



[GW Law Faculty Publications & Other Works](#)

[Faculty Scholarship](#)

2012

Matching Political Contributions

Spencer A. Overton

George Washington University Law School, soverton@law.gwu.edu

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications

 Part of the [Law Commons](#)

Recommended Citation

96 MINN. L. REV. 1694 (2012)

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

Article

Matching Political Contributions

Spencer Overton[†]

INTRODUCTION

Traditional public financing of campaigns is in trouble. Successful candidates have increasingly rejected public financing because it provides inadequate funding and limits candidate spending.¹ In an attempt to revive the idea, several states and localities adopted provisions that gave additional “equalizing funds” to publicly financed candidates so they could remain competitive with privately financed opponents.² In June 2011, however, the U.S. Supreme Court struck down Arizona’s version of this provision,³ reasoning that it discouraged the speech of privately financed candidates.⁴

[†] Professor of Law, The George Washington University Law School. Michael Abramowicz, Eleanor Brown, Anupam Chander, Tom Colby, Chris Edley, Roger Fairfax, Heather Gerken, Rick Hasen, Sam Issacharoff, Larry Lessig, Amy Loprest, Michael Malbin, Bill Marshall, Mimi Marziani, Nick Nyhart, Dan Ortiz, Rick Pildes, Adam Skaggs, Peter Smith, Benjamin Spencer, Dan Tokaji, Amanda Tyler, Adam Winkler, and Fane Wolfer provided helpful comments that allowed me to develop this Article. Rachel Applestein, Benjamin Kapnik, and Stephanie Rodriguez contributed invaluable research assistance. Copyright © 2012 by Spencer Overton.

1. See *infra* text accompanying notes 45–50 (discussing how candidates have increasingly opted out of the presidential public financing system).

2. See *infra* note 52 and accompanying text (discussing examples of these provisions).

3. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2829 (2011). The author edited and signed onto an amicus brief in *Arizona Free Enterprise* that argued the Court should allow state and local innovation with tools like supplemental funding triggers to improve campaign finance laws. See Brief for Constitutional and Election Law Professors as Amici Curiae Supporting Respondents, *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (Nos. 10-238, 10-239), 2011 WL 686402 [hereinafter Brief for Professors].

4. See *Ariz. Free Enter.*, 131 S. Ct. at 2813 (holding the Arizona law at issue violative of the First Amendment).

The Court's decision in *Arizona Free Enterprise v. Bennett* deals a significant blow to traditional public financing.⁵ But rather than give up the fight, reformers should seize the decision as an opportunity to transform their entire approach. Public financing should no longer aim to purge private money from politics. Instead, it should encourage as many private citizens as possible to participate in financing politics. Increased participation makes government more accountable and responsive to the people as a whole, and it facilitates individual autonomy and self-governance.⁶ Just as civic norms encourage all citizens to vote,⁷ a key goal of public financing should be to encourage everyone to make a financial contribution to a political candidate of his or her choice.

Conventional reformers and press accounts suggest that "there is too much money in politics"⁸—but they are wrong. The real problem is that the money comes from too few people. While 64% of eligible Americans voted in the November 2008 election, only 10% typically give to political campaigns, and less than 0.5% are responsible for the bulk of the money that politicians collect from individual contributors.⁹

Unfortunately, conventional public financing has made this problem worse by suppressing participation. Had Barack Obama participated in the public financing program for the 2008 general election, for example, his campaign would not have been able to collect even a \$5 contribution from a donor, and he would not have attracted an unprecedented 2.7 million small donors.¹⁰ Perhaps more important, Obama also would have sacrificed thousands of volunteer organizers who engaged in voter registration, door-to-door canvassing, and phone banking, as studies show donating even small amounts develops bonds to a movement that lead to other forms of grassroots engagement.¹¹

5. While the Court in *Arizona Free Enterprise* did not invalidate all traditional public financing programs, its decision made most traditional public financing schemes unworkable. See *infra* notes 53–58 and accompanying text.

6. See *infra* text accompanying notes 59–61.

7. See *id.*

8. See, e.g., George F. Will, 'Campaign Reform' Means 'Shut Up!', N.Y. POST, Feb. 3, 2012, http://www.nypost.com/p/news/opinion/opedcolumnists/campaign_reform_means_shut_up_BlibKnKWSaIdQYGy7fg2TL.

9. See *infra* notes 60–61 and accompanying text.

10. See *infra* note 65 and accompanying text.

11. See *infra* note 71 and accompanying text.

This Article navigates this new legal and political order and maps out the future of public financing. The way forward requires an overhaul of public financing that spurs greater participation by the public at large.

Specifically, the answer lies in a system that gives a multiple match to donor contributions. Rather than continuing to give each candidate a flat grant of \$100,000, for example, public financing systems should give six-to-one multiple matching funds on the first \$200 of a contribution. This would make a \$200 contribution worth \$1400 to a candidate.

Multiple matching funds reflect a philosophical shift about the role of money in politics. Money is not an “evil,” but should be embraced as a tool to make government accountable to more people. Public financing should not “level the playing field”¹² among candidates, but should reward candidates who mobilize more supporters. Reformers need to spend less energy on “getting big money out of campaigns” and more on “getting the people back in” to those very same campaigns.¹³

Multiple matching funds address the core challenge to financial political participation—a lack of income.¹⁴ Financial constraints determine who gives money.¹⁵ Individuals with family incomes over \$100,000 represented 11.1% of the population in 2004, cast 14.9% of the votes, and were responsible for approximately 80% of political contributions over \$200.¹⁶

Participation rates are also low because candidates face lower transaction costs in mobilizing larger contributions from a narrow group of higher-income Americans.¹⁷ Studies show that mobilization is a major factor in financial participation (people asked to give are much more likely to do so), and fundraisers find that they can raise more money by targeting larger contributors.¹⁸ “Why should I call ten people and ask for \$100 each,” many candidates and fundraisers ask, “when it takes me less time to call one person and ask for \$1000?”¹⁹

12. See *Ariz. Free Enter.*, 131 S. Ct. at 2825 (rejecting a “state interest in leveling the playing field”).

13. David Donnelly, *We Need More Citizen Participation*, BOS. REV., Sept.–Oct. 2010, <http://www.bostonreview.net/BR35.5/donnelly.php>.

14. See *infra* note 78 and accompanying text.

15. See *infra* note 79 and accompanying text.

16. See *infra* notes 80–82 and accompanying text.

17. See *infra* text accompanying notes 85–88.

18. *Id.*

19. *Id.*

Against this accepted wisdom, however, multiple matching programs make candidates more willing to engage more Americans and expand participation. For example, while candidates in California (which lacks multiple matching funds) collect only 5% of their money from contributors who give \$250 or less,²⁰ candidates in New York City (the only American jurisdiction with six-to-one multiple matching funds) collect over half of their money from contributors who give \$250 or less.²¹ Seven times more New York City residents contributed to city races (which have multiple matching funds) than contributed to state races (which lack multiple matching funds).²² Data presented for the first time here show that six-to-one multiple matching funds stimulate participation much more effectively than a basic one-to-one match²³ and a handful of jurisdictions have employed such multiple matching funds for decades.²⁴

Nonetheless, critics will still argue that private markets alone should finance politics.²⁵ They are wrong. Providing the basic framework for citizen participation through multiple matching funds is a proper government function, as evidenced by the other tools government uses to facilitate democratic participation. For example, the state traditionally provides a platform to participate by supplying voter registration services, accessible polling places, ballots, and other tools.²⁶ Multiple matching funds are no different. Indeed, multiple matching of contributions is not “welfare for politicians” that boosts candidates with weak fundraising skills, as some have labeled conventional public financing. Instead, multiple matching funds facilitate the majority’s maxim in *Citizens United v. FEC* that money is a form of speech and therefore an important tool to “hold officials accountable to the people.”²⁷ Those who insist that private money alone should finance politics elevate their mechanical aversion to government over a commitment to expand liberty.

20. See *infra* note 42 (listing states, including California, that provide partial matching payments).

21. See *infra* note 109 and accompanying text.

22. See *infra* note 78 and accompanying text.

23. See discussion *infra* Part III.

24. See *id.*

25. See discussion *infra* Part II.B (discussing arguments from market-oriented critics against public financing of campaigns).

26. See *infra* text accompanying notes 96–99.

27. *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

In facilitating participation, a multiple matching program also diversifies a candidate's support so that she is less beholden to a narrow group of large donors, thereby reducing the potential for corruption.²⁸ Such a program would represent less than 0.07% of government spending and would deliver a return on investment several times higher by helping to prevent corruption in a political process that collects and spends trillions of dollars each year.²⁹

Multiple matching programs also avoid significant problems faced by traditional public financing, including funds being rejected by strong candidates and large subsidies being wasted on candidates with little public support.³⁰ Further, multiple matching programs do not burden speech, and they comply with the Court's campaign finance decisions.³¹

This is a critical moment for campaign finance. Within two terms, the Roberts Court struck down corporate spending restrictions and rendered traditional public financing schemes obsolete.³² *Citizens United* also led to the emergence of independent expenditure-only committees that may accept unlimited contributions—or “superPACs”—which increased candidates' incentives to find a few wealthy investors to fund these outside groups with multimillion-dollar contributions.³³ November 2012 will be the first general election in which presidential candidates from both major parties reject public financing since the inception of the program. If existing programs are

28. See *infra* text accompanying notes 118–21.

29. See *infra* text accompanying notes 137–51 (discussing cost-benefit analyses of various matching programs).

30. See *infra* text accompanying notes 45–52.

31. See discussion *infra* Part III.C.

32. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2812 (2011) (invalidating the trigger provision of public financing); *Citizens United*, 130 S. Ct. at 929 (invalidating restrictions on corporate spending on politics); see also *Speechnow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (holding that independent expenditure political committees could accept unlimited contributions from individuals, following the holding of *Citizens United*); FEC Advisory Op. 2010-11, available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3069> (stating that unions and corporations could give unlimited contributions to such independent expenditure committees).

33. See *Speechnow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010); Memorandum from Thomasenia P. Duncan, General Counsel, FEC, et al. to the FEC (July 21, 2010), available at <http://www.fec.gov/agenda/2010/mtgdoc1042.pdf>. Outside groups have spent \$45,754,221 in the 2012 Republican primary race compared to \$43,423,823 from the candidates. See *Outside Spending: 2012 Presidential Race*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/races/index.php?cycle=2012&id=PRES> (last visited Feb. 12, 2012).

not revamped soon, public financing may be off the public's radar for decades, as budget deficits make antiquated public financing programs ripe targets for spending cuts. At the same time, technology is removing barriers to participation—a movement reflected by the rise of the small dollar donor. With so much in flux, federal, state, and local lawmakers are looking for guidance. This Article provides the direction that public financing should now take.

Part I of this Article chronicles the demise of public financing in the United States. Part II introduces a participatory theory to public financing, and explains why it is superior to the approaches of both conventional public financing advocates who seek to purge private money from politics and libertarians who would rely exclusively on private economic markets. Part III details the implementation of this new approach by outlining and analyzing a multiple match proposal for citizen contributions.

I. THE DEMISE OF CONVENTIONAL PUBLIC FINANCING

In public financing systems, candidates receive cash grants for campaigning from the public treasury.³⁴ Generally, candidates qualify for public funds by raising a threshold amount of money from a minimum number of donors or by winning a party nomination.³⁵ While all public funding systems require that participating candidates limit their campaign spending,³⁶ the

34. Candidates or parties may receive other forms of public subsidies, such as the franking privilege, bulk mailing rates, rebates or tax credits to contributors, political conventions grants, and television and radio subsidies. See Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 566–68 (1999) (discussing the forms of public subsidies available to political candidates).

35. In “Clean Elections” states, candidates qualify for grants by raising a threshold number of small private contributions and then agreeing to refrain from additional private fundraising. See, e.g., ARIZ. REV. STAT. ANN. §§ 16-946, 16-950 (2011) (requiring candidates to raise different numbers of \$5 donations to qualify for funding); CONN. GEN. STAT. §§ 9-702, 9-704 (2011) (requiring candidates to raise \$250,000 in contributions no greater than \$100); ME. REV. STAT. tit. 21, §§ 1122, 1125 (2011) (requiring different numbers of \$5 donations depending on position sought); N.M. STAT. ANN. §§ 1-19A-2, 1-19A-4 (2011) (requiring \$5 contributions from a percentage of the state population); N.C. GEN. STAT. §§ 163-278.62, 163-278.64 (2011) (requiring 350 contributions, each between \$10 and \$500). Presidential primary candidates qualify for public funds by raising \$5000 from donors in at least twenty states. See 26 U.S.C. § 9033(b) (2006). In addition, only the first \$250 of each contribution is counted. See *id.*

36. See Briffault, *supra* note 34, at 568 (“All existing systems for providing public funds to candidates require those who accept public funds to agree to accept limits on their campaign spending.”); see also, e.g., ARIZ. REV. STAT.

Court has interpreted the Constitution as forbidding such limits on candidates who choose not to participate.³⁷

Jurisdictions allocate public funds in different ways.³⁸ Full flat-grant financing jurisdictions give candidates flat lump-sum grants equal to those received by other participating candidates, and prohibit participating candidates from spending any private money. Partial flat-grant financing jurisdictions often give candidates flat lump-sum grants equal to the amounts given to other participating candidates, but allow them to collect private money.³⁹

Other jurisdictions match donor contributions. Most of these systems give candidates a modest match for private contributions in gubernatorial (and sometimes other statewide) elections. For example, in a jurisdiction that provides a one-to-one match for the first \$250 of a private contribution, a private \$250 contribution is worth \$500 to a candidate. Two cities offer significant multiple match programs. New York City, for example, matches the first \$175 of a political contribution at a six-to-one ratio (e.g., a \$150 contribution is worth \$1050 to a candidate).⁴⁰

ANN. §§ 16-941, 16-947 (2011); CONN. GEN. STAT. § 9-702 (2011); FLA. STAT. § 106.33 (2011); HAW. REV. STAT. §§ 11-423, 11-428 (2011); ME. REV. STAT. tit. 21-A, § 1125(9) (2011); MD. CODE ANN., ELEC. LAW § 15-105 (2011); MASS. GEN. LAWS ch. 55C, § 1A (2011); MICH. COMP. LAWS § 169.267 (2011); MINN. STAT. § 10A.25 (2010); NEB. REV. STAT. § 32-1604 (2011); N.J. STAT. ANN. § 19:44A-7 (West 2011); N.M. STAT. ANN. § 1-19A-3 (2011); N.C. GEN. STAT. § 163-278.64 (2011); R.I. GEN. LAWS § 17-25-19 (2011); VT. STAT. ANN. tit., 17 § 2853 (2011); WIS. STAT. § 11.50 (2011).

37. Although spending limits applied to all candidates are unconstitutional, imposing spending limits on candidates as a condition of accepting public funds is permissible. *Buckley v. Valeo*, 424 U.S. 1, 58–59, 107–08 (1976) (per curiam); see also R. SAM GARRETT, CONG. RESEARCH SERV., RL 33814, PUBLIC FINANCING OF CONGRESSIONAL CAMPAIGNS: OVERVIEW AND ANALYSIS 4 (2011) (“[P]ublic financing is attractive to some because it is one of the few constitutional ways to limit campaign spending . . .”).

38. For a summary of state and local public financing laws, see JESSICA A. LEVINSON & SMITH LONG, CTR. FOR GOVERNMENTAL STUDIES, MAPPING PUBLIC FINANCING IN AMERICAN ELECTIONS 5 (2009); JESSICA A. LEVINSON, CTR. FOR GOVERNMENTAL STUDIES, STATE PUBLIC FINANCING CHARTS 2 (2009).

39. Partial public financing in Nebraska becomes available only if one candidate adheres to spending limits while the other does not (the candidate complying with limits is given public money). GARRETT, *supra* note 37, at 37. This may violate the holding of *Arizona Free Enterprise*.

40. N.Y.C., N.Y. ADMIN. CODE §§ 3-703, 3-705 (2010). San Francisco offers candidates a four-to-one match for the first \$100,000 in contributions of up to \$500 to the candidate after the candidate qualifies for public matching funds. S.F., CAL., CAMPAIGN & GOVERNMENTAL CONDUCT CODE §§ 1.104, 1.144 (2010). Members of Congress have recently introduced multiple matching for

In 2011, five states provided full public financing,⁴¹ four states provided partial public financing in the form of lump sum payments,⁴² and seven states provided a modest match for

Congressional campaigns. See Fair Elections Now Act, H.R. 1826, 111th Cong. (2009) (providing a four-to-one match on contributions of \$100 or less).

41. ARIZ. REV. STAT. ANN. § 16-950 (2011); CONN. GEN. STAT. § 9-704 (2011); ME. REV. STAT. tit. 21, § 1125 (2011); N.M. STAT. ANN. § 1-19A-4 (2011); N.C. GEN. STAT. § 163-278.64 (2011); LEVINSON & LONG, *supra* note 38, at 4 (indicating that the states of Arizona, Connecticut, Maine, New Mexico, and North Carolina and the cities of Albuquerque and Portland provide full “clean elections” public financing to qualified candidates running for some offices).

42. MINN. STAT. § 10A.31 (2011); NEB. REV. STAT. § 32-1606 (2011) (mandating financing in set amounts for candidates for a variety of positions); VT. STAT. ANN. tit. 17, § 2855 (2011) (implementing block financing for governor and lieutenant governor); WIS. STAT. § 11.50 (2011) (mandating funding split between political positions, and then apportioned to each eligible candidate running for that position); LEVINSON & LONG, *supra* note 37, at 5 (indicating that the states of Florida, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, Rhode Island, Vermont, and Wisconsin; the county of Miami-Dade; and the cities of Austin, Boulder, New Haven, New York City, Tucson, and several California cities (Long Beach, Los Angeles, Oakland, Richmond, Sacramento, and San Francisco) provide partial public financing—in which Levinson and Long include matching funds—for some offices to candidates who qualify). Iowa, Ohio, and Utah do not offer public financing to candidates but offer it to parties (Rhode Island offers it to both parties and candidates). IOWA CODE § 68A.605 (2011); OHIO REV. CODE ANN. § 3517.18 (LexisNexis 2011); R.I. GEN. LAWS § 44-30-2 (2011); UTAH CODE ANN. § 59-10-1312 (LexisNexis 2011). Arkansas, Oregon and Virginia do not offer public financing to candidates or parties, but offer a tax credit to individuals who make political contributions (Arizona, Minnesota, Ohio, and Rhode Island offer both tax credits and public financing grants to either parties or candidates). ARIZ. REV. STAT. ANN. § 16-954 (2011) (allowing \$5 tax credit for donation directed to a specific party, or up to \$500 tax credit for donation to public funding of elections that cannot be directed); ARK. CODE ANN. § 7-6-222 (2011) (allowing up to a \$50 credit for an individual return); MINN. STAT. § 290.06 (2011) (allowing a tax credit of up to \$50 per individual for donation to political party or candidate); OHIO REV. CODE ANN. § 3517.18 (LexisNexis 2011) (offering tax credit of up to \$50 for donation to candidate); OR. REV. STAT. § 316.102 (2009) (same); R.I. GEN. LAWS § 44-30-2 (2011) (providing for up to \$5 tax credit per individual for donation to public financing, up to \$2 of which can be directed to a specific political party); VA. CODE ANN. § 58.1-344.3 (2011) (allowing tax refund for up to a \$25 contribution to a political party). In all, twenty-two states currently offer some form of tax credit for political contributions and/or full or partial public financing to candidates and/or parties. A majority of democracies throughout the world have “legal provisions” for some form of public financing of campaigns. Magnus Öhman, *Practical Solutions for the Public Funding of Political Parties and Election Campaigns*, in POLITICAL FINANCE REGULATION: THE GLOBAL EXPERIENCE 25, 60 (Magnus Öhman & Hani Zainulbhai eds., 2009) (suggesting that over half of the 183 United Nations member states that have a “de jure multi-party system” have “legal provisions” for public funding to political parties).

private contributions.⁴³ The federal government provided major party presidential candidates full public financing for the general election and a modest one-to-one match on the first \$250 of a contribution for primary elections.⁴⁴

Recently, stronger candidates have opted out of the presidential public financing system because of inadequate funding and low spending limits imposed on participants. All winning presidential candidates used the public financing system from its inception in 1976 until 1996.⁴⁵ In 2000 and 2004, however, George W. Bush opted out of the primary public financing system.⁴⁶ In 2008, Barack Obama opted out of both primary and general election public financing.⁴⁷ Had Obama accepted public financing he would have received \$105.8 million in public funds⁴⁸ and been limited to spending \$126.15 million,⁴⁹ whereas by opting out he was able to raise \$745.7 million.⁵⁰

Anticipating an opt-out problem in their state and local elections, in the 1990s and early 2000s several states and localities adopted a “trigger” provision to entice candidates to accept

43. Seven states and the presidential primary fund utilize matching contributions. I.R.C. § 9034 (2006); FLA. STAT. § 106.35(2) (2008) (providing a two-to-one match for first \$250); HAW. REV. STAT. § 11-429 (2011) (providing a one-to-one match); MASS. GEN. LAWS, ch. 55C, §§ 1, 5 (2011) (providing a one-to-one match under \$250); MD. CODE ANN., ELEC. LAW § 15-106 (2011) (providing a limited one-to-one match for gubernatorial candidates in the primary); MICH. COMP. LAWS §§ 169.212(1), 169.264(1) (2005) (providing a two-to-one match for contributions less than \$100 in primary for participating gubernatorial candidates); N.J. STAT. ANN. § 19:44A-33 (West 2009) (providing a two-to-one match on the first \$1500 for gubernatorial candidates); R.I. GEN. LAWS § 17-25-19 (2009) (providing a two-to-one match for contributions less than \$500 and a one-to-one match for contributions above \$500).

44. See I.R.C. §§ 9034(a), 9037 (2006) (providing a one-to-one match on first \$250).

45. Eric M. Appleman, Democracy in Action, *Presidential Campaign Finance*, GEORGE WASHINGTON UNIV., <http://www.gwu.edu/~action/2008/presfin08.html> (last visited Aug. 29, 2011).

46. *Id.*

47. *Id.*

48. *Presidential Spending Limits for 2008*, FEC, http://www.fec.gov/pages/brochures/pubfund_limits_2008.shtml (last visited Aug. 25, 2011); *Quick Answers to Public Funding Questions*, FEC, http://www.fec.gov/ans/answers_public_funding.shtml#howmuchmoneydotheyget (last visited Aug. 26, 2011).

49. *Presidential Spending Limits for 2008*, *supra* note 48.

50. Jonathan D. Salant, *Watergate-Era Public Finance System Faces Budget Ax*, BLOOMBERG (Jan. 26, 2011), <http://www.bloomberg.com/news/2011-01-26/watergate-era-finance-system-for-presidential-races-faces-house-budget-ax.html>.

public money.⁵¹ These provisions increased spending limits and gave additional public funds to a publicly financed candidate when an opposing privately financed candidate and/or outside group received or spent funds above a designated amount (often the spending limit imposed upon the publicly financed candidate).⁵²

In *Arizona Free Enterprise v. Bennett*, a five-Justice majority invalidated Arizona's trigger provision, concluding that it violated the First Amendment.⁵³ The Court determined that the trigger burdened the speech of privately financed candidates and independent groups, as these entities knew that spending over a set amount would trigger government-sponsored speech opposing their interests.⁵⁴ The Court found that the drafters of the trigger intended to equalize speech between candidates, and determined that this rationale did not constitute a compelling state interest that justified burdening speech.⁵⁵

Justice Elena Kagan, writing for the four dissenters, argued that the trigger was not a restriction designed to equalize candidates, but a tool to efficiently allocate public funds to pre-

51. Deborah Goldberg, *Public Funding of Judicial Elections: The Roles of Judges and the Rules of Campaign Finance*, 64 OHIO ST. L.J. 95, 106 (2003).

52. See ARIZ. REV. STAT. ANN. § 16-952(A)-(B) (2011); FLA. STAT. § 106.355 (2011); ME. REV. STAT. tit. 21-A, § 1125(9) (2011); N.M. STAT. ANN. § 1-19A-14 (2011); N.C. GEN. STAT. § 163-278.67 (2011); WIS. STAT. § 11.512 (2011). Cities with trigger provisions that provide additional public funding include Albuquerque, Chapel Hill, Los Angeles, and New Haven. ALBUQUERQUE, N.M., CHARTER OF THE CITY OF ALBUQUERQUE, art. XVI, § 16 (2010); CHAPEL HILL, N.C., GEN. CODE OF ORDINANCES § 2-95(a)-(b) (2010); L.A., CAL., MUN. CODE § 49.7.22(C)-(D) (2011); NEW HAVEN, CONN., CODE OF GEN. ORDINANCES § 2-825 (2011); see also Brief for Professors, *supra* note 3, at 7.

53. Chief Justice Roberts wrote the majority opinion joined by Justices Alito, Kennedy, Thomas, and Scalia, and Justice Kagan wrote the dissent and was joined by Justices Breyer, Ginsburg, and Sotomayor. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2812–13 (2011).

54. According to the majority, *Arizona Free Enterprise* was controlled by *Davis v. FEC*, which invalidated a federal "Millionaire's Amendment" provision that trebled the individual contribution limit for federal candidates whose opponents spent more than \$350,000 of their own money on their campaigns. *Ariz. Free Enter.*, 131 S. Ct. at 2818 ("The logic of *Davis* largely controls our approach to this case.") (citing *Davis v. FEC*, 554 U.S. 724, 729 (2008)).

55. *Ariz. Free Enter.*, 131 S. Ct. at 2825 ("[W]hen confronted with a choice between fighting corruption and equalizing speech, the drafters of the [trigger] provision chose the latter. . . . [The government has no] compelling state interest in 'leveling the playing field' . . .").

vent corruption.⁵⁶ Kagan recognized that the trigger simultaneously minimized waste in uncompetitive contests, and encouraged candidates to accept public financing by guaranteeing the additional funds when privately financed opponents spent more.⁵⁷ To Kagan, the trigger made public financing workable, and public financing prevented corruption because it supplanted the private cash that Kagan viewed as the source of political corruption.⁵⁸

The holding of *Arizona Free Enterprise* posed a thorny problem for public financing supporters. To retain public financing's traditional structure, public financing had to provide more money to competitive candidates. At the same time, increased across-the-board funding to all candidates would likely waste money on uncompetitive elections and on candidates who have little popular support.

II. A PARTICIPATION THEORY OF PUBLIC FINANCING

Rather than respond to *Arizona Free Enterprise* with stop-gap provisions that lure candidates back to conventional public financing, reformers should use the decision to transform the public financing paradigm. Public financing should no longer aim to purge all—or even most—private money from politics. Instead, it should encourage as many citizens as possible to participate in financing politics.⁵⁹

Throughout the United States, relatively few people make

56. *Id.* at 2831–32 (Kagan, J., dissenting) (observing that the trigger allows states to motivate candidates to use public funding without resorting to overly large lump payments).

57. *Id.*

58. *Id.* at 2830 (“By supplanting private cash in elections, public financing eliminates the source of political corruption.”); *id.* at 2841 (“When private contributions fuel the political system, candidates may make corrupt bargains. . . . And voters, seeing the dependence of candidates on large contributors (or on bundlers of smaller contributions), may lose faith that their representatives will serve the public’s interest. . . . Public financing addresses these dangers by minimizing the importance of private donors”); see also *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (per curiam) (“It cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest.”).

59. See Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259 (2012). While *The Participation Interest* introduces the state’s interest in facilitating financial participation in politics, this Article explains how conventional public financing undermined participation, why participation-based public financing is a proper government expenditure, the attributes and costs of multiple matching of contributions, and how multiple matching represents the future of public financing after *Arizona Free Enterprise*. See *id.*

political contributions. While 64% of eligible Americans voted in the November 2008 election, only 10% typically give to political campaigns,⁶⁰ and less than 0.5% are responsible for the bulk of the money that politicians collect from individual contributors.⁶¹ Just as civic norms encourage all citizens to vote, a key goal of public financing should be to encourage everyone to make a financial contribution to a political candidate or a cause of his or her choice. The bulk of campaign funds should come from a broader cross section of the population, and public financing should facilitate widespread participation.

This Part explains how past public financing approaches have suppressed participation. It then details why facilitating citizen participation through public financing is a proper function of government.

A. PUBLIC FINANCING SHOULD PROVIDE INCENTIVES FOR CITIZEN PARTICIPATION RATHER THAN SUPPRESS IT

Many advocates of traditional public financing programs have vilified private money in politics and have assumed that supplanting private money with public money would reduce corruption, increase equality, and enhance political competition.⁶² Unfortunately, this conventional approach to public financing has often suppressed participation.

For example, in *Arizona Free Enterprise Justice* Kagan observed that “massive pools of private money” can corrupt our

60. See STEVEN J. ROSENSTONE & JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA 41–42 (1993) [hereinafter ROSENSTONE & HANSEN] (finding that between 1952 and 1990, in presidential election years, only 10% of the voting age population contributed money to parties or candidates); Stephen Ansolabehere et al., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 108 (2003) (finding that during the 2000 election, 10% of Americans over the age of eighteen gave to political candidates, party committees, or political organizations). Because small contributions on the federal level and in many states and localities do not need to be individually itemized and disclosed, the exact number of contributions is unavailable but must be estimated through extrapolations of survey data.

61. In 2008, 0.44% of the adult population made a political contribution worth \$200 or more. See Ctr. for Responsive Politics, *Donor Demographics*, OPENSECRETS.ORG, <http://www.opensecrets.org/bigpicture/DonorDemographics.php?cycle=2008> (last visited Feb. 12, 2012). At the state level, a fraction of one percent of donors make contributions accounting for 80% of the money contributed. See E-mail from Edwin Bender, Exec. Dir., Nat'l Inst. on Money in State Politics, to author (Mar. 7, 2011, 12:18 EST) (on file with author).

62. See, e.g., Jay Mandle, *The Need for Judicial Public Financing*, DEMOCRACY MATTERS (Feb. 2008), www.democracymatters.org/index.php?option=com_content&id=208.

political system, and “[b]y supplanting private cash in elections, public financing eliminates the source of political corruption.”⁶³ Using public grants to supplant private contributors, however, suppresses expressive activity that poses no threat of corruption, such as \$25, \$50, and \$100 grassroots contributions.

To illustrate, Professor Richard Briffault—a leading public financing scholar—has asserted that public financing advances equality because “[m]oney from the public fisc comes from everyone and, thus, from no one in particular. . . . No one gains influence over the election through public funding.”⁶⁴ Had Barack Obama participated in the public financing program for the 2008 election, however, his campaign would not have been able to collect even a \$5 contribution from a donor and would not have attracted an unprecedented 2.7 million small donors.⁶⁵ In attempting to advance equality by ensuring that money comes from “no one in particular,” full public financing deadens citizen participation.

Briffault also argues that public financing is more likely to promote competition because flat grants are “not tied to a candidate’s success in raising private donations” and “place candidates on an equal footing.”⁶⁶ In trying to level the playing field

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

64. Briffault, *supra* note 34, at 578. Many other reformers have pushed for equality. See, e.g., Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1215 (1994); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1, 27–28 (1996); Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL’Y REV. 273, 279 (1993); Daniel P. Tokaji, *The Obliteration of Equality in American Campaign Finance Law (And Why the Canadian Approach Is Superior)* (Ohio St. Pub. Law Working Paper No. 140, Jan. 24, 2011).

65. Mark Schmitt, *Can Money Be a Force For Good?*, THE AMERICAN PROSPECT (December 12, 2008), <http://prospect.org/article/can-money-be-force-good>. While “clean money” programs require that candidates collect a fixed number of small contributions (e.g., ranging from \$5 to \$500) to qualify for public funds, candidates who qualify are thereafter prohibited from mobilizing even small donors. Indeed, the Campaign Finance Institute found that clean money candidates often raise small qualifying contributions from their previous large-dollar supporters, rather than bringing new people into the process. See Michael J. Malbin, Peter W. Brusoe & Brendan Glavin, *Small Donors, Big Democracy: New York City’s Matching Funds as a Model for the Nation and States*, 11 ELECTION L.J. 3, 19 (2012) (“Most [candidates] appear to have raised their needed qualifying funds by staying within their old circles of friends and supporters. As a result, the contributions did not bring many new people into the system or more economic and racial diversity among donor-participants, where were said to be among the goals.”).

66. Briffault, *supra* note 34, at 569–73. *But see* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-390, CAMPAIGN FINANCE REFORM: EXPERIENCES OF TWO

among candidates, however, traditional reformers assume erroneously that democracy should not give a competitive advantage to candidates who mobilize more people to participate financially. Similarly, traditional reformers vilify “bundlers,”⁶⁷ but they fail to emphasize that many fundraisers are volunteer activists who mobilize participation of thousands of people in a way that candidates alone could never accomplish.⁶⁸

Private money is not always an evil that indebts politicians to a few special interests—it can also be a democratic good that allows citizens to hold politicians accountable. While traditional reformers would supplant as much private money as possible to eliminate the source of political corruption, the Court has recognized that money is an important tool to “hold officials accountable to the people.”⁶⁹ Traditional reformers assume that public financing is necessary to protect a candidate’s time from fundraising,⁷⁰ but the need for candidates to collect contributions can prompt them to engage with constituents and can facilitate accountability.

Traditional reformers are also wrong to attempt to purge private money from politics because studies show that financial participation is a gateway to other types of political participation. Small donors are more likely than non-donors and larger donors to volunteer to ask others to vote for a candidate (e.g., by staffing a phone bank or canvassing), to put up a candidate’s

STATES THAT OFFERED FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES 41–44 (2010) (showing that, after full public financing in Maine and Arizona, the percentage of contested races increased only slightly, and incumbent reelection rates remained roughly unchanged).

67. See, e.g., *Ariz. Free Enter.*, 131 S. Ct. at 2829 (Kagan, J., dissenting) (asserting that contribution limits are inadequate to prevent corruption because “[i]ndividuals who ‘bundle’ campaign contributions become indispensable to candidates in need of money”); Briffault, *supra* note 34, at 563 (stating that law would have negative consequences by “providing a major role for . . . bundlers”); Philip M. Nichols, *The Perverse Effect of Campaign Contribution Limits: Reducing the Allowable Amounts Increases the Likelihood of Corruption in the Federal Legislature*, 48 AM. BUS. L.J. 77, 81 (2011) (suggesting that bundlers “work for or against businesses” and “offer bribes to legislators”).

68. Private money itself is bad to some traditional reformers, and thus these reformers fail to distinguish between an individual who makes a single \$100,000 soft money contribution and an activist who raises \$100,000 by mobilizing 1000 people to give \$100. As a matter of disclosure, the author served on the Obama National Finance Committee for the 2008 and 2012 presidential elections.

69. *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010). The five-Justice majority in *Arizona Free Enterprise* is identical to the five-Justice majority in *Citizens United*.

70. See *infra* notes 126–27 and accompanying text.

campaign signs, or to distribute literature in a public place, such as a county fair or election poll site.⁷¹

Interviews suggest that political operatives also see a relationship between giving and other forms of participation.⁷² As a Campaign Finance Institute report states, “From the mobilizer’s perspective, the underlying logic of the gateway sequence is a simple extension of the pervasive commercial sales practices of cross-selling and up-selling, in which a firm attempts to persuade someone who has purchased one of its products to buy another, perhaps more expensive of its product [sic].”⁷³ Politicians and community organizers sometimes ask citizens for a nominal financial contribution not as a primary source of campaign revenue, but as a step to help develop citizens’ investment in the campaign.⁷⁴ Based on that relationship, the organizers then motivate citizens to engage in other ways, such as volunteering.

B. FACILITATING PARTICIPATION IS A PROPER USE OF PUBLIC RESOURCES

Public financing skeptics are wrong to assert that government has no role in political financing.

71. See, e.g., MICHAEL J. MALBIN ET AL., THE CFI SMALL DONOR PROJECT: AN OVERVIEW OF THE PROJECT AND A PRELIMINARY REPORT ON STATE LEGISLATIVE CANDIDATES’ PERSPECTIVES ON DONORS AND VOLUNTEERS 28 (2007), available at http://www.cfinst.org/pdf/books-reports/CFI_Small-Donor_APSA-paper_2007.pdf (noting the estimates of the proportion of various types of donors who helped campaign in ways beyond giving money); see also ROSENSTONE & HANSEN, *supra* note 60, at 170–78 (“[P]eople who give also become the focus of other efforts to generate participation, for example, by discussing politics with neighbors, writing letters, and, most importantly, voting.”).

72. MALBIN ET AL., *supra* note 71, at 5–6 (showing how Ohio’s Delaware County Republican Party converted \$75 contributors into phone banking or canvassing volunteers, and how national political strategist Karl Rove directed campaign staff to keep records of small donors to ask them to volunteer).

73. *Id.* at 6. Money may serve as an important gateway to nonfinancial participation because a small contribution may be a relatively easy way for some Americans to participate initially, as suggested by data indicating that many more people give money than time to politics. See sources cited *supra* note 71.

74. MALBIN ET AL., *supra* note 71, at 6–7, n.7 (explaining how an Iowa citizens group used dues to get members vested and then mobilized the members for rallies and meetings with government officials); see also SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTEERISM IN AMERICAN POLITICS 367 (1995) (“[T]aking part in politics probably enhances political interest, efficacy, and information; reciprocally, these political orientations surely have an impact on participation.”).

Many skeptics of campaign finance reform argue not just for freedom from government restrictions on campaign contributions and spending, but also for freedom from all government involvement in campaign funding.⁷⁵ A leading skeptic, Bradley Smith, believes it is “dangerous to have the incumbent government directly involved in shaping the quantity and substance of the very debate intended to determine how voters judge that government’s performance on election day.”⁷⁶

Granted, political debates will continue about the proper role of government spending and tax incentives in such varied areas as agriculture, housing, health care, military intervention abroad, and education,⁷⁷ as well as how government allocates finite resources among these several areas. But providing the basic platform for citizen participation in democracy through properly crafted public financing is a worthwhile government function.

Anti-public financing advocates fail to grapple with the reality that the incomes of many citizens discourage politicians from even reaching out to mobilize them and render these citizens less able to participate and hold politicians accountable. A lack of income chokes off financial political participation more than it hinders other forms of political participation.⁷⁸ For ex-

75. See, e.g., WILLIAM R. MAURER & DOMINIC DRAYE, FEDERALIST SOCIETY FOR LAW & PUB. POLY STUDIES, NEW FEDERAL INITIATIVES PROJECT: FAIR ELECTIONS NOW ACT 3–4 (2010); CTR. FOR COMPETITIVE POLITICS, FAIRLY FLAWED: ANALYSIS OF THE 2009 FAIR ELECTIONS NOW ACT 1, 28–30 (2009); Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POLY 283, 287–89 (2010) (arguing that current public financing is “largely irrelevant” and that *Davis v. FEC* will put an end to most new public financing attempts); Bradley A. Smith, *Some Problems with Taxpayer-Funded Political Campaigns*, 148 U. PA. L. REV. 591, 594–96 (1999) [hereinafter Smith, *Some Problems*].

76. Bradley A. Smith, *The Separation of Campaign and State*, N.Y. TIMES, June 27, 2011, <http://www.nytimes.com/roomfordebate/2011/06/27/the-court-and-the-future-of-public-financing/the-courts-separation-of-campaign-and-state> [hereinafter Smith, *The Separation*]. Public financing skeptics also argue that implicit in the U.S. Constitution is a “separation of campaign and state” principle that government should have no role in subsidizing campaigns. For a discussion of this argument, see *infra* notes 162–69 and accompanying text.

77. ABRAHAM LINCOLN, LIFE AND WORKS OF ABRAHAM LINCOLN: EARLY SPEECHES, 1832–1856, at 215 (1907) (“The legitimate object of government is to do for a community of people whatever they need to have done, but cannot do at all, or cannot so well do, for themselves.”).

78. See VERBA ET AL., *supra* note 74, at 361 (discussing the importance of income). See generally ROSENSTONE & HANSEN, *supra* note 60. While wealth may also be a significant factor in the ability to make contributions, this Arti-

ample, among those who are active in politics, people with little income give nearly as much time volunteering in politics as people with significant income—but income constraints determine who gives money.⁷⁹ Of Americans living in families, individuals with families with incomes over \$100,000 represented 15.6% of the voting-age population in 2004⁸⁰ and cast 19.2% of the votes.⁸¹ Individuals with household incomes over \$100,000 were also responsible for approximately 80% of political contributions over \$200.⁸²

Participation rates are also low due to collective action problems in attracting smaller contributions from a broad group of middle- and lower-income Americans.⁸³ Candidates face lower transaction costs in mobilizing larger contributions

cle focuses on income because most of the data available examines the correlation between income and political contributions.

79. VERBA ET AL., *supra* note 74, at 366 (“When it comes to making financial donations . . . the resource constraints of income are determinative even among those who are active and engaged in politics.”); *id.* at 361 (“[P]olitical interest has much less influence on contributions than on the other kinds of acts. . . . In comparison to other activists, contributors are—all else being equal—affluent but not especially engaged.”).

80. See KELLY HOLDER, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004, at 4, 10 (2006), available at <http://www.census.gov/prod/2006pubs/p20-556.pdf> (noting that the over-eighteen population of individuals in families with annual incomes over \$100,000 was 24,025,000 and total population of individuals over eighteen in families was 161,927,000).

81. See *id.* at 4, 10 (noting that 81.3% of individuals in families with incomes over \$100,000 voted, compared to just 48.3% of individuals in families with incomes less than \$20,000).

82. See INST. FOR POLITICS, DEMOCRACY, & THE INTERNET, SMALL DONORS AND ONLINE GIVING: A STUDY OF DONORS TO THE 2004 PRESIDENTIAL CAMPAIGNS12 (2006), http://www.cfinst.org/pdf/federal/president/IPDI_SmallDonors.pdf (finding that 86% of the contributions over \$200 in 2000 and 78% of such contributions in 2004 came from individuals with a household income over \$100,000). Other studies have revealed similar findings. See VERBA ET AL., *supra* note 74, at 193 (utilizing data from a period in which federal contributions were limited to \$1000, and finding that “[t]he 3% of the sample with family incomes over \$125,000 are responsible for 4% of the votes, 8% of the hours devoted to campaigning, and fully 35% of the money contributed”); John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 614 (2005) (citing AM. POLITICAL SCI. ASS’N TASK FORCE ON INEQUALITY & AM. DEMOCRACY, AMERICAN DEMOCRACY IN AN AGE OF RISING INEQUALITY 7 (2004), available at <http://www.apsanet.org/imgtest/taskforcereport.pdf>) (“Only 6% of people with incomes under \$15,000 contribute to campaigns, contrasted to 56% of those with incomes over \$75,000.”).

83. See ROSENSTONE & HANSEN, *supra* note 60, at 21–23 (explaining the “paradox of participation”).

from a narrow group of higher-income Americans.⁸⁴ Studies show that mobilization is a major factor in financial participation (people asked to give are much more likely to do so),⁸⁵ and fundraisers find that they can raise more money by targeting personalized appeals to larger contributors. “Why should I call ten people and ask for \$100 each,” many candidates and fundraisers ask, “when it takes me less time to call one person and ask for \$1000?”⁸⁶ While wholesale online solicitations are starting to displace expensive direct-mail solicitations and to lower the transaction costs of raising money from smaller donors, data reveal that retail solicitation of large contributors continues to dominate fundraising.⁸⁷ In the 2008 election cycle, for example, candidates for the House of Representatives received almost four times more money from individuals who gave \$1000 or more than they did from contributors who gave \$200 or less.⁸⁸

Public financing critics also fail to address the fact that market forces alone will not sufficiently expand participation in the near future. Despite conventional wisdom about the emergence of the Internet as a better means for small donors to contribute, technology alone is unlikely to expand participation so that candidates are more responsive and accountable to a significantly larger percentage of the population.⁸⁹ Presidential

84. See *id.* at 30–33 (describing how strategies for targeted mobilization drives candidates to contact wealthier Americans).

85. See ROSENSTONE & HANSEN, *supra* note 60, at 36–37 (observing that “[t]he strategic choices of political leaders—their determinations of who and when to mobilize—determine the shape of political participation in America”); *id.* at 171 (finding that people who are contacted by a political party are almost twice as likely in presidential election cycles to contribute money than those not contacted); VERBA ET AL., *supra* note 74, at 137–38 (comparing spontaneous political activity to that which is done in response to a request, and finding that “[o]nly for contributors . . . is the proportion who acted spontaneously well under half”); MALBIN ET AL., *supra* note 71, at 7 (discussing the correlation between citizens being asked to donate and donating to a campaign).

86. See *infra* note 110 and accompanying text.

87. See, e.g., Michael J. Malbin et al., *The Need for an Integrated Vision of Parties and Candidates: National Political Party Finances, 1999–2008*, in THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES 185, 198 (John C. Green & Daniel J. Coffey eds., 6th ed. 2011) (demonstrating the discrepancy between aggregate donations from large contributions compared to small contributions in campaigns for the House of Representatives).

88. See *id.* The ratio was substantially similar for the 2003–04 and 2005–06 elections. See *id.*

89. See Malbin, Brusoe & Glavin, *supra* note 65, at 4 (noting that technology and the Internet has not, by itself, leveled the playing field between large and small donors); ANGELA MIGALLY & SUSAN LISS, BRENNAN CTR. FOR JUS-

candidate Barack Obama, who had more contributors than any American candidate in history and used technology in cutting-edge ways for his time, received 69.5 million votes in the 2008 general election but had around 3 million donors throughout the entire primary and general election process (including an estimated 2.5 million small donors).⁹⁰ For more typical candidates running for less visible offices, the rate of financial participation is even lower.

Public financing skeptics may suggest that less wealthy Americans participate by volunteering,⁹¹ but this discounts the value of financial participation. While non-financial participation is critical, financial participation is easier for many—more than five times as many people give only money to a candidate as those who give only time.⁹² Many wealthier individuals have limited time and may find it easier to participate through financial contributions, and democratic participation is broadened when less wealthy individuals enjoy a similar opportunity to make a meaningful financial contribution.⁹³ Financial participation is an important indicator of autonomy and self-governance, regardless of income.⁹⁴

Identifying these challenges to participation and addressing them is a proper function of law. In the electoral context, government regularly provides the basic framework and tools

TICE, SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE 24 (2010) (“[T]echnology alone cannot unilaterally transform campaign fundraising.”). *But see* Richard L. Hasen, *Political Equality, the Internet, and Campaign Finance Regulation*, 6 FORUM 1 (2008), available at <http://electionlawblog.org/archives/hasen-forum-final.pdf> (“The effects of an expected deregulatory move by the Supreme Court, however, are somewhat blunted by the rise of the Internet, both as a means for the exchange of political information and for small-donor fundraising.”).

90. *See* Schmitt note 65; *see also* FED. ELECTION COMM’N, 2008 PRESIDENTIAL POPULAR VOTE SUMMARY FOR ALL CANDIDATES LISTED ON AT LEAST ONE STATE BALLOT 5, <http://www.fec.gov/pubrec/fe2008/tables2008.pdf>.

91. *See* MAURER & DRAYE, *supra* note 75, at 13 (observing that “there are other ways citizens can have influence in the political process besides contributing financially. Volunteers are a key component of almost every campaign.”).

92. VERBA ET AL., *supra* note 74, at 67 (indicating that of individuals who participate in politics, 69% limit their involvement to giving money, 19% give both time and money, and 12% give time but not money).

93. Professor Bradley Smith, who opposes campaign finance reform generally, has asserted that political contributions are democratizing because they give people who lack political skills an opportunity to influence politics. Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 94 (1997).

94. *See id.* at 48–55 (arguing that campaign donations are a form of free speech).

for participation.⁹⁵ In the past, private parties provided ballots, private parties financed and regulated party primary election contests, and citizens who voted paid directly for the election infrastructure through their poll taxes.⁹⁶ More recently, however, the state has provided a platform to facilitate participation by designing and providing ballots, funding and conducting the party primary election process, funding elections from the general treasury rather than taxing voters, and offering other avenues of participation such as voter registration services at Department of Motor Vehicle offices.⁹⁷ Public financing that facilitates participation is a part of this evolution.

In *Buckley v. Valeo*, the Court upheld a public financing program that matched donations so that a \$250 contribution would be worth \$500 to presidential primary candidates.⁹⁸ While this one-to-one match was not as effective as the multiple match proposed below, the Court noted the program furthered pertinent First Amendment values because it was “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.”⁹⁹

Ronald Reagan—who criticized unnecessary government spending—not only accepted matching funds for contributions but benefitted more than any other candidate.¹⁰⁰ Reagan mobilized thousands of contributors and remains the “only candi-

95. Benjamin D. Black, Note, *Developments in the State Regulation of Major and Minor Political Parties*, 82 CORNELL L. REV. 109, 109–12 (1996) (providing an overview of ways legislatures and courts control political parties’ frameworks).

96. Briffault, *supra* note 34, at 583 (“[I]t is just as appropriate to use tax dollars to cover the costs of an election campaign as it is to use tax dollars to pay for preparing and producing ballots and collecting and tabulating the results.”); *cf.* Black, *supra* note 95, at 116.

97. *See, e.g.*, National Voter Registration Act of 1993, 42 U.S.C. § 1973(gg) (2006).

98. *Buckley v. Valeo*, 424 U.S. 1, 85–86, 89–90, 107–08 (1976) (*per curiam*).

99. *Id.* at 92–93; *see also id.* at 93 n.127 (“Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial *assistance* to the exercise of free speech” (emphasis added)).

100. *See* Brief for Amici Curiae Anthony Corrado et al. in Support of Respondents at 16–17, *Ariz. Free Enter. Club’s Freedom PAC v. Bennett*, 131 S. Ct. 2806 (2011) (Nos. 10-238, 10-239), 2011 WL 661708.

date to ever reach the public funding primary campaign maximum.”¹⁰¹

While government should not compel financial participation or equalize all citizen giving,¹⁰² policymakers should recognize that lack of income causes people not to participate, and should use the law to facilitate participation.

III. MULTIPLE MATCHING OF POLITICAL CONTRIBUTIONS

Federal, state, and local lawmakers should adopt multiple matching fund programs that match the money a contributor gives to a candidate. The program should match the first \$200 of a political contribution at a six-to-one ratio,¹⁰³ so that a \$100 contribution would be worth \$700 to a candidate. Multiple matching funds would increase citizen participation,¹⁰⁴ prevent corruption, make candidates more accountable to voters, and attract competitive candidates to public funding.¹⁰⁵ Multiple matching funds are also cost-effective and constitutional.¹⁰⁶

A. MULTIPLE MATCHING FUNDS INCREASE PARTICIPATION

Multiple matching programs increase participation, as demonstrated by the New York City program that matches the first \$175 of a political contribution at a six-to-one ratio. In 2009, the typical New York City Council candidate who participated in the multiple match program had twice as many contributors and three times as many small contributors as the typical nonparticipating candidate.¹⁰⁷ Seven times more New York City residents contributed to city candidates (the city had the multiple matching program) than contributed to state can-

101. *Id.* (“But no candidate benefitted from public funding more than Ronald Reagan. . . . President Reagan remains the only candidate to ever reach the public funding primary campaign maximum.”).

102. *See Overton, supra* note 59, at 1282–88 (distinguishing equality from participation).

103. This \$200 level is proposed in 2011 dollars, and it should be indexed to inflation.

104. *See infra* Part III.A.

105. *See infra* Part III.B.

106. *See infra* Part III.C.

107. MIGALLY & LISS, *supra* note 89, at 15. In 2009, matching fund participants included 93% of primary candidates, 66% of general election candidates, and 95% of those elected to city office (all but Mayor Bloomberg and two of the fifty-one City Council members participated). *See id.* at 10.

didates (the state lacked a matching program).¹⁰⁸ Money attributable to donors who gave \$250 or less made up 65% of the money of City Council candidates who participated in the matching program (including public money), but only 17% of nonparticipating New York City Council candidates' money, and only 7% of New York State candidates' money.¹⁰⁹

Interviews with New York City candidates suggest that the matching program increased candidates' incentives to reach out to more people. Former City Councilmember David Yassky explained the calculus from the perspective of a candidate:

[W]ithout the multiple match, a \$175 contribution is of marginal value to a campaign because it is simply too time intensive to seek out small donors. For example, I could make one phone call and ask for a \$2,000 check, or I could make twenty calls to solicit \$100 donations. The six-to-one multiple match turns \$100 into \$700, making it worth it to pursue small donors. Because there is no public financing system in place at the federal level, federal candidates are much less interested in \$100 checks than are candidates in New York City elections.¹¹⁰

Candidates also suggested that multiple matches increased contributors' incentives to donate. Public Advocate Bill de Blasio explained:

Even people who were not very interested in politics were energized by the possibility that they could play such a role in the campaign be-

108. See Malbin, Brusoe & Glavin, *supra* note 65, at 12 tbl.4 (noting that 0.22% of the New York City voting age population contributed to state elections in 2006, compared to 1.75% of the New York City voting age population contributing to city campaigns in 2009). This data refers to the 2006 New York State election, the last statewide election with comparable data, and the 2009 New York City elections, the last city election with comparable data. See *id.* Five times more New York City residents contributed to candidates in the 2005 city election than the 2006 state election (the city's 2005 four-to-one match was less lucrative than its 2009 six-to-one ratio). *Id.* at 12–13. New York City has ninety-seven state officials that represent the city (including the Governor, Lt. Governor, Comptroller, and Attorney General (all statewide), and twenty-eight state senators and sixty-five state legislators with all or parts of their districts in the city), and fifty-nine city officials who represent the city (including Mayor, the Public Advocate, the Comptroller, five Borough Presidents, and fifty-one City Council candidates). See *Elected Officials*, NYC.GOV, <http://www.nyc.gov/portal/site/nycgov/menuitem.36b1636466ec9207a62fa24601c789a0/index.jsp?cf01pg=1&cf01sz=10> (last visited Aug. 21, 2011); *Who Are Your Elected Officials?*, N.Y. STATE BOARD OF ELECTIONS, <http://nymap.elections.state.ny.us/nysboe/> (last visited Aug. 21, 2011).

109. Malbin, Brusoe & Glavin, *supra* note 65, at 8 tbl.1. Among participating candidates, individual contributors under \$250 accounted for more private money (37%) than contributors over \$1000 (31%). *Id.* at 7 tbl.2.

110. MIGALLY & LISS, *supra* note 89, at 14 (citing interview by Angela Migally with David Yassky, Comm'r/Chair, N.Y.C. Taxi and Limousine Commission, in N.Y.C., N.Y. (June 25, 2010)).

cause of the effect the multiplier had on their smaller contribution. When people who didn't understand that there was a six-to-one match learned about the match, it was huge for them. Someone who would never have given \$175 to a campaign would do it with the match. It empowered them by empowering their money.¹¹¹

The six-to-one multiple matching funds program stimulates participation much more effectively than more modest one-to-one or two-to-one matches, perhaps because the more modest programs give candidates insufficient incentives to mobilize smaller contributors.¹¹² In New York City, for example, participation increased as lawmakers revised the program from a one-to-one match on the first \$1000 contributed (in the 1989, 1993, and 1997 elections), to a four-to-one match on the first \$250 (in the 2001 and 2005 elections), and eventually to a six-to-one match on the first \$175 (in the 2009 election).¹¹³ According to the New York City Campaign Finance Board, the shift from the one-to-one ratio to the six-to-one ratio increased the

111. *Id.* at 12 (citing Telephone Interview by Elizabeth Daniel with Bill de Blasio, Public Advocate, in N.Y.C., N.Y. (May 18, 2010)).

112. Of existing matching fund systems, New York City's program is likely the most successful because it provides "the largest matching ratio [six-to-one] on the lowest matchable amount [\$175]." *Id.* at 4. These more modest matches may have also failed because they were limited to a few statewide elections like governor's races. Thus, the programs did not spark an across-the-board culture of incentives for citizen participation in all state-level races. Furthermore, these statewide candidates possibly had less use for grassroots campaigning than local or legislative candidates because their electorates were so large. In addition, in some jurisdictions (e.g., Maryland), spending limits on participating candidates were set at such low rates that few candidates participated. GARRETT, *supra* note 37, at 36–44.

113. In 1997, contributions of \$250 or less accounted for 54,456 total donations, comprising \$4,228,040 and, with public funding, made up 30.8% of participating candidates' funds. E-mail from Ilona Kramer, N.Y.C. Campaign Fin. Bd., to author (Aug. 12, 2011, 09:33 EST) (on file with author). In 2001, there were 107,281 such donations for \$11,241,506 and, with public financing, 55.1% of participating candidates' funds. *Id.* In 2005, the number of such donations fell to 66,110, amounting to \$7,180,067 and, with public financing, 49.7% of participating candidates' funds. *Id.* In 2009, participation grew again with 76,397 such donations for \$6,806,183 or, with public financing, 54.4% of participating candidates' available funds. *Id.* Another examination of the data shows a slightly different but similar trend, with contributors of \$250 or less (private and public money) accounting for 39% of participating candidate money in 1997, 68% in 2001, 58% in 2003, 54% in 2005, and 64% in 2009. Malbin, Brusoe, & Glavin, *supra* note 65, at 8. The year 2001 was an outlier according to a New York City Campaign Finance Board official because it "was the first election with term limits and the increased matching rate. There were an unprecedented number of open seats . . . and new candidates felt the ability to run without the incumbency factor and with the increased benefits of the matching funds program." E-mail from Ilona Kramer, N.Y.C. Campaign Fin. Bd., to author (Aug. 12, 2011, 12:00 EST) (on file with author).

percentage of private money candidates received from small contributors 33% percent, and increased the percentage of private and public funds attributable to small contributors by 76%.¹¹⁴

The shift in ratio to six-to-one increased the yield on a \$175 contribution and lowered the cost of raising money from smaller contributors. With a one-to-one match, raising a \$175 contribution (worth \$350) was still much more expensive than raising a \$1000 contribution (which also increased in value due to the match),¹¹⁵ because the yield on the \$175 was not sufficiently high compared with the relatively fixed transaction costs associated with all contributors (e.g., campaign resources required to identify, solicit, engage/entertain, and thank all contributors, and the administrative and legal compliance costs of each donation). The six-to-one match, however, changed candidate behavior because it sufficiently increased the value of \$175 contributions (now worth \$1225). Other relevant factors included the efficiencies candidates realized in being able to merge their fundraising operations and constituency outreach,¹¹⁶ and the relatively broad pool of people who could afford to give \$175 (which was much larger than the pool of potential \$1000 contributors).¹¹⁷

B. OTHER POLICY CONSIDERATIONS

In addition to facilitating participation, multiple matching funds possess other attractive characteristics.

Multiple matching funds reduce the potential for corruption. Consistent with Justice Kagan's assumptions that private

114. The shift from the one-to-one to six-to-one match increased the percentage of private money candidates received from contributors of \$250 or less from 14.4% up to 19.2%, and increased the percentage of private and public funds attributable to this group from 30.8% to 54.4%. E-mail from Ilona Kramer, N.Y.C. Campaign Fin. Bd., to author (Aug. 12, 2011, 09:33 EST) (on file with author).

115. The one-to-one match on the first \$1000 *increased* politicians' incentives to pursue larger contributors and ignore smaller contributors by doubling the disparity between a \$175 contributor (worth \$350) and a \$1000 contributor (worth \$2000). The six-to-one match on the first \$175, however, does not increase the raw dollar difference between the \$175 contributor (worth \$1225) and the \$1000 contributor (worth \$2050). The six-to-one ratio, however, does increase disparities between \$175 contributors and those who contribute less. While this issue is inevitable with multiple matching funds, it is best addressed by adopting a high multiplier and a low matched amount.

116. See *infra* notes 127–28 and accompanying text.

117. These factors made it easier for many candidates to pursue two \$175 contributors (worth \$2450 with multiple matching funds) than a single \$1000 contributor (worth \$2050 with multiple matching funds).

money from large contributors and “bundlers” is suspect,¹¹⁸ some conventional reformers might argue that the multiple match facilitates corruption by allowing bundlers and special-interest groups to funnel matched contributions to favored politicians to influence the process.¹¹⁹ This reformer vision of democracy runs counter, however, to the Court’s observation in *Citizens United* that private money is an important tool to “hold officials accountable to the people.”¹²⁰ Reformers should not aim to purge organization and mobilization from politics,¹²¹ as these are key elements of participation. Multiple matching programs reduce the likelihood of a more commonly accepted definition of improper behavior—quid pro corruption—by diversifying a candidate’s support so that she is less beholden to a narrow group of large donors.

In addition to helping to prevent corruption, multiple matching funds are more flexible and efficient than flat-grant programs. In rigidly distributing equal grants to different candidates in varied political races, flat-grant programs face the “Goldilocks Dilemma.”¹²² Generous flat-grant programs, for example, often waste public funds on candidates who obtain little benefit from increased spending (e.g., unpopular candidates with no chance of winning, popular candidates with no chance of losing, and candidates in competitive but less expensive races). Frugal flat-grant programs with more stringent qualification requirements may exclude promising new candidates, and frugal programs that give inadequate grants prompt stronger candidates to opt out of public financing.¹²³

118. See *supra* note 58.

119. Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1171–72 (1994) (observing that in a privately financed system without income disparities, “the most anti-social and self-seeking factions could gain an advantage in government and use their power to win sweetheart contracts, tax breaks, and other government subsidies”).

120. *Citizens United v. FEC*, 130 S. Ct. 876, 898, 910 (2010).

121. Mark Schmitt, *Mismatching Funds: How Small-Donor Democracy Can Save Campaign Finance Reform*, DEMOCRACY: A J. OF IDEAS, Spring 2007, at 8, 15, available at <http://www.democracyjournal.org/pdf/4/008-020.schmitt.FINAL.pdf> (“The campaign reform movement should first stop fighting organization itself.”).

122. Cf. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2832 (Kagan, J., dissenting) (“The difficulty, then, is in finding the Goldilocks solution—not too large, not too small, but just right.”).

123. Malbin, Brusoe & Glavin, *supra* note 65, at 20 (“If the threshold is set too low, public money will be wasted. If too high, the threshold will effectively become a barrier, defeating the goal of bringing new and potentially viable

Multiple matching fund programs largely avoid the Goldilocks Dilemma. The qualification threshold can be low to allow upstart candidates to participate, but candidates who do not attract a significant following generally will not attract enough contributions that must be matched to drain the public treasury.¹²⁴ Further, because the spending limit is not tied to the public money allocated (as it is with full public financing), multiple matching programs that give each candidate a relatively modest total amount of matching money can attract candidates by relaxing or abolishing candidate spending limits.¹²⁵

Multiple matching programs also allow candidates to merge their fundraising operations and constituency outreach. Conventional reformers assert that traditional large-dollar fundraising hampers representation because it requires that candidates spend too much time away from their voting constituents.¹²⁶ Multiple matching funds encourage candidates to raise a greater portion of their money from their constituents,

candidates into the system.”). A fixed program that gives an identical flat grant of \$100,000 to all candidates running for state legislature, for example, can be both too generous for races in some districts and waste public money, and too frugal for others. Some have proposed addressing this problem by distributing public funds to political parties, and giving parties the discretion to allocate more public funds to their candidates in particular districts. *See, e.g.*, Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 351–54 (1989) (discussing a party allocation system of public financing). While this proposal eliminates waste, it does not facilitate citizen participation or work in party primaries.

124. Malbin, Brusoe & Glavin, *supra* note 65, at 20 (explaining that with matching funds “the qualification threshold can be set fairly low. . . . Candidates who do not develop significant constituencies are not likely to get enough in matching funds to raise a fiscal concern anyway”).

125. Multiple matching programs could relax spending limits in one of several ways: (1) set a relatively high spending limit tied to inflation; (2) exempt from spending limits all expenditures that derive from contributions of \$200 or less; (3) exempt from spending limits publicly financed candidates when they are outspent by privately financed opponents (some interpretations of *Arizona Free Enterprise* may prohibit this); or (4) abolishing all spending limits for publicly financed candidates. For further discussion, see Spencer Overton, *Ending Spending Limits in Public Financing for Campaigns* (Sept. 29, 2011) (unpublished manuscript) (on file with author).

126. *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1281 (1994) (asserting that the need to preserve the time of elected representatives for legislative duties justifies campaign finance reform); Briffault, *supra* note 34, at 583 (“Public funding can reduce the time and effort that all but independently wealthy candidates must currently devote to fundraising, thus enabling candidates to focus more on the voters and less on donors.”); Raskin & Bonifaz, *supra* note 119, at 1188 (“Time on the money trail is . . . time spent away from one’s voting constituents.”).

especially when such programs match only those contributions from residents of the candidate's locality or state.¹²⁷ These programs increase campaign efficiencies by allowing candidates to invest fewer resources in large-dollar fundraising operations, and by facilitating the conversion of networks of small donors into networks of community organizers.¹²⁸ As four-term Bronx Borough President Fernando Ferrer stated:

Because the match makes it effective for me to raise money in all communities, my fundraising activities do not diverge as much from my actual campaign as they would without the match. I am in contact with many of the same people, regular voters, both for regular campaign purposes and fundraising purposes.¹²⁹

Proponents of traditional flat grants might assert that multiple matching funds favor incumbents, celebrities, and candidates tied to membership organizations such as unions and the NRA, and disadvantage political newcomers.

Public financing should not be an equal-employment opportunity plan for candidates, but should increase citizen participation. By focusing on citizens, multiple matching funds encourage candidates to mobilize a core group of supporters, raise funds from that group, and then use those resources to mobilize a broader group of supporters. Multiple matching funds reward candidates who are popular not simply among the affluent elite (who fund the bulk of our current campaigns), but also among a much larger population of citizens.

Another complaint is that multiple matching funds amplify only the voices of those who have the resources to give,¹³⁰ and that a voucher system would better minimize the impact of dis-

127. For example, in New York City eligibility for public financing for borough presidents and city council members requires candidates for those offices to raise a certain number of matchable contributions from "residents of the borough," and from residents "of the district in which the seat is to be filled," respectively. N.Y.C. ADMIN. CODE § 3-703(2)(a) (2011). Once a candidate for these offices has met the eligibility requirement, the law restricts matchable contributions to contributions "made by a natural person resident in the city of New York." N.Y.C. ADMIN. CODE § 3-702(3) (2011).

128. MIGALLY & LISS, *supra* note 89, at 18 (indicating that "[u]nder the NYC [multiple matching] system, candidates are incentivized to build networks of small donors who become networks of organizers. The most cost-effective fundraising and the most persuasive organizing takes place at the same spot: in supporters' living rooms").

129. *Id.* (citing Affidavit of Bronx Borough President Fernando Ferrer ¶ 4, City of New York v. N.Y. City C.F.B., No. 400550/01, (Feb. 12, 2001)).

130. Raskin & Bonifaz, *supra* note 64, at 332 (asserting that one-to-one matching funds on the first \$200 use public money "to reinforce and to amplify the voice of those already wealthy enough to give" and "lock into place a fundamentally flawed regime in which private wealth continues to dominate").

parities in income.¹³¹ One leading voucher program, for example, would give each American \$50 in “Patriot Dollars” to donate to their favored candidates who participate in the program and agree not to accept other forms of private financing.¹³²

Although multiple matching funds will not overcome all barriers to participation, they advance different values and enjoy advantages over vouchers. Vouchers promote mathematical equality, while multiple matching funds facilitate meaningful participation. By disqualifying candidates who accept and spend private money, vouchers are less likely to be used by candidates than multiple matching funds. Unlike vouchers, multiple matching programs allow donors to express the intensity of their preferences by contributing more money. Multiple matching funds also make it easier for citizens to give contributions to multiple candidates, which is particularly helpful to less-visible, down-ballot candidates.

Skeptics might also assert that ideological extremists on the far left and the right currently give the bulk of small contributions, and multiple matching funds would enhance their polarizing influence on politics.¹³³ Conservative Congresswoman Michele Bachmann, for example, raised 73% of her funds in 2010 from small donors (more than any other member of Congress).¹³⁴ Multiple match programs that limit the match to contributions from residents of a candidate’s locality or state would not accelerate polarization,¹³⁵ however, as the bulk of ideologically charged contributions come from out-of-district residents (e.g., Bachmann’s 2010 congressional campaign raised 69% of its money from outside of Bachmann’s state¹³⁶).

131. See BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 43 (2002) (rejecting matching fund systems because Americans “should not be required to sacrifice private goods” to support candidates financially); see also Foley, *supra* note 64, at 1220–26 (promoting vouchers); Hasen, *supra* note 64, at 18–27 (promoting a voucher program).

132. See Bruce Ackerman & Ian Ayres, *‘Patriot Dollars’ Put Money Where the Votes Are*, L.A. TIMES, July 17, 2003, at B15.

133. Cf. Smith, *Some Problems*, *supra* note 75, at 601 (observing that “a number of fringe candidates have qualified for federal matching funds”).

134. Michele Bachmann, OPENSECRETS.ORG, <http://www.opensecrets.org/politicians/summary.php?cid=N00027493#funds> (last visited Jan. 31, 2011).

135. For a discussion of New York City’s restrictions regarding in-district and city residents, see *supra* note 127 and accompanying text.

136. It is not possible to trace the origins of very small contributions as candidates are not required to include the addresses of contributors who give less than \$200 in their reports to the FEC. 2 U.S.C. § 434(b)(3) (2006 & Supp. 2010); see also, e.g., Michele Bachmann: Campaign Finance/Money—

The cost of a multiple matching program is also reasonable. In the 2009 election, the New York City matching program cost \$27 million,¹³⁷ or about \$3.22 per resident once every four years.¹³⁸ On an average annual basis, this represented 0.00011% of New York City's budget.¹³⁹ New York City spends more on the Taxi and Limousine Commission,¹⁴⁰ temporary services,¹⁴¹ and printing¹⁴² than it does on the multiple match program.¹⁴³

For a relatively insignificant cost, multiple matching funds facilitate widespread participation and engagement in a political process that affects almost all citizens by determining the allocation of trillions of dollars in tax revenues and government expenditures. In the United States, the federal government alone collected an average of \$7005.77 per resident in revenue,¹⁴⁴ and expended on average \$2639.71 per resident on de-

Geography Data, OPENSECRETS.ORG, <http://www.opensecrets.org/politicians/geog.php?cid=N00027493&cycle=2010> (last visited Jan. 31, 2012) (noting that the calculation of in-state and out-of-state contributions includes only those contributions of more than \$200). Even without the in-state provision, multiple matching funds would not likely polarize politics. Without a match, ideology motivates many small donors. Thus, the multiple match would likely prompt participation by a larger group of less ideological citizens.

137. N.Y.C. CAMPAIGN FIN. BD., NEW YORKERS MAKE THEIR VOICES HEARD 5 (2010), available at http://www.nycfb.info/PDF/per/2009_PER/2009_PostElectionReport.pdf. The 2005 election cost about \$24 million. See N.Y.C. CAMPAIGN FIN. BD., PUBLIC DOLLARS FOR THE PUBLIC GOOD 74 (2006), available at http://www.nycfb.info/PDF/per/2005_PER/2005_Post_Election_Report.pdf.

138. See U.S. CENSUS BUREAU, NEW YORK CITY, NEW YORK: ACS DEMOGRAPHIC AND HOUSING ESTIMATES1 (2009), available at http://www.nyc.gov/html/dcp/pdf/census/nyc_boro_demo_06to09_acs.pdf (finding 8,391,881 N.Y.C. residents).

139. New York City's Net Total Expense Budget for Fiscal Year 2010 in the City's Adopted Budget was \$59,479,863,786. CITY OF NEW YORK, ADOPTED BUDGET FISCAL YEAR 2010 i (2009), available at http://www.nyc.gov/html/omb/downloads/pdf/erc6_09.pdf.

140. *Id.* at 148E.

141. *Id.* at 5C (using as an example temporary secretarial services).

142. *Id.* at 4C.

143. Some may be concerned that multiple matching funds program require the creation of additional bureaucracy. While the Federal Election Commission has experience with a modest presidential primary matching fund program, many localities and states would need to establish a regulatory structure to administer matching funds.

144. In 2010, the government had receipts of \$2163 billion. OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2012 BUDGET OF THE U.S. GOVERNMENT 171 (2011), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/budget.pdf>. In 2010, the United States had an official population count of 308,745,538. *U.S. Census Bureau Announces 2010 Census Population*

fense,¹⁴⁵ \$2270.48 on Social Security,¹⁴⁶ \$2328.78 on Medicare and Medicaid,¹⁴⁷ \$1590.31 on non-defense discretionary spending (i.e., other executive branch and independent agencies),¹⁴⁸ and \$634.83 on interest on the public debt.¹⁴⁹ An annual expenditure of \$4.88 per person for multiple matching funds¹⁵⁰ is a modest cost to ensure adequate input from—and accountability to—a broad and diverse group of Americans, as well as to help prevent corruption and the appearance of corruption in the allocation of these resources.¹⁵¹

Counts, U.S. CENSUS BUREAU (Dec. 21, 2010), <http://2010.census.gov/news/releases/operations/cb10-cn93.html>.

145. See OFFICE OF MGMT. & BUDGET, *supra* note 144, at 174 (showing expenditures on discretionary security programs of \$815 billion).

146. See *id.* (showing expenditures on Social Security of \$701 billion).

147. See *id.* (showing expenditures on Medicare of \$446 billion and Medicaid of \$273 billion).

148. See *id.* (showing expenditures on discretionary non-security programs of \$491 billion).

149. See *id.* (showing expenditures on interest of \$196 billion).

150. This figure errs on the high side of possible costs, if Congress were to allocate enough funds to fully fund every federal election (including midterm elections) at the level of a presidential election, and not just provide a match. If Congress were to allocate \$3.008 billion for the multiple match—the entire amount spent by candidates for federal office in the 2008 elections—then the annual cost per United States resident would be \$4.88. See 2008 PRESIDENTIAL CAMPAIGN FINANCIAL ACTIVITY SUMMARIZED: RECEIPTS NEARLY DOUBLE 2004 TOTAL, FEC (June 8, 2009), <http://www.fec.gov/press/press2009/20090608PresStat.shtml> (noting \$84.1 million in public funds and \$46.4 million in private funds for John McCain’s legal and accounting expenses for general election); *Congressional Candidates Raised \$1.42 Billion in 2007–08*, FEC (Dec. 29, 2009), <http://www.fec.gov/press/press2009/2009Dec29Cong/2009Dec29Cong.shtml> (showing \$1.38 billion in expenditures for House and Senate races in 2008 election); PRESIDENTIAL PRE-NOMINATION CAMPAIGN DISBURSEMENTS DECEMBER 31, 2008, FEC (Dec. 31, 2008), http://www.fec.gov/press/press2009/20090608Pres/3_2008PresPrimaryCmpgnDis.pdf (showing \$1,497,977,843 in expenditures, including activity for Ralph Nader, Democratic and Republican primary candidates, and both primary and general election funds for President Obama); U.S. CENSUS BUREAU, *supra* note 144 (finding that the population of U.S. is 308,745,538).

151. Some suggest that contributions do not shape budgetary priorities. See MAURER & DRAYE, *supra* note 75, at 15 (asserting no connection exists between campaign contributions and political favors, that public financing will not reduce government spending, and suggesting that public financing may facilitate earmarks and pork barrel spending by elected officials who prioritize their constituents’ parochial interests over national interests). Others disagree, and assert that firms profit from contributions. See AM. FOR CAMPAIGN REFORM, MONEY IN POLITICS & GOVERNMENT WASTE (2010), available at <http://www.accreform.org/wp-content/uploads/2010/12/Fact-Sheet-Earmarks-Money-in-Politics1.pdf> (observing that in 2008, the top ten recipients of defense industry earmarks each received an average of \$13 in federal funds for every \$1 they spent on contributions and lobbying expenditures). While demonstrating that cam-

Multiple matching funds are also less expensive than conventional full public financing. Unlike full public financing grants that supplant private money, multiple matching jurisdictions provide only a portion of what is needed to run an election, and this amount can be lowered if needed.¹⁵² For example, assuming it costs \$100,000 to run a typical city council race, a jurisdiction could agree to give six-to-one matching funds on the first \$200 of each contribution up to \$25,000, \$50,000, or \$75,000 for each race.¹⁵³ While the \$75,000 level will likely ensure the greatest participation, the \$25,000 level will also stimulate significant participation.

Finally, sufficient protections exist to prevent the fraudulent use of multiple matching funds. Critics might argue that a candidate could give \$100 checks to 500 different people, have each of those people contribute \$100 to the candidate's campaign, and receive a six-to-one match on the money collected—turning \$50,000 into \$350,000.¹⁵⁴ This type of fraud could be prosecuted under existing federal, state, and local anti-conduit laws that prohibit individuals from providing funds to others for the purpose of making a contribution.¹⁵⁵

Skeptics might also argue that candidates will waste public funds to stay in lavish hotels or build war chests for future

paign contributions produce unwarranted expenditures or tax relief is beyond the scope of this Article, the allocation of tax burdens and spending priorities certainly warrants the engagement of the broad base of citizens that results from multiple matching funds.

152. The argument that multiple matching funds cost too much and reinforce the participation of wealthier individuals could be addressed by limiting these programs to small contributions or less wealthy people. Such limitations would avoid subsidizing larger contributors who would have given regardless of the incentive, and would increase fundraisers' incentives to mobilize smaller donors. Incentives available only to small donors, however, could be construed as discouraging larger contributions, and raise more constitutional concerns under *Arizona Free Enterprise*. See *infra* Part III.C for a discussion of constitutional issues.

153. In the alternative, a jurisdiction could allocate a fixed amount of public money, and allocate money to candidates on a first-come/first-serve basis until the money is depleted. This approach, however, may advantage early candidates and incumbents.

154. See *gt*, *Thursday, September 23, 2010*, SOAPBOX (Sept. 23, 2010, 5:33 PM), <http://ballots.blogspot.com/2010/09/recently-i-wrote-blog-post-about-how-to.html>; MAURER & DRAYE, *supra* note 75, at 12 (quoting former FEC Chair David Mason as saying "the presence of matching funds provides a dramatically increased incentive for conduit contributions").

155. See, e.g., 2 U.S.C. § 441f (2006); ARIZ. REV. STAT. ANN. § 16-907 (2006); TEX. ELEC. CODE ANN. § 253.001 (2010); FEC Contribution and Expenditure Limitations and Prohibitions, 11 C.F.R. § 110.4 (2011).

elections. Many public financing programs, however, contain provisions that limit the use of public money to specific campaign-related expenses, require that leftover funds be returned to the government, and provide for repayment or even criminal prosecution for violations.¹⁵⁶ Further, unlike conventional flat-grant full public financing, candidates who contemplate a misuse of matching funds on unnecessary luxuries know they will be held accountable by past and potential contributors who have either already invested or are considering investing their personal funds to the campaign.

C. MULTIPLE MATCHING FUNDS ARE CONSTITUTIONAL

Multiple matching funds do not burden speech, and therefore the programs are not subject to heightened judicial scrutiny and do not pose the constitutional problems of the “trigger” provision invalidated in *Arizona Free Enterprise*.

In *Buckley v. Valeo*, the Court upheld the constitutionality of matching funds (a one-to-one match on the first \$250 of a contribution).¹⁵⁷ The Court explicitly found that the program “furthers, not abridges, pertinent First Amendment values” because it was “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.”¹⁵⁸ Increasing the match to six-to-one does nothing to “abridge, restrict, or censor” speech, and more effectively furthers pertinent First Amendment values *Buckley* referenced by multiplying the money available for public discussion and enhancing incentives for participation.

Moreover, multiple matching funds for contributions do not violate the holding of *Arizona Free Enterprise*. Although the Supreme Court referred to the Arizona law it rendered unconstitutional as a “matching funds scheme,” the Arizona law gave additional funds to publicly financed candidates to match the

156. See, e.g., N.Y.C. ADMIN. CODE §§ 3-702(21), 3-704, 3-710 (2010) (defining “expenditure” and imposing audits and penalties for improperly spent funds and requiring repayment of excess funds); Fair Elections Now Act, H.R. 1404, 112th Cong. §§ 103, 523, 534 (2011) (limiting types of expenditures and requiring repayment of improperly spent funds while also allowing for criminal investigation).

157. 424 U.S. 1, 106, 143–44 (1976) (per curiam).

158. *Id.* at 92–93.

spending of privately financed candidates.¹⁵⁹ Unlike the trigger provisions in *Arizona Free Enterprise*, multiple matching funds for contributions are not triggered by and do not respond to the spending of opposing candidates, independent expenditure groups, or contributors,¹⁶⁰ and therefore they do not burden the speech of these entities.¹⁶¹

Opponents might argue that the multiple match is unconstitutional because it represents government burdening of unfettered speech. Just as the First Amendment provides for separation of church and state, opponents may argue, it also prohibits government from interfering with politics by subsidizing particular political actors.¹⁶² These opponents might reference the following language from *Arizona Free Enterprise*:

[I]t is not legitimate for the government to attempt to equalize electoral opportunities in this manner. And such basic intrusion by the government into the debate over who should govern goes to the heart of First Amendment values. . . . The First Amendment embodies our choice as a Nation that . . . the guiding principle is freedom—the “unfettered interchange of ideas”—not whatever the State may view as fair.¹⁶³

159. *Ariz. Free Enter. Club’s Freedom PAC v. Bennett*, 131 S. Ct. 2806, 2810 (2011).

160. The Court in *Arizona Free Enterprise* observed that unlike Arizona’s trigger, permissible government subsidies of speech did not directly respond to the speech of another. *Id.* at 2822 (“[N]one of those cases [upholding government subsidies of speech] . . . involved a subsidy given in direct response to the political speech of another, to allow the recipient to counter that speech.”).

161. The New York City program provision that increases the spending limit and the match from six-to-one to 8.57-to-1 if a privately financed opponent spends over a particular amount, however, is likely unconstitutional under *Arizona Free Enterprise*. See Larry Levy & Andrew Rafalaf, *High Court’s Recent Decision on Public Matching Funds Renders New York City’s Campaign Finance System Ripe for Constitutional Attack*, ALB. GOV’T L. REV. FIREPLACE (July 11, 2011, 05:46 PM), <http://aglr.wordpress.com/2011/07/11/high-courts-recent-decision-on-public-matching-funds-renders-new-york-citys-campaign-finance-system-ripe-for-constitutional-attack-2/>.

162. Smith, *The Separation*, *supra* note 76 (asserting that implicit in the U.S. Constitution is a “separation of campaign and state” principle that government should have no role in subsidizing campaigns). While the power of state and local governments to subsidize private industry (e.g., sporting arenas) is sometimes limited by state constitutions, these limitations usually apply only when a specific and identifiable private beneficiary exists rather than a broader group of beneficiaries, such as all citizens. Brent Bordson, Note, *Public Sports Stadium Funding: Communities Being Held Hostage by Professional Sports Team Owners*, 21 HAMLIN L. REV. 505, 508–09 (1998) (noting some state constitutional provisions require that public finances serve a “public purpose”).

163. *Ariz. Free Enter.*, 131 S. Ct. at 2826 (citing *Buckley*, 424 U.S. at 14); *cf. Davis v. FEC*, 554 U.S. 724, 742 (2008) (“Leveling electoral opportunities

These arguments are unpersuasive. First, as discussed above, dicta in *Arizona Free Enterprise* referenced a trigger that, unlike multiple matching of contributions, was deemed to deter speech.¹⁶⁴ Further, the *Buckley* Court explicitly rejected a libertarian “separation of campaign and state” argument, holding that any analogy to separation of church and state was “patently inapplicable” because the Establishment Clause was intended to prevent religious persecution, whereas the Speech Clause was intended to advance robust public debate.¹⁶⁵ First Amendment text prohibiting the “establishment” of religion differs from text prohibiting Congress from “abridging” speech.¹⁶⁶ Multiple matching funds do not abridge speech but instead “use public money to facilitate and enlarge public discussion and participation in the electoral process”¹⁶⁷ Congress possesses the power to provide financial support for speech,¹⁶⁸ and it has properly done so in contexts as varied as public broadcasting, educational media, preferential postal rates for newspapers, and antitrust exemptions.¹⁶⁹

Multiple matching funds do not discriminate against larger contributors.¹⁷⁰ Six-to-one matching funds on the first \$200 of a

means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. . . . [I]t is a dangerous business for Congress to use the election laws to influence the voters’ choices.”).

164. See *supra* text accompanying note 160.

165. *Buckley*, 424 U.S. at 92–93 & n.127.

166. *Id.* at 92.

167. *Id.* at 92–93.

168. *Id.* at 90–91 (determining that Congress has the power to provide public subsidies to politics due to its authority to regulate federal elections and to decide which expenditures will promote the general welfare).

169. *Id.* at 93 n.127.

170. Some might argue that multiple matching funds that subsidize only the contributions of in-district or in-state donors favor the speech of locals over others and constitute viewpoint discrimination. See MAURER & DRAYE, *supra* note 75, at 3 (“[R]elegating out-of-state contributions to second-class status undermines . . . the federal right to free speech and association . . .”). This claim should fail. The in-district requirement would not prohibit out-of-district contributions, but simply would not subsidize them with public funds. The First Amendment allows government to allocate funds using neutral criteria that do not lend themselves to viewpoint-based discrimination. See *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 614–15 (1998) (Souter, J., dissenting). Residency is a neutral factor unrelated to political party, ideology, or other viewpoint, and is utilized in a variety of electoral contexts (e.g., candidates must often live in the district in which they run, petition signatures are often deemed valid only if they are of a resident of the district, and voting is generally limited to residents of a district). Furthermore, the viewpoints expressed by both out-of-district and in-district donors are often identical (e.g., support for the candidate), and thus the decision to match one donation and

contribution are available to all donors, large and small.¹⁷¹ The fact that matching funds match only the first \$200 of a \$1000 donor's contribution does not burden the larger contributor's speech.

Those challenging multiple matching funds may also argue that the program impermissibly restricts speech by decreasing the relative value of larger contributions.¹⁷² For example, without the match, a \$1000 contribution is worth *five times* as much as a \$200 donation. With a six-to-one match on the first \$200, however, a \$1000 contribution (which works out to \$2200) is worth *only 1.57 times* as much as a \$200 contribution (which nets the candidate \$1400). This extensive decrease in the value of larger contributions relative to smaller contributions, challengers might argue, fundamentally differs from the decrease that stems from the one-to-one match upheld in *Buckley*.

Courts should reject this "relative value" burden argument. The argument requires difficult line-drawing exercises: Does a match become unconstitutional at two-to-one, three-to-one, or four-to-one? Further, interpreting diminishing relative value as a burden on speech would require invalidation of laws in various other areas, including public broadcasting and government funding for the arts. Judicial invalidation of multiple matching funds would restrict the speech of smaller contributors in order

not the other is not related to the expressive content of the donation. See *Herschaf v. N.Y.C. Campaign Fin. Bd.*, 127 F. Supp. 2d 164, 168 (E.D.N.Y. 2000) (noting that New York City "plainly has a substantial interest in ensuring that public" matching funds are "given only to those candidates that have the requisite support within their district and that have received legitimate matchable contributions from New York City residents."); see also *Finley*, 524 U.S. at 596 (Scalia, J., concurring) (asserting that "[i]t is preposterous to equate the denial of taxpayer subsidy with measures 'aimed at the suppression of' . . . speech" (emphasis omitted)).

171. Granted, multiple matching funds might change a prospective donor's incentives to give the matched amount (e.g., a \$200 contribution in a system that gives a six-to-one match on the first \$200)—which may encourage some smaller donors to give more and larger donors to give less. Simple changing of incentives, however, does not constitute a burden or restraint on speech, as contributors are free to give more money, and no opposing spending or contributions will be triggered by their decision to do so.

172. Opponents could also claim multiple matching funds discriminate based on wealth by increasing the relative influence of small donors in violation of the Equal Protection Clause. Multiple matching funds do not exclude larger donors, however, but allow them to take advantage of the multiple match on the first \$200. Even in the unlikely event the multiple match is deemed a wealth-based classification, rational basis review (not heightened scrutiny) would apply, see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54–55 (1973), and the multiple match likely would be upheld.

to enhance the relative voice of larger contributors, which “is wholly foreign to the First Amendment.”¹⁷³

The argument that the multiple match burdens the speech of larger contributors is also flawed because the Court has held that contributions do not contain the same expressive value as expenditures.¹⁷⁴ Thus, the Court has found that a contribution limit “involves little direct restraint on [a person’s] political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor’s freedom to discuss candidates and issues.”¹⁷⁵ The multiple match is less problematic than a contribution limit, as the multiple match involves no restraint on the larger contributor’s political communication, but instead enhances it by applying the match.

While some public finance opponents may suggest that any campaign finance rules that “level the playing field” are unconstitutional,¹⁷⁶ this equality rationale is prohibited only for laws that burden speech. Laws that burden speech are subject to heightened scrutiny, and the Court has indicated that prevention of corruption and the appearance of corruption are the only permissible justifications for restricting political money.¹⁷⁷ The Court has repeatedly invalidated campaign finance restrictions

173. *Cf. Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam) (“[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 . . .”).

174. *See id.* at 20–21 (comparing expenditures to contributions, and observing that “[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing”). The triggers invalidated in *Davis* and *Arizona Free Enterprise* were deemed to burden expenditures, not contributions.

175. *Id.* at 21; *accord Davis v. FEC*, 554 U.S. 724, 737 (2008) (“This Court has previously sustained the facial constitutionality of limits on discrete and aggregate individual contributions and on coordinated party expenditures.”).

176. *See MAURER & DRAYE, supra* note 75 (asserting the “Court has condemned regulations with the purpose of equalizing the opportunities for speech. . . . The only government interest . . . sufficiently compelling to support campaign finance rules is the prevention of corruption or the appearance of corruption.” (footnotes omitted)).

177. *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985) (“We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests . . . for restricting campaign finances.”).

designed to promote equality.¹⁷⁸ Multiple matching of contributions does not burden speech, however, and conceptually the justification for the program need not be prevention of corruption but could include promoting equality.¹⁷⁹

To minimize litigation risk in the unlikely event a court characterizes multiple matching funds as a burden on speech; however, legislators should enact multiple matching funds to help prevent corruption, not to promote equality. Multiple matching programs prevent quid pro quo corruption by increasing participation and diversifying a candidate's support so she is less beholden to a narrow group of donors.¹⁸⁰ Although leveling the playing field between average citizens and wealthy special interests may be politically effective rhetoric, officials should avoid bill text, legislative record language, press releases, website statements, and other language that suggests that a purpose of multiple matching funds is to equalize contributors or to diminish or dilute the influence of larger contributors.

CONCLUSION

Public financing should no longer aim to purge private money from politics, but should instead encourage as many cit-

178. *Ariz. Free Enter. Club's Freedom PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011) (stating that equalizing opportunities is "a dangerous enterprise and one that cannot justify burdening protected speech"); *Davis*, 554 U.S. at 741 (stating that precedential cases "provide no support for the proposition that [equalizing candidates] is a legitimate government objective"); *Buckley*, 424 U.S. at 54 (holding that the interest in equalizing the relative financial resources of candidates competing for elective office "is clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights").

179. The Court referenced a similar rationale with approving language in *Buckley*. See *Buckley*, 424 U.S. at 107 ("The thrust of [matching funds] is to reduce financial barriers and to enhance the importance of smaller contributions." (footnote omitted)).

180. See *supra* text accompanying notes 69–71. One could assert that the primary anticorruption benefit of multiple matching funds is to reduce the possibility of corruption by supplanting large contributions with small contributions and public money. The five Justices in the majority of *Citizens United* and *Arizona Free Enterprise* likely see monetary participation of all sizes as essential to hold politicians accountable to the people, however, and thus a "supplant large contributions" theory of prevention of corruption will likely fail to persuade a majority of justices. Indeed, such a theory may lead public financing skeptics to characterize multiple matching funds as an attempt to restrain the speech of larger contributors that warrants heightened scrutiny. See MAURER & DRAYE, *supra* note 75, at 17–19 (characterizing the Fair Election Now Act's goal of reducing the significance of large contributors as an attempt to silence these donors). For further discussion of how the multiple match prevents corruption, see *supra* Part III.B.

izens as possible to participate in financing politics. Federal, state, and local lawmakers should transform their approach to public financing by adopting multiple matching of contributions. Multiple matching funds increase citizen participation, reduce the potential for corruption, and comply with the Court's First Amendment jurisprudence.