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ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC V. BENNETT: MONEY TALKS, MATCHING FUNDS PROVISION WALKS

*Roya Rahmanpour**

Money's influence on politics has posed a problem for many jurisdictions. Arizona tried to combat this issue in part through the "matching funds" provision of its Clean Elections Act. This provision was part of a larger campaign-financing scheme; it allowed for additional campaign money to go to publicly financed candidates when the expenditures of their privately financed opponents and other independent groups collectively exceeded the initial funding that the state had provided to the publicly financed candidates. In Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the U.S. Supreme Court held that this matching funds provision violated the First Amendment. This Comment examines the Court's ruling and argues that the Court's disregard of empirical evidence, narrowing of the acceptable compelling state interests, and prioritization of individual speech over societal interests could lead to unprincipled decisions in the field of campaign finance and could cause campaign-finance deregulation. It further argues that the decision's myopic analytic approach could bring about the piecemeal invalidation of intricate public-financing schemes and adversely impact policy decisions.*

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I. INTRODUCTION

As the adage goes, "Money talks." And money, in the context of political campaigns, is a form of speech that the First Amendment protects.[1] In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,[2] the U.S. Supreme Court considered this First Amendment right as applied to the "matching funds" provision of Arizona's Clean Elections Act (the "Act"). This provision granted additional campaign money to publicly financed candidates when the expenditures of their privately financed opponents and other independent groups collectively exceeded the initial funding that the state had provided to the publicly financed candidates.[3] The five-member majority of the strongly divided Court held that this matching funds scheme violated the First Amendment.[4]

This decision, which addressed the constitutionality of Arizona's matching funds provision and the bounds of permissible public financing more generally, is an important addition to campaign-finance jurisprudence for several reasons. First, *Arizona Free Enterprise* resolves a substantial circuit split regarding whether schemes like Arizona's violate the First Amendment.[5] Moreover, *Arizona Free Enterprise* marks the first case in which the Court has struck down a matching funds provision and is thus of great precedential value.[6] As precedent, the decision renders other jurisdictions' matching funds provisions and clean election laws

1. Buckley v. Valeo, 424 U.S. 1, 15 (1976).

2. 131 S. Ct. 2806 (2011). The Court consolidated this case with *McComish v. Bennett*.

3. *Ariz. Free Enter.*, 131 S. Ct. at 2816 (deciding the constitutionality of ARIZ. REV. STAT. ANN. § 16-952 (2011)).

4. *Id.* at 2813.

5. *Compare* McComish v. Bennett, 611 F.3d 510 (9th Cir. 2010), *rev'd sub nom.* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011), N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2008), *and* Daggett v. Comm'n on Governmental Ethics and Election Practices, 205 F.3d 445 (1st Cir. 2000) (each holding that matching funds to publicly financed candidates based on contributions and expenditures for privately financed candidates do not violate the First Amendment), *with* Scott v. Roberts, 612 F.3d 1279 (11th Cir. 2010), Green Party of Conn. v. Garfield, 616 F.3d 189 (2d Cir. 2010), *and* Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) (each holding similar laws unconstitutional).

6. *See* Brief of Amicus Curiae Union for Reform Judaism in Support of Respondents at 17, *Ariz. Free Enter.*, 131 S. Ct. 2806 (Nos. 10-238, 10-239), 2011 WL 661704, at *17.

more susceptible to constitutional attack.[7] Moreover, the decision, which invalidated a key provision of the Arizona law, eliminates a workable public-financing model that other jurisdictions could have followed.[8]

Part II of this Comment briefly summarizes the facts and procedural history of *Arizona Free Enterprise*. Part III then details the Court's reasoning in arriving at its holding. Next, Part IV analyzes the decision by arguing that the Court's disregard of empirical evidence, narrowing of the permissible compelling state interest, and prioritization of individual speech over societal interests can lead to campaign-financing deregulation and yield unprincipled decisions in the area of campaign-finance law. Part IV also argues that this decision's myopic analytic approach leads to piecemeal invalidation of intricate public financing schemes and adversely impacts policy decisions.

II. BACKGROUND OF ARIZONA LAW AND STATEMENT OF THE CASE

The Arizona Clean Elections Act implemented a completely voluntary public-financing system to fund the election campaigns of candidates for state office.[9] Candidates who chose to participate ("publicly financed candidates") were granted an initial allotment of public funds in exchange for accepting certain campaign restrictions and obligations.[10] The state also granted participating candidates additional matching funds if the combined expenditures of their privately financed opponents and of other independent groups that supported the privately financed opponents exceeded the state's

7. *See, e.g.*, Melissa Griffin, *San Francisco Election Financing Needs to Change*, THE EXAMINER (June 28, 2011, 3:00 AM), http://www.sfexaminer.com/local/2011/06/san-francisco-election-financing-needs-change (explaining that in light of this case, San Francisco's campaign financing system will have to change).

8. Through this decision "the U.S. Supreme Court took away the power of lawmakers on all levels of government to craft public campaign financing programs that best meet their needs." Jessica A. Levinson, *Justices Strike Down 'Rescue Funds' Provision in Public Campaign Financing Laws*, SUMMARY JUDGMENTS, LOY. L. SCH., L.A. FAC. BLOG (July 1, 2011), http://llsblog.lls.edu/faculty/2011/07/justices-strike-down-rescue-funds-provision-in-public-campaign-financing-laws.html#more.

9. *Ariz. Free Enter.*, 131 S. Ct. at 2813.

10. *Id.* at 2814 (referring to ARIZ. REV. STAT. ANN. §§ 16-941(A), -956(A)(2) (2006)) (stating that "publicly funded candidates" must agree to limit their expenditure of personal funds, participate in one debate, and adhere to an overall spending cap).

initial allotment to the participating candidates.[11] The state issued these additional matching funds at a ratio of ninety-four cents for every dollar that the privately financed candidates and independent expenditure groups spent.[12] The state capped matching funds to publicly financed candidates at three times[13] the initial state allotment, at which point it stopped providing further matching funds even while it still required the participating candidate to refrain from private fundraising.[14] Thus, a candidate who was able to raise funds in excess of three times the amount of a publicly financed candidate's initial grant gained a potentially unlimited financial advantage by opting out of public funding.[15]

Five past and future political candidates and two independent expenditure groups challenged the constitutionality of Arizona's matching funds provision, arguing that the provision violated their First Amendment rights; they claimed that their fear of triggering matching funds to their publicly financed opponents caused them to curb their campaign fundraising or spending and therefore chilled their speech.[16] The district court struck down the matching funds provision, but the Ninth Circuit reversed, concluding that the provision imposed a minimal burden on speech and was justified by Arizona's interest in curbing quid pro quo political corruption.[17] The Supreme Court reversed again, holding that Arizona's matching funds scheme violated the First Amendment rights of privately financed candidates and independent expenditure groups because it substantially burdened political speech and was not sufficiently justified by a compelling state interest.[18]

11. *Id.*

12. *Id.* (noting that the six-percent deduction accounts for the privately financed candidate's fundraising expenses).

13. The Court mistakenly wrote that the state capped matching funds at two times the allotment, but section 16-952(E) makes clear that the cap is three times the allotment. § 16-952(E); *Ariz. Free Enter.*, 131 S. Ct. at 2825.

14. *Ariz. Free Enter.*, 131 S. Ct. at 2814–15.

15. *Id.*

16. *Id.* at 2816.

17. McComish v. Brewer, No. CV-08-1550-PHX-ROS, 2010 WL 2292213 (D. Ariz.), *rev'd sub nom.* McComish v. Bennett, 611 F.3d 510 (9th Cir. 2010), *rev'd sub nom.* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).

18. *Ariz. Free Enter.*, 131 S. Ct. at 2828.

III. REASONING OF THE COURT

A. The Majority's Reasoning

Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas, and Alito, struck down Arizona's matching funds provision, first by finding that the provision severely burdened protected political speech—necessitating application of strict scrutiny—and then by determining that the provision was not justified by a compelling state interest.[19]

1. Whether the Matching Fund Provision Imposed a Substantial Burden on Privately Financed Candidates' Speech

The majority relied heavily on *Davis v. FEC*[20] in deciding that the matching funds provision substantially burdened protected speech.[21] *Davis* involved a First Amendment challenge to the "Millionaire's Amendment" of the federal Bipartisan Campaign Reform Act, which called for an asymmetrical regulatory scheme if a candidate for the U.S. House of Representatives spent more than $350,000 of his personal funds.[22] Under that asymmetrical scheme, when a candidate spent more than $350,000 of his personal funds, his opponent could collect individual contributions that amounted to three times the normal contribution limit.[23] The Court in *Davis* found that the scheme burdened the self-funded candidate's First Amendment rights because his expenditure of personal funds in excess of $350,000 enabled his opponent to raise more money and counteract his speech.[24]

Likewise, the *Arizona Free Enterprise* majority reasoned that Arizona's matching funds provision burdened speech because the privately financed candidate's choice to raise or spend more than the state's initial grant to his opponent publicly financed candidate triggered a state grant of additional funds to his opponent.[25] The

19. *Id.*
20. 554 U.S. 724 (2008).
21. *Ariz. Free Enter.*, 131 S. Ct. at 2817–18.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*

majority then characterized the matching funds provision as a "penalty" that was constitutionally more problematic than the law in *Davis*[26] was because (1) an outright grant of matching funds was more burdensome than a raising of the contribution limits for one of the candidates was; (2) the matching funds provision could have created a multiplier effect in elections with multiple publicly financed candidates; and (3) the triggering of the matching funds may have been out of the privately financed candidate's control because spending by independent expenditure groups could have also triggered matching funds.[27]

Additionally, the majority determined that independent expenditure groups' speech was burdened even more than that of privately financed candidates because these independent expenditure groups did not have the option of participating in Arizona's public financing scheme.[28] According to the majority, the Act burdened these groups by forcing them to choose among triggering a grant of matching funds, changing their message, or not speaking.[29]

In the remainder of its burden analysis, the majority defended its reasoning in light of the dissent's criticism.[30] Countering the dissent's view that the matching funds provision actually fostered more speech,[31] the majority stated that any increased speech came at the expense of the privately financed candidate.[32] The majority also stated that a privately financed candidate's willingness to trigger the state's grant of matching funds to his opponent did not make the law any less burdensome.[33] As to the dissent's evidentiary concern, the majority replied that proving a negative (i.e., that speech had been chilled) was not easy and cited *Davis* for the proposition that no empirical evidence was needed to determine that the law was burdensome.[34] Finally, the majority reasoned that the constitutional infirmity of the provision was not the amount of funding that was triggered but rather the manner in which funding was triggered—

26. *Id.*
27. *Id.* at 2818–19.
28. *Id.* at 2819–20.
29. *Id.*
30. *Id.* at 2820–24.
31. *See infra* Part III.B.1.
32. *Ariz. Free Enter.*, 131 S. Ct. at 2821.
33. *Id.* at 2823.
34. *Id.*

namely that it was triggered in response to the speech of privately financed candidates or independent expenditure groups.[35]

2. Whether a Compelling State Interest Justified the Matching Funds Provision

Because the majority held that the Act imposed a substantial burden on protected speech, the majority applied strict scrutiny, which requires a compelling state interest to justify a law.[36] The majority accepted the challengers' contention that the matching funds provision impermissibly sought to equalize electoral opportunities rather than further the state's alleged compelling interest of preventing corruption or the appearance of corruption.[37] It found the operation of the provision and its legislative terminology of "equalizing funds" as evidence that the Act was an attempt to level the electoral playing field.[38]

The majority further doubted that the Act had an anticorruption rationale because a candidate's use of personal funds, without outside influence, also triggered a grant of matching funds.[39] Finally, the majority expressed doubt about whether the matching funds provision provided any additional anticorruption value by noting that Arizona already had fundraising disclosure requirements and contribution limits that aimed to deter corruption.[40] Thus, the Court held that Arizona's matching funds provision was not justified by a compelling state interest and was therefore unconstitutional.[41]

B. The Dissent's Reasoning

Justices Kagan, Ginsburg, Breyer, and Sotomayor joined in a vigorous dissent in which they argued that the Act's matching funds provision did not burden protected speech or that it was justified by the state's compelling anticorruption interest.[42] Before delving into

35. *Id.* at 2824.
36. *Id.*
37. *Id.* at 2825.
38. *Id.*
39. *Id.* at 2826.
40. *Id.* at 2827.
41. *Id.* at 2828–29.
42. *Id.* at 2829 (Kagan, J., dissenting).

their constitutional analysis, the dissenters first discussed the virtues and mechanics of Arizona's public-funding scheme.[43]

According to the dissent, Arizona's political history revealed how ineffective contribution limits and disclosure requirements were in eliminating corruption; even with those regulations, the state suffered "AzScam," one of the worst corruption scandals in Arizona history, where authorities caught nearly ten percent of the state's legislators accepting bribes for political favors.[44] As a result, the state enacted the public-funding scheme on top of its existing contribution limits and disclosure requirements.[45] To make the scheme effective, Arizona crafted a "Goldilocks solution" to set the matching fund amount; the legislature set matching fund limits high enough in order to assure participating candidates that they could run competitive races, but not so high as to waste taxpayer dollars.[46] Thus, after discussing the matching funds provision, the dissent moved on to analyze the provision's constitutionality.[47]

1. Whether the Matching Fund Provision Imposed a Substantial Burden on Privately Financed Candidates' Speech

As the dissent stated, not only did the provision not burden protected speech but it also "subsidize[d] and so produce[d] *more* political speech."[48] The dissent noted that speech restrictions differ from speech subsidies and explained that "government subsidies of speech are consistent with the First Amendment so long as they do not discriminate on the basis of viewpoint."[49] Since Arizona offered its public-financing program to all candidates regardless of their viewpoints, the dissent found no First Amendment violation.[50] It explained that "Arizona . . . offers to support any person running for state office. Petitioners here *refused* that assistance. So they were making a novel argument: that Arizona violated *their* First

43. *Id.* at 2830–31.
44. *Id.* at 2832.
45. *Id.*
46. *Id.* (describing the matching funds provision as an optimal means of calibrating public funds at just the right amount).
47. *Id.* at 2833.
48. *Id.*
49. *Id.* at 2834.
50. *Id.* at 2834–35.

Amendment rights by disbursing funds to *other* speakers even though they could have received (but chose to spurn) the same financial assistance."[51] Indeed, the dissent was outraged that the challengers to the law were essentially demanding a right to speak free from response.[52]

Citing the seminal campaign finance case *Buckley v. Valeo*,[53] the dissent also articulated that the majority was misguided in holding that a subsidy of electoral speech constituted a restraint on speech.[54] According to the dissent, a viewpoint-neutral subsidy of additional, responsive speech has never been seen as a First Amendment burden and is certainly not a "substantial" burden.[55] Any burden that the matching funds provision imposed was no greater than the burden that is imposed by (1) a lump-sum public financing scheme; (2) disclosure and disclaimer requirements; or (3) contribution limits—all of which the Court had previously upheld.[56]

Additionally, the dissent distinguished *Davis*, which was the linchpin case in the majority's reasoning.[57] In *Davis*, the candidate's expenditure triggered a "discriminatory speech restriction," but in *Arizona Free Enterprise*, the candidate's expenditure triggered a "non-discriminatory speech subsidy."[58] Furthermore, the dissent noted that *Davis* never called into question the trigger mechanism itself, but rather questioned the discriminatory speech restriction that the mechanism brought about.[59] By distinguishing *Davis*, the dissent reiterated that Arizona's matching fund provision did not impose a substantial burden on protected speech.[60]

2. Whether a Compelling State Interest Justified the Matching Funds Provision

The dissent alternatively maintained that, even if the matching funds provision substantially burdened speech, it was justified by

51. *Id.* at 2835.
52. *Id.*
53. 424 U.S. 1 (1976).
54. *Ariz. Free Enter.*, 131 S. Ct. at 2836 (Kagan, J., dissenting) (citing *Buckley*, 424 U.S. at 1).
55. *Id.* at 2836–37.
56. *Id.* at 2837–39.
57. *Id.* at 2839–41.
58. *Id.* at 2839.
59. *Id.* at 2840.
60. *Id.* at 2839–41.

Arizona's anticorruption rationale.[61] Campaign-finance precedent squarely acknowledges the prevention of corruption or its appearance as a compelling state interest.[62]

As evidence of the anticorruption interest that Arizona claimed, the dissent found instructive the formal findings of the public financing statute, which stated that the Act's objective was to create a clean election system that functioned to limit the influence of special interest money in elections.[63] The dissent also noted that Arizona's history of corruption and the infamous AzScam scandal indicated that Arizona had a valid anticorruption rationale.[64] Since the matching funds provision, as the "Goldilocks solution," was integral to the effectiveness of Arizona's pubic-financing program, the dissent attributed the state's anticorruption rationale to that provision as much as it did to the entire program.[65]

Finally, the dissent criticized the majority for characterizing Arizona's real purpose in creating the provision as "'level[ing] the playing field,' not fighting corruption."[66] The dissent noted that the majority failed to present convincing evidence that the state's interest was anything other than fighting corruption.[67] Further, the dissent asserted that even if Arizona had sought to level the electoral playing field, as long as the state had a compelling interest—such as anticorruption—any separate interest in leveling the playing field would be irrelevant.[68] Thus, the dissent would have upheld the matching funds provision as constitutional.[69]

IV. ANALYSIS

This Comment argues that the *Arizona Free Enterprise* majority's disregard of empirical evidence, informal narrowing of acceptable compelling state interests, and prioritization of individual speech over societal interests might well lead to campaign-finance deregulation and yield unprincipled court decisions. This Comment

61. *Id.* at 2841.
62. *Id.*
63. *Id.* at 2841–42.
64. *Id.* at 2842.
65. *Id.* at 2842–43.
66. *Id.* at 2843.
67. *Id.* at 2844.
68. *Id.* at 2844–45.
69. *Id.*

also asserts that this decision's myopic analytic approach risks the piecemeal invalidation of intricate public-financing schemes and adversely impacts policy decisions.

A. Empiricism Does Matter and Should Not Be Unjustifiably Downplayed

Arizona Free Enterprise sets problematic precedent in its disregard of empirical evidence. In the field of election law, empiricism matters and should not be unjustifiably downplayed. Its importance is especially acute in regard to campaign-finance-reform efforts, which not only contain elements of democratic theory, law, and public policy but also depend on empirical political science.[70] If legislators and policy makers rely on empirical facts to draft laws like Arizona's, then courts should also consider such evidence before they make their decisions.

Despite the importance of empiricism in this field, the *Arizona Free Enterprise* majority offered little empirical evidence to support its reasoning.[71] For example, in regard to whether the matching funds provision burdened political speech, the majority was satisfied that "it is never easy to prove a negative."[72] More telling, the majority explicitly stated that "we do not need empirical evidence to determine that the law at issue is burdensome."[73]

In contrast to the majority's highly abstract discussion, the dissent and the Ninth Circuit more fully engaged the empirical evidence. For instance, in finding that the matching funds provision did not impose a burden on speech, the dissent relied on several statistics that showed that expenditures by candidates and independent groups increased since the public financing law was enacted.[74]

Likewise, the Ninth Circuit refused to recognize "mere metaphysical threats to political speech as severe burdens" and required the plaintiffs to prove that the specter of matching funds

70. Bruce E. Cain, *Election Law as a Field: A Political Scientist's Perspective*, 32 LOY. L.A. L. REV. 1105, 1119 (1999).

71. The majority simply cited several plaintiffs' petitions for certiorari, in which they attested that the Act burdened their speech. *Ariz. Free Enter.*, 131 S. Ct. at 2822.

72. *Id.* at 2823 (quoting Elkins v. United States, 364 U.S. 206, 218 (1960)).

73. *Id.*

74. *Id.* at 2834 n.2 (Kagan, J., dissenting).

actually chilled their speech.[75] The Ninth Circuit noted, "No Plaintiff . . . 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."[76] Rather, even though he claimed that the Act burdened his political speech, one privately financed candidate could not recall whether his spending had ever triggered a state's grant of matching funds to an opponent; another privately financed candidate instructed his campaign consultant to fundraise as much as possible without mentioning concerns of triggering matching funds.[77]

Aside from its importance to the issue of burdening speech, empiricism is also pivotal to a court's inquiry into a compelling state interest.[78] Although political scientists have not been able to prove conclusively the seemingly obvious fact that money corrupts,[79] the evidence in *Arizona Free Enterprise* surely established that Arizona's public funding law was aimed at combating political corruption that was caused by campaign contributions.[80] While the majority quickly dismissed evidence of Arizona's anticorruption rationale, the dissent, like the Ninth Circuit, acknowledged that empirical evidence and recognized that Arizona passed the Act in response to AzScam.[81] Ironically, if the majority had been more inclined to consider Arizona's anticorruption rationale, proof of Arizona's need to combat corruption was literally staring it in the face: Arizona senator and key plaintiff in *Arizona Free Enterprise* John McComish, who just that week admitted to being embroiled in a campaign-finance scandal, was present in the courtroom during oral arguments.[82]

75. McComish v. Bennett, 611 F.3d 510, 522–23 (9th Cir. 2010), *rev'd sub nom.* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).

76. *Id.* at 523.

77. *Id.* at 524.

78. Cain, *supra* note 70, at 1114–15 ("Defining important state purposes is both a normative and an empirical task.").

79. *Id.* at 1115.

80. *See, e.g.*, *Ariz. Free Enter.*, 131 S. Ct. at 2832 (2011) (Kagan, J., dissenting).

81. *Id.*; *McComish*, 611 F.3d at 514, 525; *see supra* Part III.B.

82. Doug Kendall, *McComish, the Supreme Court and the Fiesta Bowl Scandal*, HUFFPOST POLITICS (Apr. 4, 2011, 6:35 PM), http://www.huffingtonpost.com/doug-kendall/mccomish-the-supreme-cour_b_844728.html.

Overall, the majority's disregard for empirical evidence not only resulted in an unprincipled[83] decision in *Arizona Free Enterprise* but also set a worrisome precedent for future campaign-finance cases. *Arizona Free Enterprise* represents the second wave of Supreme Court campaign-finance cases that have disregarded empirical evidence. The first wave came with what one scholar has called the "New Deference Quartet"—four campaign-finance cases in the early 2000s in which the Court only casually considered empirical evidence.[84] Scholars have criticized those decisions as unprincipled because the Court only paid lip service to satisfying a "quantum of empirical evidence."[85] But the *Arizona Free Enterprise* decision is arguably even more unprincipled for its outright statement that empirical evidence is unnecessary.

So why did the *Arizona Free Enterprise* majority perpetuate a disregard for empirical evidence? At least two reasons present themselves. The cynical view is that the Justices use evidence merely to buttress their "simple value judgments . . . on the wisdom of particular campaign finance laws."[86] Another view is that the Court may treat evidence somewhat superficially because it has lost faith in the kinds of questions that the existing doctrine makes relevant.[87] But whatever the majority's reason was for disregarding empirical evidence, its decision to do so caused *Arizona Free Enterprise* to be an unprincipled decision and a problematic precedent.

B. The Decision Reflects the Roberts Court's Trend of Narrowing the Acceptable Compelling State Interests in Campaign-Finance Cases

Another troubling aspect of *Arizona Free Enterprise* is the majority's implicit narrowing of the acceptable compelling state interests in campaign finance cases. By way of background, in the seminal campaign finance case *Buckley*, the Court held that preventing corruption or the appearance of corruption, unlike

83. The decision is "unprincipled" in the sense that it is not anchored to the real world and can lead a court to implement judicial discretion that is not grounded in fact or law.

84. Richard L. Hasen, *No Exit? The Roberts Court and the Future of Election Law*, 57 S.C. L. REV. 669, 674–75 (2006).

85. *See, e.g.*, *id.*

86. Daniel R. Ortiz, *The Empirics of Campaign Finance*, 78 S. CAL. L. REV. 939, 944–45 (2005).

87. *Id.* at 945.

leveling the electoral playing field, is a compelling state interest that justifies an infringement on First Amendment rights.[88] However, while the Justices in *Buckley* considered corruption in terms of a quid pro quo (money for political favors), the word "corruption" itself is pliable and susceptible to many meanings.[89] The Court took advantage of this pliability in the "New Deference Quartet" cases, which expanded the definitions of "corruption" and "the appearance of corruption" beyond the quid pro quo variety and into the territory of more subtle favoritism and undue influence.[90] In *Davis,* the Court halted this trend that embraced a broader view of corruption and reverted to the *Buckley* conception of corruption.[91] More recently, in *Citizens United v. FEC*,[92] the Court clearly circumscribed the anticorruption interest, strictly limiting it to the threat of actual quid pro quo corruption or the appearance thereof.[93]

Given this background, *Arizona Free Enterprise* was seemingly yet another instance where the Court restricted the government's anticorruption rationale. There, the majority suggested that anticorruption needs should be the major reason, if not the only reason, behind a campaign-finance regulation, lest that rationale is perceived as illusory.[94] Specifically, because the majority discerned that one reason behind Arizona's public-funding law may have been to "level the playing field," it held that the state's anticorruption rationale was illusory and merely a front for a constitutionally impermissible reason.[95] As the dissent indicated, however, campaign finance jurisprudence has never required that anticorruption be the state's only interest; as long as preventing corruption or the

88. Buckley v. Valeo, 424 U.S. 1, 26–29 (1976).

89. Jason S. Campbell, Note, *Down the Rabbit Hole with* Citizens United*: Are Bans on Corporate Direct Campaign Contributions Still Constitutional?*, 45 LOY. L.A. L. REV. 171, 195 (2011).

90. Hasen, *supra* note 84, at 674–75 (referencing *McConnell v. FEC*, 540 U.S. 93 (2003), *FEC v. Beaumont*, 539 U.S. 146 (2003), *FEC v. Colorado Republican Federal Campaign Commission*, 533 U.S. 431 (2001), and *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000)).

91. Emily C. Schuman, Comment, Davis v. Federal Election Commission*: Muddying the Clean Money Landscape*, 42 LOY. L.A. L. REV. 737, 753–54 (2009).

92. 130 S. Ct. 876 (2010).

93. Campbell, *supra* note 89, at 196; *see also* Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 125–26 (2010).

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

95. *Id.*

appearance of corruption is one valid rationale behind a law, it does not matter that another rationale may be an insufficient interest.[96]

Despite the dissent's protest, the majority opinion is binding on lower courts. Thus, courts can now more easily strike down campaign-finance regulations where combating corruption is not the sole rationale and where additional impermissible rationales also motivate the law. The ease with which post-*Arizona Free Enterprise* courts can invalidate campaign-finance laws for lack of a "non-illusory" compelling state interest aligns well with Chief Justice Roberts's political philosophy. According to the Chief Justice, who wrote the majority's opinion, "the political process itself [is] an adequate remedy for corruption."[97] Because of Roberts's belief in the self-regulation of the political process, the anticorruption rationale will likely continue to become an impotent compelling state interest during his tenure on the Court. Given its ongoing circumscription of the anticorruption rationale from *Davis* to *Citizens United* to *Arizona Free Enterprise*, it is conceivable that the Court will continue to limit the rationale to the extent that it supports a burden on First Amendment rights in only extremely narrow circumstances. The narrowing trend already means that future campaign-finance laws will have more difficulty in passing constitutional muster, and it may also lead to increased deregulation of campaign finance.

C. Prioritizing Individual Speech over Societal Interests Is Inconsistent with First Amendment Principles

The Court's balancing of First Amendment rights is also troubling. The *Arizona Free Enterprise* majority focused on how the Arizona law burdened the speech of individual candidates and independent expenditure groups without considering the countervailing First Amendment rights of society at large. This prioritization of individual speech over societal interests can yield nearsighted decisions in future campaign-finance jurisprudence and lead to campaign-finance deregulation.

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

97. Rachel Gage, Note, Randall v. Sorrell*: Campaign-Finance Regulation and the First Amendment as a Facilitator of Democracy*, 5 FIRST AMENDMENT L. REV. 341, 368 (2007).

The Free Speech Clause of the First Amendment was drafted to foster democratic self-government, among other reasons.[98] *Buckley* recognized this societal aspect of the First Amendment by prescribing an "electorate-centered" analytical approach whereby "the relationship between First Amendment rights and campaign finance should be structured in a way that best serves the electorate."[99] The *Buckley* approach provided a critical foundation for upholding public funding regulations because those regulations often restrict an individual candidate while they benefit the public.[100]

As one commentator has noted, *Davis* marked a paradigm shift "away from the interests of the voting public and toward individual candidates."[101] By adopting a "candidate-centered" interpretation of First Amendment interests in the campaign-finance context, *Davis* prioritized individual speech over societal interests.[102] As a case that heavily relied on *Davis*, *Arizona Free Enterprise*'s prioritization of individual speech over societal interests was not surprising.

Critics of the First Amendment as protector of societal interests have asserted that:

> If the First Amendment can require restrictions on individual speech in order to protect democracy-facilitating speech-in-the-aggregate, it is left to the courts to decide the point at which the restriction on the individual fails to serve society's interests, and also to determine when an individual deserves protection despite the fact that such protection may be at odds with democratic self-governance.[103]

Essentially, these critics claim that an individual-centered First Amendment approach is correct simply because it is more straightforward.[104] However inconvenient it may be to consider countervailing societal interests in a First Amendment analysis, such interests are an integral part of the First Amendment and should therefore have a place in the burden calculus. By adopting the *Davis*

98. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2366 (2000).

99. Schuman, *supra* note 91, at 741.

100. *Id.*; *see also* Issacharoff, *supra* note 93, at 119 ("[The] restrictive aspect of the [campaign finance] reform agenda is ultimately both its strength and its constitutional liability.").

101. Schuman, *supra* note 91, at 741.

102. *Id.* at 741–42.

103. Gage, *supra* note 97, at 363–64.

104. *Id.* at 364–65.

candidate-centered view of the First Amendment, *Arizona Free Enterprise* put a stamp of approval on subverting societal First Amendment interests and thus endangered the viability of future public-funding schemes.

D. A Myopic Approach Can Result in Undesirable Repercussions

The Court's myopic approach toward invalidating the matching funds provision represents another fundamental reason that *Arizona Free Enterprise* is a disconcerting decision. Whereas the dissent took a holistic approach to analyzing the matching funds provision by recognizing that the provision was integral to the effectiveness of Arizona's entire public-financing program,[105] the majority took a myopic approach by isolating that provision and analyzing it in a vacuum.[106]

The majority's shortsighted approach has at least two possible repercussions. First, it undermines entire campaign-finance schemes in Arizona, and by application, elsewhere. *Arizona Free Enterprise* is significant in that it represents a problematic piecemeal approach to invalidating an intricate public financing scheme. Although the effects of disturbing one part of a multifaceted law cannot be known with certainty,[107] the Court's disturbing of Arizona's matching funds provision likely undercuts the state's entire scheme because the provision was "one component that [was] not only attractive but necessary to make this type of funding work."[108] Tellingly, at oral arguments, Justice Breyer lamented that "it is better to say that it's all illegal than to subject these things to death by a thousand cuts, because we don't know what will happen when we start tinkering with one provision rather than another."[109] In this manner, Justice

105. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2842–43 (2011) (Kagan, J., dissenting).

106. *See, e.g.*, *id.* at 2818 (majority opinion).

107. *See also* Gene Nichol, Citizens United *and the Roberts Court's War on Democracy*, 27 GA. ST. U. L. REV. 1007, 1010 (2011) (noting that by constantly leaving only half of campaign finance programs intact, the Court has rendered those regulations ineffective). *See generally* Michael A. Fitts, *The Hazards of Legal Fine Tuning: Confronting the Free Will Problem in Election Law Scholarship*, 32 LOY. L.A. L. REV. 1121 (1999) (noting how it is difficult to predict the impact of legal changes).

108. Schuman, *supra* note 91, at 740.

109. Lyle Denniston, *Argument Recap: Kennedy Shows His Hand*, SCOTUSBLOG (Mar. 28, 2011, 12:05 PM), http://www.scotusblog.com/?p=116863.

Breyer, as a member of the dissent, stressed that deviating from a holistic approach to analyzing such public-financing laws can have unintended consequences.

Arizona Free Enterprise also has far-reaching implications for local and national policy decisions. The Court's decision facilitates the ability of other courts to strike down laws that are aimed at both curbing political candidates' dependence on outside money and the concomitant threat of corruption. As access to elected officials is increasingly linked to wealth, the more likely it is that the civil rights of the poor and minorities will be neglected.[110] This, in turn, has the effect of diminishing the public's confidence in our democracy and of increasing its concerns about special interests.[111] Indeed, following 2010's controversial *Citizens United* ruling, which cleared the way for unlimited spending by corporations in federal elections, public concerns about special interests is already high.[112]

V. CONCLUSION

Arizona Free Enterprise's disregard for empirical evidence, informal narrowing of the acceptable compelling state interests, prioritization of individual speech over societal interests, and myopic analytical approach endanger campaign-finance regulations and could lead to unprincipled decisions in future campaign-finance cases. If this case is any indicator of the future of campaign-finance reform, money talks—and it will have troubling things to say.

110. Brief of Amicus Curiae Union for Reform Judaism in Support of Respondents, *supra* note 6, at 14.

111. *Ariz. Free Enter.*, 131 S. Ct. at 2830 (Kagan, J., dissenting).

112. Denniston, *supra* note 109.