citizens must shoulder certain hardships so that the country can adhere to the principle that "constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'"[79]

4. Freedom of Speech — Campaign Finance Regulation. — In *Davis v. FEC*,[1] the Supreme Court struck down the Millionaire's Amendment, a provision relaxing campaign contribution restrictions for candidates whose opponents spent over $350,000 in personal funds,[2] as an impermissible burden on political speech.[3] Commentators disagreed over the decision's implications for public financing systems that employed matching funds mechanisms.[4] Last Term, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,[5] the Supreme Court held that the Arizona Citizens Clean Elections Act[6] (CCEA) unconstitutionally burdened privately funded candidates' political speech by granting matching funds to their publicly financed opponents.[7] The decision split the Court 5–4 and produced a pair of opinions that provided independently thorough analyses but relied on dissonant theories of the First Amendment. Although the Court's doctrinal analysis, if extended, could imperil the constitutionality of longstanding public funding systems, the Court's focus on the CCEA's trigger mechanism will likely prevent the implications from reaching so far.

Despite contribution limits enacted by Arizona voters in 1986,[8] Arizona remained plagued by campaign finance–related political corruption scandals throughout the late 1980s and the 1990s.[9] Governor Evan Mecham was indicted for perjury and fraud for allegedly concealing a campaign loan,[10] both then-sitting U.S. Senators were inves-

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[79] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (quoting NAACP v. Button, 371 U.S. 415, 445 (1963)).

[1] 128 S. Ct. 2759 (2008).

[2] *Id.* at 2766.

[3] *Id.* at 2771.

[4] *Compare, e.g.*, Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL'Y 283, 321–22 (2010) (arguing that *Davis* implies that "asymmetrical schemes of public financing that provide additional funding or raise contribution limits in response to independent expenditures are presumably unconstitutional"), *with The Supreme Court, 2007 Term — Leading Cases*, 122 HARV. L. REV. 276, 384 (2008) (arguing that the subsidy-penalty distinction "draws a clear doctrinal line between the asymmetrical restriction scheme in *Davis* and the asymmetrical funding schemes in many states").

[5] 131 S. Ct. 2806 (2011).

[6] ARIZ. REV. STAT. ANN. § 16-940–16-961 (2006 & Supp. 2010).

[7] *See Ariz. Free Enter.*, 131 S. Ct. at 2813.

[8] *See* ARIZ. REV. STAT. ANN. § 16-905 historical and statutory notes.

[9] *See* McComish v. Bennett, 611 F.3d 510, 514 (9th Cir. 2010) (amended opinion); *see also* Carey Goldberg, *2 States Consider Boldly Revamping Campaign Finance*, N.Y. TIMES, Oct. 19, 1998, at A1 (suggesting that passing the campaign finance reform measures would have "special impact" in Arizona because the state had "been plagued by corruption scandals").

[10] *See Arizona: Indicting a Wild-Card Governor*, NEWSWEEK, Jan. 18, 1988, at 31.

tigated by the Senate Ethics Committee for intervening in the federal investigation of a bank belonging to a generous contributor to their campaigns,[11] and many state legislators were indicted after being caught promising to support gambling legislation in exchange for campaign contributions.[12]

In November 1998, Arizona voters passed an initiative for public financing of political campaigns, which became the CCEA.[13] Candidates who chose not to participate were unaffected,[14] while participating candidates received a lump sum grant from the public fund[15] in exchange for agreeing not to fund their campaigns through private contributions, not to exceed strict limits on personal funding, and to refund any unused public money.[16] Additionally, for every dollar spent by a nonparticipating opponent above the lump sum grant amount, a participating candidate received ninety-four cents.[17] Independent expenditures against the participating candidate or in favor of a nonparticipating opponent were similarly matched by public funds.[18] The CCEA capped the sum of the initial grant and the matching funds at three times the lump sum grant amount.[19]

Four candidates for political office in the 2010 election brought suit, alleging that the CCEA was unconstitutional under the First Amendment and the Equal Protection Clause.[20] Reviewing the parties' cross-motions for summary judgment,[21] the district court held that the logic of *Davis* required strict scrutiny of the CCEA and that the matching funds provision was not narrowly tailored to the state's interest in eliminating corruption or the perception of corruption.[22]

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[11] *See* Tom Morganthau et al., *The S&L Scandal's Biggest Blowout*, NEWSWEEK, Nov. 6, 1989, at 35.

[12] *See* Sally Ann Stewart, *New Tarnish on Arizona's Image*, USA TODAY, Feb. 13, 1991, at 6A.

[13] *See Ariz. Free Enter.*, 131 S. Ct. at 2813.

[14] *See McComish*, 611 F.3d at 516; ARIZ. REV. STAT. ANN. § 16-941(B) (2006 & Supp. 2010).

[15] *McComish*, 611 F.3d at 516; ARIZ. REV. STAT. ANN § 16-951. The amount provided varied based on the office sought, whether the election was contested, and whether the candidate had party support. *See* ARIZ. REV. STAT. ANN. § 16-951.

[16] ARIZ. REV. STAT. ANN. §§ 16-941(A)(1)–(2), 16-953.

[17] *McComish*, 611 F.3d at 516; ARIZ. REV. STAT. ANN. § 16-952(A)–(B). The six percent deduction was meant to account for a nonparticipating candidate's fundraising costs. *See* ARIZ. REV. STAT. ANN. § 16-952(B).

[18] *McComish*, 611 F.3d at 516; ARIZ. REV. STAT. ANN. § 16-952(C)(1)–(3).

[19] *McComish*, 611 F.3d at 517; ARIZ. REV. STAT. ANN. § 16-952(E).

[20] *See McComish*, 611 F.3d at 517. Plaintiffs alleged that the CCEA violated the Equal Protection Clause because of its unequal treatment of participating and nonparticipating candidates. McComish v. Brewer, No. CV-08-1550-PHX-ROS, 2010 WL 2292213, at *10 (D. Ariz. Jan. 20, 2010).

[21] *See McComish*, 2010 WL 2292213, at *6.

[22] *Id.* at *8–9.

The court therefore held the provision unconstitutional under the First Amendment and declined to consider the equal protection challenge.[23]

The Ninth Circuit reversed.[24] Judge Tashima, writing for the panel,[25] held that the CCEA was constitutional because the matching funds provision minimally burdened First Amendment rights and survived intermediate scrutiny.[26] The court found that the provision was meant to encourage participation in the public financing system, which was intended to remedy the political corruption rampant in Arizona when its voters passed the initiative.[27] The panel therefore concluded that, by making public financing a competitive option for participants, the matching funds provision was substantially related to the state's interest in combating corruption.[28]

The Supreme Court reversed.[29] Writing for the Court, Chief Justice Roberts[30] held that the CCEA violated the First Amendment because it imposed a substantial burden on political speech and failed strict scrutiny.[31] The Court argued that "[i]f the law at issue in *Davis* imposed a burden on candidate speech, the Arizona law unquestionably [did] as well,"[32] since any relevant differences made "the Arizona law *more* constitutionally problematic, not less."[33]

Because any additional publicly funded speech would be at the expense of privately financed candidates' and independent expenditure groups' speech, the Court rejected Arizona's argument that the CCEA results in more speech.[34] The majority emphasized that Arizona's subsidies to participating candidates were triggered by political speech from nonparticipating opponents, distinguishing this case from Supreme Court precedent upholding other speech subsidies.[35] The Court

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[23] *See id.* at *10.

[24] *McComish*, 611 F.3d at 514.

[25] Judge Tashima was joined by Judge Thomas. Judge Kleinfeld concurred, arguing that the CCEA was constitutional because it did "not restrict speech at all." *Id.* at 528 (Kleinfeld, J., concurring).

[26] *Id.* at 513–14 (majority opinion).

[27] *See id.* at 525–27.

[28] *See id.* at 527.

[29] *Ariz. Free Enter.*, 131 S. Ct. at 2829.

[30] Chief Justice Roberts was joined by Justices Scalia, Kennedy, Thomas, and Alito.

[31] *Ariz. Free Enter.*, 131 S. Ct. at 2813.

[32] *Id.* at 2818.

[33] *Id.* Specifically, the majority noted that the matching funds provision actually distributed funds, while the Millionaire's Amendment granted opposing candidates only an opportunity to solicit more contributions; that if a nonparticipating candidate had multiple participating opponents, the matching funds provision could have a multiplier effect; and that nonparticipating candidates had less control over the imposition of the penalty because matching funds could be triggered by third-party expenditures while the Millionaire's Amendment was triggered only by spending personal funds. *See id.* at 2818–19.

[34] *Id.* at 2820–21.

[35] *See id.* at 2822.

acknowledged that privately financed candidates and independent expenditure groups were not obligated to express messages with which they disagreed.[36] But the Court analogized the matching funds provision to provisions requiring newspapers and utility companies to distribute replies to their own speech[37] — provisions it characterized as unconstitutional "government efforts to increase the speech of some at the expense of others."[38] Thus, in the Court's view, although the record showed concrete examples of the matching funds provision chilling political speech,[39] such evidence was not required because a burden on speech was inherent in the choice between subsidizing one's opponent and refraining from expression.[40] As the burden lay in the choice, not the funding, arguments comparing the matching funds provision with a larger lump sum grant "miss[ed] the point."[41]

Having found a substantial burden on political speech, the Court then conducted a strict scrutiny analysis.[42] It reaffirmed last Term's rejection[43] of "leveling the playing field" as a compelling state interest after reviewing the "ample" evidence that the CCEA was intended to do just that.[44] Recognizing that such a goal "can sound like a good thing," the Court emphasized that "campaigning for office is not a game," but "a critically important form of speech."[45] Under such circumstances, the Court held, First Amendment principles require freedom, not the state's notions of fairness.[46] The Court then summarily dismissed the argument that the CCEA indirectly combats corruption by encouraging participation in public financing,[47] noting that expenditures from personal funds and independent committees raise no corruption concerns, and observing that Arizona had already imposed

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[36] *See id.* at 2821.

[37] *See id.* (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974); Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1 (1986)).

[38] *Id.*

[39] *See id.* at 2822 (noting that the record "contain[ed] examples of specific candidates curtailing fundraising efforts, and actively discouraging supportive independent expenditures, to avoid triggering matching funds").

[40] *See id.* at 2823.

[41] *Id.* at 2824.

[42] *See id.*

[43] *See* Citizens United v. FEC, 130 S. Ct. 876, 921 (2010) (overruling Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), in part because its reasoning was "inconsistent with *Buckley*'s explicit repudiation of any government interest in 'equalizing the relative ability of individuals and groups to influence the outcome of elections'" (quoting Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam))).

[44] *See Ariz. Free Enter.*, 131 S. Ct. at 2825–26.

[45] *Id.* at 2826.

[46] *Id.*

[47] *See id.* at 2827 ("[T]he fact that burdening constitutionally protected speech might indirectly serve the State's anticorruption interest, by encouraging candidates to take public financing, does not establish the constitutionality of the matching funds provision.").

strict contribution limits and disclosure requirements, the normal mechanisms for combating corruption and its appearance.[48]

After clarifying that its decision did not "call into question the wisdom of public financing as a means of funding political candidacy,"[49] the Court held that Arizona's means of encouraging participation in the public financing system was "unduly burdensome and not sufficiently justified to survive First Amendment scrutiny."[50] In order to preserve vigorous public debate on governmental affairs, Chief Justice Roberts concluded, the Arizona matching funds provision had to be struck down.[51]

Justice Kagan dissented.[52] Her opinion opened with a comparison between two hypothetical states: one that had enacted all anticorruption campaign finance mechanisms approved by the Court, but remained plagued by political corruption; and one that, after observing the inadequacy of the mechanisms employed by the first state, eliminated its political corruption by also establishing a public funding system rendered attractive to candidates through a matching funds provision.[53] She argued that the majority opinion interfered with the second state's successful eradication of corruption by insisting that voters limit themselves to the mechanisms employed by the first state, despite those mechanisms' demonstrated ineffectiveness.[54]

The dissent briefly reviewed the history of public campaign financing, noting the difficulty of determining the appropriate amount of public funding to grant.[55] According to Justice Kagan, the CCEA provided a "Goldilocks solution,"[56] ensuring a grant sufficient to make public financing attractive without making the system infeasibly expensive.[57] Then, emphasizing the doctrinal distinction between speech subsidies and restrictions, the dissent argued that the CCEA did not restrict political speech, but only subsidized it.[58] According to this view, the CCEA was a viewpoint-neutral speech subsidy that "should easily survive First Amendment scrutiny."[59] Nonparticipating candidates were offered that subsidy but declined it.[60] Subsequently arguing that their First Amendment rights were violated by the grant of

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48 *See id.* at 2826–27.
49 *Id.* at 2828.
50 *Id.*
51 *Id.* at 2828–29.
52 Justices Ginsburg, Breyer, and Sotomayor joined Justice Kagan's dissent.
53 *See Ariz. Free Enter.*, 131 S. Ct. at 2829 (Kagan, J., dissenting).
54 *See id.* at 2829–30.
55 *See id.* at 2830–32.
56 *Id.* at 2832.
57 *Id.* at 2832–33.
58 *See id.* at 2833–34.
59 *Id.* at 2834.
60 *See id.* at 2835.

that subsidy to other candidates, Justice Kagan wrote, might be considered "*chutzpah*."[61]

The dissent then offered three reasons why any purported burden on privately funded speech would not be substantial: first, long-accepted lump sum models impose the same burden; second, disclosure and disclaimer requirements, never deemed substantial burdens, similarly deter some political speech; and finally, contribution limits impose a greater burden on candidates than does funding another candidate, and they also had never been considered substantial burdens.[62] Justice Kagan distinguished *Davis* by arguing that the law in that case triggered a discriminatory speech restriction that Congress could not have imposed directly, while Arizona could have directly granted public funds absent the trigger mechanism.[63]

Next, the dissent turned to the state's asserted interest in combating corruption and the perception of corruption.[64] Citing Supreme Court precedent holding that public financing served the state's interest in combating corruption,[65] Justice Kagan argued that the matching funds mechanism also served that interest because it made public financing effective.[66] If the CCEA served a compelling state interest in combating corruption, she reasoned, it would be no less constitutional if it were also meant to "level the playing field."[67]

The dissent closed by expounding the virtues of the CCEA as a means of attaining "[l]ess corruption, more speech,"[68] and criticized the majority for its restriction of Arizona citizens' right to enact democratic reforms.[69] Countering the majority's admonition that "campaigning for office is not a game,"[70] Justice Kagan concluded: "Truly, democracy is not a game."[71]

Although each opinion in *Arizona Free Enterprise* thoroughly responds to the other's arguments, the opinions also rely on contrasting visions of the First Amendment that inhibit meaningful debate. Independently, each opinion appears unassailable — if one accepts its underlying premises. Familiar conflicting First Amendment philosophies determined whether Justices viewed the matching funds provision as a

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[61] *Id.*

[62] *See id.* at 2837–39.

[63] *See id.* at 2839.

[64] *See id.* at 2841–42.

[65] *See id.* at 2841 (citing Davis v. FEC, 554 U.S. 724, 741 (2008); FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985)).

[66] *See id.* at 2842–43.

[67] *See id.* at 2844–45.

[68] *Id.* at 2845.

[69] *See id.* at 2846.

[70] *Id.* at 2826 (majority opinion).

[71] *Id.* at 2846 (Kagan, J., dissenting).

subsidy or as a penalty. Significantly, the Court for the first time recognized that subsidizing one party's speech can burden the speech of another. If the Court expands this break with the traditional subsidy-penalty distinction, long-accepted public financing schemes could be cast into constitutional doubt. Such an outcome is unlikely in the short term, however, because the majority placed heavy emphasis on the trigger mechanism's role in creating a burden on speech.

Despite the First Amendment's apparently simple command that governments "shall make no law . . . abridging the freedom of speech,"[72] scholars have identified multiple visions of the Speech Clause's core purposes in Supreme Court precedent.[73] The opinions in *Arizona Free Enterprise* reprised a familiar conflict between two First Amendment philosophies. The majority espoused the classical "marketplace of ideas"[74] free from government intrusion,[75] while the dissent invoked a vision of "market failure" warranting some government intervention.[76]

This conflict largely resulted from ambiguities in the First Amendment's subsidy-penalty distinction,[77] as the opinions reasoned from opposite sides without acknowledging that the matching funds provision falls into both categories. Justice Kagan argued that the CCEA "impose[d] nothing remotely resembling a coercive penalty on privately funded candidates"[78] and should have been upheld as a "viewpoint-neutral subsidy," which the Court had "never, not once," understood to be a "First Amendment burden."[79] Chief Justice Roberts countered that "none of [the cases cited by the dissent] — not one — involved a subsidy given in direct response to the political

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[72] U.S. CONST. amend. I.

[73] *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 424 (1996) (describing two approaches, one that believes "[q]uantity . . . is of the essence" and one that "focuses on the quality of the expressive arena"); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 145 (2010) (arguing that First Amendment doctrine includes "libertarian" and "egalitarian" visions of the speech clause).

[74] Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

[75] *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 11 (1989) (describing the "marketplace theory" as "assum[ing] that unrestrained speech aids listeners in finding truth and, thus, promotes wise decisionmaking"); *see also* Sullivan, *supra* note 73, at 145 (describing the "libertarian" view as one that generally believes that "ideas are best left to a freely competitive ideological market").

[76] *See* BAKER, *supra* note 75, at 37–38 (summarizing First Amendment approaches based on the idea of market failure).

[77] *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1066–69 (16th ed. 2007).

[78] *Ariz. Free Enter.*, 131 S. Ct. at 2836 (Kagan, J., dissenting).

[79] *Id.* at 2837.

speech of another"[80] and therefore treated the statutory subsidy of one candidate's speech as a penalty on the speech of an opponent.

But neither opinion recognized what legal scholars have long acknowledged: the line between the doctrinal categories of speech "subsidies" and speech "penalties" is far from clear.[81] The CCEA's matching funds provision qualifies as both. It certainly operates as a "subsidy allow[ing] for responsive speech."[82] Simultaneously, granting "advantages for opponents"[83] necessarily imposes a penalty on privately financed candidates and independent expenditure groups, particularly considering "the zero-sum nature of a political race."[84]

As legal scholars have explained, the classification of provisions as penalties or subsidies depends on an arbitrary baseline.[85] If the baseline is funding for all nonprofit activities, excluding funding for lobbying appears to be a penalty, but if the baseline is no funding at all, then selectively funding all nonprofit activities except lobbying appears to be a decision not to subsidize lobbying.[86] In *Arizona Free Enterprise*, First Amendment philosophies determined the baseline and thus whether matching funds should be analyzed as a subsidy to a publicly funded candidate or as a penalty on his or her privately funded opponent. If the First Amendment aims for adequate speech for each candidate, it seems only proper to subsidize candidates whose opponents spend above the lump sum amount. But if the First Amendment forbids state intervention, subsidizing a candidate's opponent appears to be a penalty.

In *Arizona Free Enterprise*, Chief Justice Roberts explicitly invoked this latter free market vision when he rejected equalizing elec-

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[80] *Id.* at 2822 (majority opinion).

[81] *See, e.g.*, Esenberg, *supra* note 4, at 324 ("Referring to something as a 'penalty' or a 'subsidy' is an interpretive choice that is not guided by the terms themselves."); Cass R. Sunstein, *Half-Truths of the First Amendment*, 1993 U. CHI. LEGAL F. 25, 39 ("[T]he sharp distinction between penalties and subsidies is inadequate. It is far too simple. It sets out the wrong sets of categories."); *cf.* Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. v. St. Paul, Rust v. Sullivan*, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 30–32 (arguing that two famous cases, one involving a speech restriction and the other a speech subsidy, present the same issue of content-based underinclusion, not two distinct issues).

[82] *Ariz. Free Enter.*, 131 S. Ct. at 2837 (Kagan, J., dissenting).

[83] *Id.* at 2818 (majority opinion) (quoting Davis v. FEC, 128 S. Ct. 2759, 2772 (2008)).

[84] *Davis*, 128 S. Ct. at 2780 (Stevens, J., concurring in part and dissenting in part).

[85] *See, e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1435–36, 1439–42 (1989) (providing examples demonstrating that "the characterization of a condition as a 'penalty' or as a 'nonsubsidy' depends on the baseline from which one measures," *id.* at 1436); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 601–04 (1990) (explaining the difficulty in determining the correct baseline to use for deciding whether an action constitutes a penalty or a subsidy).

[86] *See* Sullivan, *supra* note 85, at 1441 (discussing Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983)).

toral opportunities as a compelling state interest.[87] But the vision most informed his analysis when he considered the burden on speech. The matching funds mechanism, the majority reasoned, "[o]f course" made privately financed speech less effective[88] and forced nonparticipating candidates and independent expenditure groups to choose between subsidizing their opponents and changing their messages.[89] By changing the effectiveness and, in some cases, the content of electoral speech, Arizona had interfered with "the free discussion of governmental affairs"[90] — a conclusion difficult to refute if "free" means free from all government regulation.

In contrast, Justice Kagan's dissent subtly appealed to a vision of market failure in which government subsidies serve a vital function by ensuring viewpoint diversity.[91] While the majority viewed subsidized responsive speech as an intrusion rendering privately funded speech less effective, the dissent applauded the CCEA for fostering responsive speech and wider participation in democratic dialogue.[92] The matching funds provision and the speech it subsidized — "responsive speech, competitive speech, the kind of speech that drives public debate"[93] — furthered the purposes of the First Amendment by affording all electoral candidates adequate opportunity to participate in political discourse. If this approach forms the baseline, increasing responsive speech must be a speech subsidy, not a penalty on privately funded opponents, and any purported governmental deterrence of privately financed speech[94] can easily be justified by the opportunity for more diverse speech.[95]

Effective doctrine provides a translation between constitutional norms and their implementation in specific cases.[96] The subsidy-penalty classifications in this case, however, rested on starting points

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87 *Ariz. Free Enter.*, 131 S. Ct. at 2826 ("The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom . . . not whatever the State may view as fair.").

88 *Id.* at 2824.

89 *See id.* at 2819–20.

90 *Id.* at 2828 (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam)).

91 *Cf.* BAKER, *supra* note 75, at 38 (describing an approach to the First Amendment that "requires guaranteeing adequate, but not equal, presentation of all (serious?) viewpoints" that would mandate "providing subsidies to under-represented viewpoints").

92 *See Ariz. Free Enter.*, 131 S. Ct. at 2835–37 (Kagan, J., dissenting).

93 *Id.* at 2837.

94 The dissent denied that the matching funds mechanism deterred speech at all, arguing that "[w]hat the law does — all the law does — is fund more speech." *Id.* at 2834. But the opinion later acknowledged "on faith that the matching funds provision may lead one or another privately funded candidate to stop spending at one or another moment in an election." *Id.* at 2837.

95 *See id.* at 2835 ("[T]o invalidate a statute . . . that only provides more voices, wider discussion, and greater competition in elections . . . is to undermine, rather than to enforce, the First Amendment.").

96 *See* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 42 (2001).

dictated by the Justices' differing visions of the First Amendment; the doctrine did not implement constitutional norms, but only reiterated them. Nevertheless, both the majority and the dissent wrestled with the case's fundamental question: whether and to what degree the matching funds provision burdened political speech.[97] These extensive discussions should dispel scholars' usual concerns about baseline-dependent classifications opening the door for bias by imposing no constraints on judicial decisionmaking[98] or distracting judges from the real issues.[99] Thus, the ineffectiveness of the subsidy-penalty distinction in this case should cause little doctrinal concern.

However, campaign finance reform advocates may have reason to be concerned about the Court's novel recognition that a speech subsidy to one person can be considered a burden on the speech of another.[100] The Court could have reaffirmed the constitutionality of lump sum public financing grants established in *Buckley v. Valeo*,[101] but did not do so.[102] Only a small expansion of the logic of *Arizona Free Enterprise* is needed to argue that a lump sum grant of public funds to one candidate burdens that candidate's privately funded opponent. But despite opening the door for such an expansion, the Court consistently emphasized the importance of the matching funds trigger mechanism.[103] It remains to be seen whether the penalty analysis in this case will expand to impact more traditional public financing systems or whether the trigger mechanism will provide a sufficient distinguishing consideration.

B. Fourth Amendment

1. Exigent Circumstances Exception. — The Fourth Amendment requires police officers to obtain a warrant before they may conduct a

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97 *See Ariz. Free Enter.*, 131 S. Ct. at 2821–24; *id.* at 2836–41 (Kagan, J., dissenting).

98 *Cf., e.g.*, Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 824 (1983) ("The theory of neutral principles is initially attractive because it affirms the openness of the courts to all reasonable arguments drawn from decided cases. But if the courts are indeed open to such arguments, the theory allows judges to do whatever they want.").

99 *See, e.g.*, Sunstein, *supra* note 81, at 43 (noting that the identified problematic doctrines "distract attention from current threats to the system of free expression").

100 *See* Guy-Uriel Charles, *An Ideological Battle*, N.Y. TIMES ROOM FOR DEBATE (June 27, 2011), http://www.nytimes.com/roomfordebate/2011/06/27/the-court-and-the-future-of-public-financing/the-courts-battle-of-ideology.

101 424 U.S. 1, 86 (1965) (per curiam).

102 *See Ariz. Free Enter.*, 131 S. Ct. at 2828. The Court noted that its decision did not "call into question the wisdom of public financing as a means of funding political candidacy." *Id.* But leaving the wisdom of a policy unchallenged does not establish its constitutionality.

103 *See, e.g.*, *id.* at 2020 ("Presenting independent expenditures with such a choice — trigger matching funds, change your message, or do not speak — makes the matching funds mechanism particularly burdensome . . . ."); *id.* at 2822 ("But none of those cases — not one — involved a subsidy given in direct response to the political speech of another . . . .").