words, they must require participating candidates to suffer significant restrictions not faced by privately financed candidates in return for receiving public financing.\(^{302}\) This is consistent with the Supreme Court’s speech subsidy jurisprudence, which requires that a subsidy not be “‘manipulated’ to have a ‘coercive effect.’”\(^{303}\) In *Vote Choice, Inc. v. DiStefano*,\(^{304}\) amount of potentially triggered subsidies are taken into account, however, the amount of funds offered to a participating candidate under both systems may be the same. There appears to be no logical basis to distinguish between the two systems, but this is precisely the result of analyzing rescue funding in isolation without considering its role in a public financing system as a whole.

\(^{301}\) Republican Nat’l Comm. v. FEC, 487 F. Supp. 280, 285 (S.D.N.Y. 1980); *see also* McComish, 611 F.3d at 529 & n.10 (Kleinfeld, J., concurring) (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 829–30 (1995)) (noting that a non-participating candidate could have opted for public funding). Admittedly, independent expenditure groups do not have a choice whether to opt for public financing, and the “not similarly situated rationale” may have less significance with respect to such groups. However, it is also true that like non-participating candidates, independent expenditure groups are not at a fundraising disadvantage vis-à-vis participating candidates because of the groups’ ability to spend unlimited funds opposing participating candidates or supporting non-participating candidates. Furthermore, the application of trigger funding provisions to spending by independent expenditure groups can also be justified by the compelling state interest in preventing corruption. *See discussion infra Part V-C (explaining why trigger funding provisions survive heightened scrutiny review with respect to both non-participating candidates and independent expenditure groups).*

\(^{302}\) *See, e.g.,* Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 29 (1st Cir. 1993) (finding that a public financing system was not coercive); *see also* Rosenstiel v. Rodriguez, 101 F.3d 1544, 1550 (8th Cir. 1996) (using a test of coerciveness to hold a public financing system constitutional).

\(^{303}\) Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 587 (quoting Ark. Writers’ Project, Inc. v. Ragland, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting). Among the members of the Supreme Court, Justice Scalia has probably been the most insistent that a subsidy is not a restriction on speech because it does not generally have a “coercive effect.” *Nat’l Endowment for the Arts,* 524 U.S. at 587 (internal citation and quotation marks omitted); *see id.* at 599 (Scalia, J., concurring) (“The nub of the difference between me and the Court is that I regard the distinction between ‘abridging’ speech and funding it as a fundamental divide, on [the latter] side of which the First Amendment is inapplicable.”).
the First Circuit explained that Rhode Island’s public financing system was constitutional because it “achieve[d] a rough proportionality between the advantages available to complying candidates . . . and the restrictions that such candidates must accept to receive these advantages.” In other words, “the state exacts a fair price from complying candidates in exchange for [the] receipt of the challenged benefits.” On the other hand, courts have struck down campaign financing systems that simply provide a participating candidate with benefits, while failing to impose on them sufficient “countervailing” restrictions not faced by privately financed candidates.

C. Trigger Funding Provisions are Constitutional Under Heightened Scrutiny Review

As a viewpoint-neutral government subsidy, trigger funding should not be subjected to heightened scrutiny at all. Under a rational basis analysis, rescue funding is plainly constitutional. But even if a court treated trigger funding as a burden on a non-participating candidate’s or independent expenditure group’s First Amendment rights, trigger funding should survive heightened scrutiny as well. The McComish circuit court was the sole circuit court in the aftermath of Davis to subject trigger provisions to intermediate scrutiny; the Scott and Green Party courts, analogizing the burdens of

304 Vote Choice, 4 F.3d at 26.
305 Id. at 39.
306 Id.
307 See, e.g., Wilkinson v. Jones, 876 F. Supp. 916, 930 (W.D. Ky. 1995) (finding that scheme with disparity in contribution limits for participating and non-participating candidates penalizes privately financed candidates); see also Shrink Mo. Gov’t PAC v. Maupin, 71 F.3d 1422, 1425 (8th Cir. 1995) (holding that expenditure limit scheme offered only benefits to participating candidates and penalized non-participating candidates).
308 See, e.g., Regan v. Taxation with Representation of Wash., 461 U.S. 540, 547–51 (applying rational basis scrutiny to selective subsidy); id. at 549 (citing Buckley v. Valeo, 424 U.S. 1, 93–108 (1976) (per curiam) (“[A] legislature’s decision not to subsidize the exercise of a fundamental right . . . is not subject to strict scrutiny.”)); see also McComish v. Bennett, 611 F.3d 510, 528 & n.3 (9th Cir. 2010) (Kleinfield, J., concurring) (arguing that heightened scrutiny is inapplicable) (citing N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427, 437 (4th Cir. 2008), and Daggett v. Comm. on Govern. Ethics & Election Practices, 205 F.3d 445, 464 (1st Cir. 2000)).
309 Trigger funding is rationally related to the state’s legitimate anticorruption interest. See discussion infra notes 325–49 and accompanying text (discussing how trigger funding serves the anticorruption interest); cf. Regan, 461 U.S. at 549–51 (finding selective government subsidization rationally related to legitimate government interests).
310 McComish, 611 F.3d at 524.
trigger funding to the burden at issue in *Davis*, applied strict scrutiny.

There are a number of state interests articulated for trigger provisions: They reduce corruption or its appearance by encouraging participation in public financing systems, they equalize resources, and they preserve the public fisc. For example, the *McComish* circuit court found that with respect to the Citizens Clean Elections Act, “one of the principal purposes of the Act was to reduce quid pro quo corruption.” Its explicit purpose was to “diminish[] the influence of special-interest money” and eliminate the status quo provided by the “current election-financing system.” That system “[a]llow[ed] Arizona elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction” and “[u]ndermine[d] public confidence in the integrity of public officials.” The court also found, however, that this was not the sole

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311 Scott v. Roberts, 612 F.3d 1279, 1292 (11th Cir. 2010) (“[A]lthough under *Davis* the subsidy must be justified by a compelling state interest, the Secretary and McCollum insist that the subsidy satisfies that test.”) (internal quotation marks omitted)); Green Party of Conn. v. Garfield, 616 F.3d 213, 245 (2d Cir. 2010), petition for cert. filed sub nom. Green Party of Conn. v. Lenge, 2010 WL 5126519 (U.S. Dec. 9, 2010) (“[T]o be upheld under plaintiffs’ First Amendment challenge, the provision must be justified by a compelling state interest.”).

312 See, e.g., Gable v. Patton, 142 F.3d 940, 948 (6th Cir. 1998) (holding that trigger funding, by encouraging candidate participation, reduces corruption); Rosenstiel v. Rodriguez, 101 F.3d 1544, 1553 (8th Cir. 1996) (encouraging participation in public funding through rescue provision decreases corruption); see also Vote Choice, Inc., v. DiStefano, 4 F.3d 26, 39–40 (1st Cir. 1993) (incentivizing participation in public financing serves anti-corruption interest).

313 See, e.g., Ariz. Rev. Stat. § 16-940 (2010) (creating a public financing system intended to change the status quo that “[g]ives incumbents an unhealthy advantage over challengers” and “[e]ffectively suppresses the voices and influence of the vast majority of Arizona citizens in favor of a small number of wealthy special interests”).

314 See, e.g., Green Party of Conn. v. Garfield, 648 F. Supp. 2d 298, 373 (D. Conn. 2009), aff’d in part, rev’d in part 616 F.3d 213 (2d Cir. 2010) (discounting argument that public financing served a compelling state interest in protecting the public fisc, based not on merits but on specific facts of case); Respondent’s Brief, supra note 82, at 33 (“Triggered matching funds are one important approach to achieving the compelling purposes of public financing while protecting the public fisc . . . .”); cf. Buckley v. Valeo, 424 U.S. 1, 96 (1976) (per curiam) (finding that the government has an “interest in not funding hopeless candidacies with large sums of public money”).

315 *McComish*, 611 F.3d at 516.


317 See id. The public financing systems of other states that include trigger funding also proclaim an anticorruption purpose. See, e.g., N.C. Gen. Stat. Ann. §§ 163-278.61 (2010) (explaining that the statute’s purpose was to combat the “detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of [judicial] elections,” which threatened the “integrity and credibility” of judges).
purpose of the Act, and there is evidence to suggest that an equalization rationale may also have been behind the legislation.

Admittedly, though Buckley had held as much, Davis extinguishes any claim that trigger funding could survive heightened scrutiny on the basis of an equalization rationale: It is, quite simply, not “a legitimate government objective.” Davis and Citizens United, read together, confirm that the prevention of quid pro quo corruption or its appearance remains the only “legitimate and compelling” government interest.

Contrary to the protestations of trigger funding opponents, rescue funding does serve the anticorruption interest. In the words of

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318 McComish, 611 F.3d at 514.
319 See Petitioner’s Brief I, supra note 173, at 4-5 (presenting evidence that a purpose of the Act was to “level the playing field”); see also supra note 315 (citing language in the Act suggesting an equalizing purpose).
320 Buckley, 424 U.S. at 48–49 (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”).
324 See, e.g., McComish v. Bennett, 611 F.3d 510, 515 (9th Cir. 2010) (“Plaintiffs contend that the Act’s true purposes were to level the political playing field and reduce campaign spending.”).
325 The Green Party district court appears to suggest that any distribution of matching funding, which encourages participation in public financing, amounts to an attempt to “level the playing field.” Green Party of Conn. v. Garfield, 648 F. Supp. 2d 298, 373 (D. Conn. 2009), aff’d in part, rev’d in part 616 F.3d 213 (2d Cir. 2010) (internal quotation marks omitted). The court noted: “Practically speaking . . . there is no real difference between those two concepts [encouraging participation and equalization] . . . [T]he . . . matching fund provisions ensure candidates that the playing field will be leveled so that the baseline grants . . . will never hamstring their ability to mount a successful campaign against a high spending opponent . . . .” Id. Such a claim may be partially due to the unique facts of the case; the initial grants to participating candidates in Green Party were alone large enough to ensure a competitive race for a participating candidate. See infra note 339 and accompanying text (discussing the Connecticut system). But such a claim also ignores the fact that a public financing system must be attractive to the rational candidate in order to gain any participants at all. See Gable v. Patton, 142 F.3d 940, 949 (6th Cir. 1998) (“[A] voluntary campaign finance scheme must rely on incentives for participation, which, by definition, means structuring the scheme so that participation is usually the rational choice.”); Rosenstiel v. Rodriguez, 101 F.3d 1544, 1555 (8th Cir. 1996) (“If the benefits . . . were conferred upon all candidates . . . there would be no incentive to participate, and the State’s goals of decreasing the chances of corruption . . . would be frustrated.”); cf. Republican Nat’l Comm. v. FEC, 487 F. Supp. 280, 285 (S.D.N.Y. 1980) (explaining that a candidate will choose public financing only if it will “enhance” his ability to communicate with the electorate). Thus, the fact that a system is attractive to a rational candidate does not mean that it ipso facto “level[s] the playing field.” See also Respondent’s Brief, supra note 82, at 21 n.8 (“Nothing in this Court’s pre-
the *Buckley* Court: “It cannot be gainsaid that public financing as a
means of eliminating the improper influence of large private contribu-
tions furthers a significant governmental interest.” Thus, public
financing reduces quid pro quo corruption or its appearance, and
rescue funding is necessary to encourage participation in public fi-
nancing systems. Such a claim, as the *Scott* court rightly observed, is
“not novel.” The *Rosenstiel, Gable*, and *McComish* courts all found
that the anticorruption interest justified rescue provisions, the former
two under strict scrutiny.

As the *McComish* court noted, Arizona’s Citizens Clean Elections
Act was passed in the aftermath of AzScam, a bribery scandal ensnar-
ing nearly 10% of the Arizona legislature on civil or criminal
charges. State legislators were caught on videotape accepting cam-
paign contributions and bribes. Thus, the Act was presented to
voters as designed to change Arizona’s “reputation as a state rife
with corruption and the abuse of money in politics...” in which
“[o]ur elected officials are going to jail and this cycle of abuse seems
endless.” Arizona is not alone in passing a public financing system
in response to state corruption.

Courts striking down trigger funding, however, find that trigger
funding still fails to withstand heightened scrutiny even if it serves the
anticorruption interest. First, they point to language in *Davis*
suggesting that a burden on the personal expenditures of non-
participating candidates or independent expenditure groups can
never be justified on the basis of the anticorruption interest. But

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cedents suggests that a publicly financed candidate be unable to engage in the responsive
speech that a privately financed candidate would undertake as a matter of course.
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327 *Scott v. Roberts*, 612 F.3d 1279, 1292 (11th Cir. 2010).
328 *McComish*, 611 F.3d at 325 (applying intermediate scrutiny); *supra* note 312 (discussing
application of strict scrutiny in *Rosenstiel* and *Gable* on the basis of an anticorruption in-
terest).
329 *McComish*, 611 F.3d at 514.
330 *Id.*
331 *Id.* at 515 (citations omitted) (internal quotation marks omitted).
332 See, e.g., *Green Party of Conn. v. Garfield*, 616 F.3d 213, 218–19 (2d Cir. 2010), *petition for
(No. 10-795) (noting that Connecticut’s public financing system was passed in response to
aff’d in part, rev’d in part 616 F.3d 213 (2d Cir. 2010)).
333 See *Scott v. Roberts*, 612 F.3d 1279, 1294 (11th Cir. 2010) (finding Florida’s matching
funds provision does not survive strict scrutiny); *Green Party*, 616 F.3d at 245–46 (holding
that Connecticut’s trigger provision fails strict scrutiny).
334 See, e.g., *Green Party*, 616 F.3d at 245–246 (finding that *Davis* was “clear” that a burden on
personal expenditures can never serve the anticorruption interest); see also *Crosland, su-

what Davis, relying on Buckley, found was that restrictions on personal expenditures standing alone do not serve the anticorruption interest with respect to the burdened candidate;\footnote{Davis v. FEC, 554 U.S. 724, 744 (2008) (“The burden imposed by [the Millionaire’s Amendment] on the expenditure of personal funds is not justified by any governmental interest in eliminating corruption . . . . [The Millionaire’s Amendment], by discouraging use of personal funds, disserves the anticorruption interest.”) (emphasis added).} the assertion that personal expenditure restrictions always disserve the anticorruption interest proves too much.\footnote{For example, Buckley held that placing restrictions on expenditures of candidates (including personal expenditures) participating in public financing systems is constitutional. Buckley v. Valeo, 424 U.S. 1, 57 n.65. (1976) (per curiam). RNC found that expenditure limitations in the context of public campaign financing were justified by a compelling anticorruption interest. Republican Nat’l Comm. v. FEC, 487 F. Supp. 280, 285 (S.D.N.Y. 1980). The Scott court appeared to misinterpret Buckley and Davis entirely by suggesting at one point that the burden placed on the expenditures of participating candidates by the scheme at issue did not serve the anticorruption interest. See Scott, 612 F.3d at 1293 (“[B]y encouraging individuals to accept a limit on personal expenditures, the subsidy does not appear to reduce corruption.”).} To the extent rescue funding burdens a \textit{non-participating} candidate or independent expenditure group, such burden is coupled with a reduction in campaign contributions for the \textit{participating} candidate, which, as Buckley makes clear, expressly serves the anticorruption interest.\footnote{See supra note 326 and accompanying text (discussing Buckley’s holding that public financing serves the anticorruption interest).} Focusing on the source of the non-participating candidate’s or independent expenditure group’s funding misses the point: “In order to promote participation in the program, and reduce the appearance of quid pro quo corruption, the State must be able to ensure that participating candidates will be able to mount competitive campaigns, \textit{no matter what the source of their opponent’s funding}.\footnote{McComish v. Bennett, 611 F.3d 510, 526 (9th Cir. 2010).} The second objection to rescue funding is that it is not narrowly tailored—a less restrictive alternative is available—and thus it fails strict scrutiny.\footnote{See, e.g., Scott, 612 F.3d at 1294 (finding that public financing system is not narrowly tailored because releasing participating candidates from an expenditure limit would be less restrictive); Green Party of Conn. v. Garfield, 648 F. Supp. 2d 298, 373 (D. Conn. 2009), \textit{aff’d in part, rev’d in part} 616 F.3d 213 (2d Cir. 2010) (holding that matching funds are not necessary because initial funds are sufficient for participating candidates to run competitive races).} Here, the differences between the Arizona system in McComish and the systems found unconstitutional become manifest, suggesting why the former is narrowly tailored, even if the others may
not be based on their unique facts. In *Green Party*, for example, the initial grant provided to candidates was equivalent to the amount needed to run a competitive race; the provision of trigger funding was not needed to encourage participation and thus its true justification appeared to be an equalizing one. In Arizona, on the other hand, the state cannot afford to give each candidate a full grant in the amount needed to run a competitive race in all districts; instead, it chooses to give each candidate one-third of what it considers the competitive amount in certain districts and distributes the rest when necessary via a trigger provision. Because of the size of the initial grant, without trigger funding, many candidates for office in Arizona would simply not participate in public financing, and “a public financing system with no participants does nothing to reduce . . . quid pro quo corruption.” Furthermore, an existing restrictive contribution limit scheme had demonstrated itself to be insufficient to stem political corruption with the outbreak of AzScam, and other means of providing effective public financing were examined and rejected by the legislature as inadequate. In *Scott*, the provision at issue, unlike that in *McComish*, allowed participating candidates to continue receiving private contributions, so it is less clear how providing an additional subsidy to participants reduced corruption. Also, the *Day* court viewed the anticorruption rationale as a

340 For further discussion of the implications of the different state systems, addressing many of the same distinctions, see Respondent’s Brief, *supra* note 82, at 19 n.7, 25–32.

341 *Green Party*, 648 F. Supp. 2d at 373 (holding the trigger funds served an equalizing rationale that did not survive strict scrutiny); cf. Bob Bauer, *Something To Be Said for Davis*?, MORE SOFT MONEY HARD LAW (Jul. 3, 2008), http://www.moresoftmoneyhardlaw.com/news.html?AID=1295 (“A more aggressive—some would say, punitive—measure to “level the playing field,” such as removing the overall spending or contribution limits for the publicly funded candidate, could well provoke the Court to a Davis-like objection.”).

342 *See McComish*, 611 F.3d at 527 (“[If the Act were to raise the amount of its lump-sum grants and do away with matching funds altogether, it would make the Act prohibitively expensive and spell its doom.”).

343 Respondent’s Brief, *supra* note 82, at 29–30 (describing the rationale behind Arizona’s trigger provision).

344 *Id.* at 23 (discussing testimony of various individuals, including participating candidates, saying that absent trigger provisions, participation in Arizona’s public funding would decline).

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

346 *See id.* at 514 (noting that a contribution limit scheme was in place when AzScam occurred).

347 Respondent’s Brief, *supra* note 82, at 24 n.9.

348 *Scott v. Roberts*, 612 F.3d 1279, 1292 (11th Cir. 2010) (“The parties have not sufficiently explained how the Florida public financing system furthers the anticorruption interest.”); *id.* (“With the exception of imposing expenditure limitations and granting a subsidy[,] the system enables candidates who run campaigns that are indistinguishable from the
mere pretext for justifying trigger funding because participation in public financing in Minnesota was already near 100% prior to the enactment of the rescue provision. 349

Thus, the facts of *McComish* suggest that trigger funding can survive a strict scrutiny analysis on the basis of an anticorruption interest, but the court in the case declined to rule as much.350 Under a lower level of intermediate scrutiny, there is clearly a “substantial relation” between matching funding and the “sufficiently important” governmental interest of preventing corruption,351 for reasons just discussed.352 As the court in *McComish* noted, the evidence is unclear that the speech of non-participating candidates or independent expenditure groups was even chilled at all.353 More generally, if the speech of non-participating candidates in Arizona was typically chilled, it would be expected that most non-participating candidates would spend right up to the triggering threshold, but no further.354 But this did not occur.355 Like disclosure requirements which may discourage expenditures on political speech by those who wish to remain private, “the burden [of matching funding provisions] is merely a theoretical chilling effect on donors who might dislike the statutory result of making a contribution or candidates who may seek a tactical advantage related to the release or timing of matching funds.”356 As the *Citizens United* Court reaffirmed, intermediate scrutiny applies to disclosure requirements because they “impose no ceiling on campaign-related activities” and “do not prevent anyone from speaking.”357 Matching funding is far closer to a disclosure requirement campaigns of nonparticipants like Scott.”). Likewise, trigger provisions that merely remove an expenditure limitation on a participating candidate, allowing him to take in private contributions, are less likely to be justifiable as reducing corruption; they are also less likely to be justifiable under the “not similarly situated” rationale. See Respondent’s Brief, supra note 82, at 27 (suggesting that subsidies to one of two closely situated candidates might trigger a *Davis*-like penalty and not serve the anticorruption interest).

349 *Day v. Holahan*, 34 F.3d 1356, 1361 (8th Cir. 1994).

350 *McComish*, 611 F.3d at 526 n.10 (noting it was unnecessary to decide whether the Act would survive strict scrutiny when it is only subject to intermediate scrutiny).

351 *Id.* at 525 (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010)).

352 See supra notes 323–50 and accompanying text (discussing why trigger funding serves the compelling anticorruption interest and is narrowly tailored to serve such an interest).

353 See supra 204 (discussing the *McComish* court’s finding that there was a lack of evidence that plaintiffs were, in fact, chilled).

354 Respondent’s Brief, supra note 82, at 10.

355 *Id.* (discussing testimony of expert explaining that 45 of 46 candidates in 2006 spent either well under or over the triggering threshold).

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

than the direct restriction on speech at issue in *Davis*, suggesting that intermediate scrutiny is much more appropriate than strict scrutiny if heightened scrutiny is to be applied.\footnote{U.S. 93, 201 (2003)); see also *McComish*, 611 F.3d at 525 (quoting *Citizens United*, 130 S. Ct. at 914).}

VI. CONCLUSION

As the *McComish* district court astutely observed, “[p]laintiffs’ argument is that an award under the current regime . . . (the initial grant plus some matching funds) violates their rights [under the First Amendment], but an award of twice that amount (not based on matching funds) would not.”\footnote{McComish v. Brewer, No. CV-08-1550-PHX-ROS, 2010 WL 2292213, at *8 n.13 (D. Ariz. Jan. 20, 2010), *rev’d sub nom.* *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010).} Prior to the Supreme Court’s decision in *Davis v. FEC*, courts generally refused to accept such an “illogical”\footnote{Id. at *7.} argument, with all but the Eighth Circuit in *Day v. Holahan* finding trigger provisions constitutional. But since *Davis*, two circuits have found that *Davis* compels a finding that trigger provisions are unconstitutional, and the Ninth Circuit’s finding in favor of Arizona’s trigger provisions has been appealed to the Supreme Court in *McComish v. Bennett*. Supporters of rescue funding fear the worst.

In *McComish*, the Supreme Court has an important opportunity to preserve the constitutionality of trigger funding by clarifying the meaning of *Davis*. An application of *Davis* to trigger provisions mistakes the fundamental nature of the case’s holding. *Davis* did not hold that any time a scheme provides a benefit to one candidate as a result of his opponent’s spending, the opponent suffers an unconstitutional burden on his speech. The *Davis* holding was far narrower, focusing on the fact that a self-financing candidate was burdened by the activation of a scheme of discriminatory contribution limits for similarly situated candidates. In contrast, rescue funding, as the Supreme Court’s speech subsidy jurisprudence makes clear, is the dis-
tribution of a subsidy to a participating candidate, not a burden on a non-participating candidate. To hold otherwise would overturn decades of precedent. Admittedly, however, two members of the Court, Justices Scalia and Alito, are unlikely to agree with such an argument, as they would have granted an emergency injunction in *Respect Maine PAC*. The fact that the Supreme Court granted an injunction pending a petition for certiorari in *McComish* suggests other members of the Court may feel likewise.

Opponents of rescue funding, by characterizing trigger funding as an unfair advantage provided to a non-participating candidate, ultimately threaten much more than just rescue funding. They, on the basis of an argument rejected over thirty years ago by the Supreme Court in *Buckley*, threaten to undermine the central plank upholding the constitutionality of all public funding systems: The finding that public financing does not provide a competitive advantage to a participating candidate because such candidates “suffer a countervailing denial,” the imposition of expenditure limits, which are not placed on non-participating candidates.

As the *Daggett* court observed, no two public financing systems are the same. The Supreme Court, in considering Arizona’s system, would do well to heed this observation. Some states’ matching funding provisions may be designed to level the playing field, and thus may be unconstitutional. But others, like that in Arizona, serve a critical function because the state simply cannot afford to provide a full competitive grant to all participating candidates, an act that would clearly be constitutional. Thus, at the very least, the Court should recognize that a blanket prohibition on matching funding in *McComish* would greatly harm the viability of public campaign financing systems, which as *Buckley* makes clear, play an essential role in preventing corruption and ensuring public confidence in our representative system of government.

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361 *Buckley*, 424 U.S. at 95.
362 *Daggett v. Comm. on Govern. Ethics & Election Practices*, 205 F.3d 445, 469 (1st Cir. 2000) (“[N]o two public funding schemes are identical, and thus no two evaluations of such systems are alike . . . .”)
363 *See Hasen, supra* note 24 (“[T]he Court is likely to take away one of the only tools available to drafters of public financing measures to make such financing attractive to candidates.”).
AUTHOR’S POSTSCRIPT

As this Comment reached the printer, the Supreme Court was considering its decision in McComish v. Bennett. Should the Court declare rescue funding unconstitutional in McComish, on the basis of arguments advanced by trigger funding opponents and addressed here, I believe that the Comment has an important role to play. Trigger funding opponents assert claims about the nature of public financing systems that are not confined to the specific feature of trigger provisions. In this respect, the Comment serves as a starting point for analysis of why the Supreme Court’s ruling may ultimately mark a sharp turn in the way that the Court conceptualizes all public financing systems.