Triggering the First Amendment: Why Campaign Finance Systems That Include "Triggers" Are Constitutional

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I. INTRODUCTION

Campaign finance systems that provide benefits to candidates who voluntarily limit their campaign spending increasingly include mechanisms that give these candidates additional funds (or the opportunity to raise additional funds) in the event that their opponents benefit from private campaign expenditures.[1] These mechanisms are called "triggers." Triggers may be designed in several manners, based upon the type of political event that engages a trigger and the type of financial benefit a trigger affords.

Reformers assert that triggers are essential to genuine campaign finance reform. Without triggers, the argument goes, candidates will not accept voluntary spending limits in exchange for financial benefits. No candidate will unilaterally disarm, reformers argue, when faced with potentially unlimited expenditures by opposing candidates or their allies. Opponents of triggers argue that these mechanisms are unconstitutional because they chill speech—either by punishing independent spenders or candidates who do not accept voluntary spending limits for engaging in First Amendment activities, or by coercing candidates into accepting spending limits.

This article argues that triggers are constitutional. Section II reviews the legal and policy reasons reformers are designing and seeking passage of campaign finance systems that include triggers. Section III presents the spectrum of possible trigger designs. Section IV reviews the jurisprudence of triggers. Section V argues that triggers are constitutional because they inflict no cognizable First Amendment injuries.

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* Staff Attorney, Brennan Center for Justice at New York University School of Law. I thank all of my colleagues at the Brennan Center for spending many hours with me sharing their opinions on the topic of this article. The lucid comments of Professor Burt Neuborne and Josh Rosenkranz were particularly helpful in framing the relevant issues. I owe the greatest debt to Glenn Moramarco for guiding me through each phase of the writing of this article, and patiently reading and editing many drafts.

1. In November 1996, voters in Maine enacted a campaign finance system that will go into effect in 2000 that includes trigger provisions. An Act to Reform Campaign Finance, 1995 Me. Laws 384, § 1125(9) (draft on file with author). Triggers are included in drafts of initiatives that reformers plan to submit to voters in 1998 in Arizona, Massachusetts, and New York City. Citizens Clean Election Act § 16-952 (Arizona initiative) (draft on file with author); The Massachusetts Clean Elections Law § 11 (draft on file with author); this author is currently co-drafting a bill and a referendum for New York City's Clean Money Elections Coalition that also includes triggers. In each of the nation's remaining states, Public Campaign (a national organization providing technical support to state and local organizations working on campaign finance reform) is using a model bill that includes trigger provisions as a tool to organize future ballot and legislative initiatives. Public Campaign, ANNOTATED MODEL LEGISLATION FOR CLEAN MONEY CAMPAIGN REFORM, 27, 39 (Dec. 1997) (on file with author). Triggers also appear in the House and Senate bills that would provide full public financing for all federal elections. H.R. 2199, 105th Cong. § 506(d) (1997); S. 918, 105th Cong. § 506(d) (1997).

II. THE LEGAL AND POLICY REASONS REFORMERS ARE DESIGNING AND SEEKING PASSAGE OF TRIGGERS

Triggers are complex mechanisms that are designed to achieve an objective that is relatively straightforward: leveling the financial playing field among candidates. Explaining why reformers rely on an obtuse device to achieve a relatively simple goal requires review of campaign finance jurisprudence and campaign spending patterns.

A. How *Buckley* Made Voluntary Spending Limits the Only Equalization Device Available to Reformers

The most simple way to level the financial playing field among candidates is to impose a mandatory campaign spending cap. A more difficult way to achieve this goal is to give financial benefits to candidates who voluntarily limit their spending. The Supreme Court—in its landmark decision on campaign finance, *Buckley v. Valeo*[2]—struck the former method and upheld the latter.

Buckley arrived at the Court in the following manner. In 1974, Congress enacted the 1974 Amendments[3] to the Federal Election Campaign Act of 1971 (FECA).[4] This legislation had four major components: (1) caps on campaign contributions; (2) limits on campaign spending; (3) campaign finance reporting and disclosure requirements; and (4) public funding allowances for presidential candidates who voluntarily limit their campaign spending.[5]

Buckley considered the constitutionality of FECA and, except for the spending limits, the Court upheld its provisions. Reasoning that money equals speech, the *Buckley* Court rejected the government's argument that campaign finance rules deserve less demanding First Amendment scrutiny.[6] Instead, the *Buckley* Court examined the First Amendment values at stake in every activity regulated by FECA, and then balanced each value against the two compelling interests that were offered to justify burdening the First Amendment, deterring corruption and equalizing political participation.

Beginning with contribution limits, the Court concluded that giving money to candidates was not a direct act of expression, and thus was not worthy of the highest level of First Amendment protection. Applying an intermediate level of scrutiny, the Court found that the government's interest in deterring the corruptive potential of this act was legitimate.[7]

Spending campaign money, on the other hand, was found to be an act of pure expression entitled to the highest level of First Amendment protection. The *Buckley*

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2. Buckley v. Valeo, 424 U.S. 1 (1976) (per curium).
3. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at scattered sections of 2, 18, 26 & 47 U.S.C.).
4. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431-441h, 451-455 and scattered sections of 18 & 47 U.S.C.). The background information in this article on FECA and *Buckley* draws heavily from the following two Brennan Center publications, mostly the former: BURT NEUBORNE, CAMPAIGN FINANCE REFORMS & THE CONSTITUTION: A CRITICAL LOOK AT *BUCKLEY V. VALEO* (Brennan Center for Justice Campaign Finance Reform Series 1997); KENNETH WEINE, THE FLOW OF MONEY IN CONGRESSIONAL ELECTIONS (Brennan Center for Justice Campaign Finance Reform Series 1997).
5. *Buckley*, 424 U.S. at 7.
6. *Id.* at 16.
7. *Id.* at 23-38.

Court rejected the government's arguments that spending limits deterred corruption, and that spending limits helped equalize elections.[8] According to the Court, spending limits cannot deter corruption because a corrupt act requires a quid pro quo arrangement between two people. The Court observed that when a candidate spends money (unlike when he solicits a contribution) there is no deal being made that can potentially corrupt the candidate.[9]

Equalization was also rejected as a justification for spending limits because the Court could not accept limiting strong voices in an effort to aid weak voices. "The 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."[10]

Public financing for presidential candidates, FECA's other means of leveling the financial playing field among candidates, was upheld by the *Buckley* Court.[11]

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.[12]

Public financing, according to the Court, serves two governmental interests: "eliminating the improper influence of large private contributions," and "relieving [candidates] from the rigors of soliciting private contributions."[13] The *Buckley* Court also observed that public financing enhances the First Amendment. "[Public funding provisions are] 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 . . . ."[14]

By striking mandatory spending limits but upholding public financing, the *Buckley* Court struck FECA's stick (spending limits) but embraced its carrot (public financing). Thus, as mentioned above, reformers were left with only one means of leveling the financial playing field among candidates—public financing.

Reformers responded to *Buckley* by creating several types of carrots. Through legislative and citizen initiatives, at the state and local levels, reformers designed and implemented campaign systems that give candidates a variety of financial benefits if they voluntarily limit their spending.[15] The types of benefits that candidates are offered include (1) an amount of public funding equal to what is thought to be necessary

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8. *Id.* at 39-59.
9. *Id.* at 55-56.
10. *Id.* at 48-49.
11. The plaintiffs in *Buckley* challenged the public finance provisions on the theory that third party candidates were discriminated against. *Id.* at 90. It was not argued that candidates are coerced into accepting spending limits and therefore deprived of their First Amendment rights. This argument was put forth and rejected in *Republican National Committee v. Federal Election Commission*, 487 F. Supp. 280, 283-87 (S.D.N.Y. 1980), *aff'd mem.*, 445 U.S. 955 (1980).
12. *Buckley*, 424 U.S. at 57 n.65.
13. *Id.* at 96.
14. *Id.* at 92-93.
15. The following states provide some form of direct public financing to specified candidates: Florida, Hawaii, Kentucky, Maine (beginning in 2000), Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, North Carolina, Rhode Island, and Wisconsin. OFFICE OF ELECTION ADMIN., FEDERAL ELECTION COMM'N, CAMPAIGN FINANCE LAW 96 chart 4 (1996).

to run a competitive campaign;[16] (2) publicly funded matching grants for each private contribution raised;[17] and/or (3) the ability to raise contributions in larger increments than candidates who do not voluntarily limit their spending.[18]

These systems, however, are the exception and not the rule. The campaign finance systems of most states and localities are similar to the system that FECA created for congressional candidates: contributions to candidates are limited, spending by candidates is unlimited, and there is no public financing.

B. How Campaign Spending Patterns in the Post-*Buckley* Era Created the Rise of Triggers

By striking FECA's spending ceilings, while upholding its reporting and disclosure requirements, contribution limits, and public funding provisions,

> the *Buckley* Court created a campaign finance system very different from the one Congress intended. . . . Contribution limits and disclosure requirements made raising money harder, but the lack of spending caps maintained the system's voracious need for money. In simple economic terms, the *Buckley* Court limited supply (contributions), while leaving demand (expenditures) free to grow without limit. . . . Inadvertently, the *Buckley* opinion took a congressional program designed to minimize the impact of wealth on campaigns and turned it into an engine for the glorification of money.[19]

As discussed above, for reformers interested in equalizing participation in the electoral process among candidates, regardless of wealth, the *Buckley* decision made voluntary spending limits the only means to achieve this end. Unlike campaign systems with mandatory spending limits—where candidates have no choice as to whether or not to limit their spending—systems with voluntary limits will only have a significant equalizing impact if most candidates accept these limits. Accordingly, reformers have sought to identify and accommodate concerns of candidates that might deter them from accepting voluntary spending limits.

Triggers are used to accommodate a leading concern of candidates. According to reformers, many candidates would decline voluntary limits because they are afraid of not having the financial resources to respond to independent spenders or opponents who do not voluntarily limit their spending.[20] A candidate leery of accepting a voluntary limit invokes the unilateral disarmament metaphor mentioned in the introduction. "It would be foolhardy for me to limit my spending," he argues, "if I may face unlimited spending from an opponent or his allies." The two types of expenditures most

16. For example, the Democratic and Republican nominees for governor in New Jersey received $5.9 million each for the 1994 general election. *Id.* at NJ-13.

17. For example, candidates for New York City offices may receive matching public grants for all contributions of $1000 or less from city residents. N.Y.C. CHARTER & ADMIN. CODE § 3-705 (NEW YORK CITY CHARTER 1996).

18. For example, candidates in Rhode Island that accept voluntary spending limits may raise funds in $2000 increments, compared to $1000 increments for nonparticipating candidates. R.I. GEN. LAWS § 17-25-30 (1996).

19. NEUBORNE, *supra* note 4, at 12.

20. In each of the cases reviewing the constitutionality of triggers (discussed *infra* Part V) it was argued that triggers are necessary to induce candidates to accept voluntary spending limits. *See* Rosenstiel v. Rodriguez, 101 F.3d 1544, 1551 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1820 (1997); Day v. Holahan, 34 F.3d 1356, 1360 (8th Cir. 1994); Wilkinson v. Jones, 876 F. Supp. 916, 927 (W.D. Ky. 1995).

feared are (1) spending by self-funded candidates (e.g., Ross Perot), and (2) independent spending (i.e., expenditures from unions, corporations, political parties, or political organizations (e.g., Sierra Club, the local Chamber of Commerce)).

There is ample reason for these fears. The financial power of self-funded candidates and independent spenders has grown significantly in the post-*Buckley* era. As to the former, while candidates without a large personal fortune must undertake the labor-intensive task of gathering donations in small increments from a large number of people, millionaire candidates can raise their money by writing one check to their campaigns. Wealthy candidates could fund their own campaigns before *Buckley*, but in that era some candidates were able to counter this spending by raising contributions of the same size from wealthy allies.

Likewise, independent spenders have increased financial power in the post-*Buckley* era. Since 1974 candidates have not been able to raise more than $1000 per election from each individual contributor. Meanwhile, increases in the cost of living and campaign expenditures have made campaign costs sextuple.[21] For candidates, this means spending a larger sum of money each political cycle, but having to raise this sum in increments of decreasing value. Independent spenders, however, have not faced the same burden. Through liberal use of election law loopholes, political organizations, unions, corporations and political parties have been able to raise and spend funds in unlimited amounts so long as they do not explicitly coordinate their activities with candidates.

This independent spending has given candidates a new potential opponent. No longer is spending by other candidates the only concern. In the post-*Buckley* era, the allies of an opponent pose a formidable—and is some instances, a greater—spending threat. For example, in Arizona in 1996, the AFL-CIO spent almost $2 million attacking a Republican House incumbent.[22] Similarly, in a special House election in New York City in 1997, the Republican National Committee spent $800,000 "independently" attacking the Democratic nominee.[23] All told, in 1996 over two dozen organizations spent over $150 million in advertising—compared to just over $400 million spent by federal candidates on advertising costs.[24]

Triggers address these types of expenditures by giving financial benefits to candidates who accept voluntary spending limits. In essence, triggers function as insurance policies. Triggers insure that candidates who accept voluntary spending limits will be able to respond to the types of expenditures they most fear.

III. THE SPECTRUM OF TRIGGERS

Reformers have been as creative in designing varieties of triggers as they have been in designing public finance systems for candidates that voluntarily limit their spending.

In general, there are two scenarios for which triggers may be designed and three types of responses that can be provided for these two scenarios. The two scenarios are:

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21. CONGRESSIONAL RESEARCH SERV., CAMPAIGN FINANCING 2 (1996).

22. *1996 House Post-Mortem*, COOK POL. REP., Dec. 11, 1996, at 55.

23. *Republican Prestidigitation*, N.Y. TIMES, Oct. 24, 1997, at A30.

24. DEBORAH BECK ET AL., ISSUE ADVOCACY ADVERTISING DURING THE 1996 CAMPAIGN: A CATALOG 3 (Annenberg Public Policy Center of the University of Pennsylvania Report Series No. 16, 1997).

(1) spending by a candidate who does not accept voluntary spending limits (an "opt-out candidate," as compared to an "opt-in candidate") and (2) independent spending.[25] The three general types of responses that triggers may provide are: (1) allowing opt-in candidates to spend additional funds and to raise these funds privately; (2) allowing opt-in candidates to spend additional funds and to raise these funds privately with the help of government matching funds for each contribution raised; and (3) providing candidates with government funds outright.

Designing a trigger demands more than simply defining the type of political scenario to which the trigger will respond and the type of response it will afford. Many details must be addressed. For example, a trigger could go into effect when an opt-out candidate or independent spender spends one dollar or $1 million. A trigger providing matching public funds may match contributions at a one-to-one ratio, a three-to-one ratio, or at any other reasonable level. A trigger giving candidates public funds outright could provide these funds in the form of cash or in-kind donations (e.g., vouchers for free broadcast advertisements).

These decisions on details may have enormous policy implications. For example, there are consequences to deciding what constitutes independent spending. If independent spending includes only express advocacy (i.e., communications that advocate the election or defeat of an identified candidate) and not issue advocacy (i.e., generic communications concerning political issues) intense pressure will be placed on the line between these two types of speech. Political participants seeking to avoid giving financial benefits to opt-in candidates will spend money on speech that comes close to, but stops short of, expressly supporting a candidate.

The chart below summarizes the two scenarios and the three means of response involving the triggers reviewed above:

Political Scenario	*Means of Response*
1. opt-in candidate challenged by opt-out candidate	a. release opt-in candidate from spending limit and allow him to raise and spend additional private funds
2. independent spending that benefits opponent of opt-in candidate	b. release opt-in candidate from spending limit and allow him to raise and spend additional private funds, and match the contributions raised with public money
	c. release opt-in candidate from spending limit and provide public funds to opt-in candidate

25. For the purposes of this article, the term independent spender denotes an individual, union, corporation, organization or political party engaged in express advocacy (e.g., speech that advocates the election or defeat of an identified candidate) or issue advocacy (e.g., generic political speech concerning issues rather than particular candidates).

IV. THE JURISPRUDENCE OF TRIGGERS

Opponents of triggers argue these mechanisms are unconstitutional because they chill First Amendment activity. The arguments of trigger opponents have been heard in three federal cases: one involving a trigger engaged by independent expenditures (*Day v. Holahan*[26]), and two involving triggers engaged by the spending of opt-out candidates (*Rosenstiel v. Rodriguez*[27] and *Wilkinson v. Jones*[28]).

A. *Day v. Holahan*

Day v. Holahan reviewed a 1993 legislative amendment to Minnesota's Ethics and Campaign Act that included a trigger provision.[29] This trigger provided that the voluntary spending limit of a candidate against whom an independent expenditure is made is "increased by the sum of independent expenditures made in opposition to [such] a candidate plus independent expenditures made on behalf of the candidate's major political party opponents."[30] It also provided that "[w]ithin three days after providing [notice], the [state ethical practices] board shall pay each candidate against whom the independent expenditures have been made . . . an additional public subsidy equal to one-half the independent expenditures."[31] Thus, if an opt-in candidate was attacked by an independent expenditure or his opponent benefitted from one, the trigger raised the opt-in candidate's voluntary spending limit by the amount of the independent expenditure and gave the opt-in candidate a public subsidy equal to one-half the independent expenditure.

Plaintiffs challenging this trigger's constitutionality included independent spenders and a candidate. Their principal argument was that the statute caused "self-censorship."[32] "By granting a public subsidy to opposed candidates, and by increasing their expenditure limits, [the statute has the effect] of deterring [an independent spender] from making independent expenditures."[33] Two Supreme Court cases were offered as legal support, *Miami Herald Publishing Co. v. Tornillo*,[34] and *Pacific Gas and Electric Co. v. Public Utilities Commission*.[35] In both of these cases the Court struck regulations requiring speakers to deliver their opponents' message. *Tornillo* struck a regulation requiring a newspaper to give response space to a candidate whose opponent benefitted from an editorial.[36] *Pacific Gas* struck a regulation requiring a public utility to include in its bills to consumers an insertion from a consumer organization.[37] The Court ruled that the effect of these types of regulations "was to deter [speakers] from speaking out in the first instance."[38] Plaintiffs in *Day* argued that the trigger created a

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26. Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994).
27. Rosenstiel v. Rodriguez, 101 F.3d 1544, 1551 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1820 (1977).
28. Wilkinson v. Jones, 876 F. Supp. 916, 927 (W.D. Ky. 1995).
29. *Day*, 34 F.3d at 1356.
30. MINN. STAT. ANN. § 10A.25, subd. 13(a) (West 1997).
31. MINN. STAT. ANN. § 10A.25, subd. 13(c) (West 1997).
32. *Day*, 34 F.3d at 1360.
33. Brief for Appellant at 6, Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) (Nos. 94-2387, 94-2388, 94-2390 & 94-2587) (on file with author).
34. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).
35. Pacific Gas and Elec. Co. v. Public Util. Comm'n, 475 U.S. 1 (1986).
36. *Tornillo*, 418 U.S. at 245.
37. *Pacific Gas and Elec. Co.*, 475 U.S. at 6.
38. *Id.* at 10.

situation in which their spending gave financial benefits to their opponents and therefore they suffered the same First Amendment burdens as the plaintiffs in *Miami Herald* and *Pacific Gas.*

The government responded that the trigger imposed no First Amendment burdens, and that it was a necessary device to encourage candidate participation in the public funding system. "The statute does not penalize [the plaintiffs] or restrict them from making whatever independent expenditures they deem necessary or desirable, nor do the statutes force them to expend funds to facilitate the expression of views which they oppose."[39] Alternatively, the government argued that even if the court concluded that the trigger imposed a cognizable First Amendment injury, this burden was constitutional. Minnesota's trigger, it was argued, provided a sufficiently narrowly tailored means to achieve a compelling state interest. "The acceptance of public subsidies reduces candidates' need to solicit contributions, thus reducing the deleterious influence of large contributions on the political process and giving candidates more time to meet voters and publicly debate the issues."[40]

The district court completely adopted the government's arguments. No cognizable First Amendment injury exists, the court reasoned, from helping "an opponent to respond using public funds, additional private funds, or both."[41] The court dismissed the plaintiffs' invocations of *Miami Herald* and *Pacific Gas*, pointing out the statutes reviewed in these cases "'forced the speaker's opponent—not the taxpaying public—to assist in disseminating the speaker's message.'"[42] Finally, the court stated that the trigger enhances, not burdens, the First Amendment. "To the extent the statute provides for increased debate about issues of public concern raised by an independent expenditure, it promotes the free and open debate the First Amendment seeks to foster and protect."[43]

The Eighth Circuit rejected each component of the district court's opinion. It began by stating that the trigger inflicted a cognizable First Amendment injury. It reached this conclusion by noting first that independent expenditures are protected speech, to which "'[t]he First Amendment affords the broadest protection.'"[44] The court then reasoned that "[t]he knowledge that a candidate who [an independent spender] does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech."[45]

Deciding that Minnesota's trigger was content-based and therefore deserved the strictest constitutional scrutiny, the court rejected the government's argument that the trigger's First Amendment burdens were justified by the compelling interest of encouraging acceptance of voluntary spending limits. "[W]ith candidate participation in public campaign financing nearing 100% before enactment of [the trigger], the interest, no

39. Brief of Appellees/Cross-Appellants at 10, Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) (Nos. 94-2387, 94-2388, 94-2390 & 94-2587) (on file with author).
40. *Id.* at 11.
41. Day v. Hayes, 863 F. Supp. 940, 947 (D. Minn. 1994).
42. *Id.* at 946 (quoting *Pacific Gas and Elec. Co.*, 475 U.S. at 15).
43. *Day*, 863 F. Supp. at 947.
44. *Day*, 34 F.3d at 1360 (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976)).
45. *Day*, 34 F.3d at 1360.

matter how compelling in the abstract, is not legitimate."[46] The court then proceeded to conclude that the trigger would not satisfy "strict, intermediate, or even the most cursory scrutiny."[47]

B. *Wilkinson v. Jones* and *Rosenstiel v. Rodriguez*

Using rationales similar to those offered by the legislature in *Day*, the Minnesota and Kentucky legislatures adopted triggers that give financial benefits to opt-in candidates facing opt-out candidates spending over specified amounts. These triggers were both upheld.

Minnesota's trigger was reviewed in *Rosenstiel v. Rodriguez*. In Minnesota, an opt-in candidate is released from his spending limit if an opt-out candidate receives contributions or makes expenditures equaling twenty percent of the applicable limit prior to ten days before the primary election, and contributions or expenditures equaling fifty percent of the applicable limit thereafter. The opt-in candidate may then raise public funds for his additional spending.[48] *Wilkinson v. Jones* reviewed a trigger for Kentucky that releases an opt-in candidate from his voluntary spending limit if an opt-out candidate spends over this limit.[49] The trigger also provides matching public funds for the contributions raised for the additional spending.[50]

Plaintiffs in both cases argued that the respective triggers unconstitutionally burden their First Amendment rights. But the argument these plaintiffs put forth differed from that of the plaintiffs in *Day*. Instead of arguing that the trigger punished them for speaking, the plaintiffs in *Rosenstiel* and *Wilkinson* claimed that the respective triggers coerced candidates into accepting spending limits. Specifically, the *Rosenstiel* plaintiffs contended that by releasing candidates from their spending limits and conferring financial benefits upon these candidates, the Minnesota trigger made the voluntary system so attractive that candidates are effectively compelled to limit their spending.[51] The *Wilkinson* plaintiffs made this same argument, claiming that with Kentucky's trigger no opt-out candidate would exceed the voluntary spending cap because doing so would provide additional funds to his opponent, allowing the opt-in candidate to respond to the opt-out candidate.[52]

This argument was rejected by both courts. The *Rosenstiel* court meticulously debunked the claim that the incentives Minnesota's trigger provided unduly coerced opt-out candidates to limit their spending. The court relied upon *Vote Choice, Inc. v. DiStefano*[53] which upheld provisions allowing candidates accepting voluntary spending limits to collect funds in larger increments than opt-out candidates. *Vote Choice,* according to *Rosenstiel*, stands for the principle that it does not burden the First Amendment for governments to offer plans that provide "a relative balance between advantages afforded to, and restrictions placed on, publicly financed candidates."[54]

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46. *Id.* at 1361.
47. *Id.* at 1362.
48. Rosenstiel v. Rodriguez, 101 F.3d 1544, 1546-48 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1820 (1997).
49. Wilkinson v. Jones, 876 F. Supp. 916 (W.D. Ky. 1995).
50. *Id.* at 926.
51. *Rosenstiel*, 101 F.3d at 1549.
52. *Wilkinson*, 876 F. Supp. at 927.
53. Vote Choice, Inc. v. DiStefano, 4 F.3d 26 (1st Cir. 1993).
54. *Rosenstiel*, 101 F.3d at 1550-51.

Minnesota's trigger, reasoned the *Rosenstiel* court, accomplishes this balancing act. "The expenditure waiver . . . is simply an attempt by the State to avert a powerful disincentive for participation in its public financing scheme: namely a concern of being grossly outspent by a privately financed opponent with no expenditure limit."[55] By averting this incentive through a trigger that funds additional speech, the court concluded, "the State's scheme promotes, rather than detracts from, cherished First Amendment values."[56]

The *Wilkinson* court did not expressly decide whether Kentucky's trigger chills speech by coercing candidates into accepting spending limits. Instead, the court argued that even if the trigger was found to chill speech, the First Amendment burden was "a narrowly tailored means which addresses a compelling state interest."[57] The interest the court found compelling was identical to that which the Eighth Circuit in *Day* rejected—inducing candidates to accept spending limits. "Kentucky has a compelling interest in encouraging candidates to accept public financing and its accompanying limitations which are designed to promote greater political dialogue among the candidates and combat corruption by reducing candidates' reliance on fundraising efforts."[58] The court argued that not having a trigger "may discourage candidates from accepting public financing in the face of expenditure-unlimited privately-financed opponents."[59]

V. TRIGGERS DO NOT INFLICT COGNIZABLE FIRST AMENDMENT INJURIES

Day, *Rosenstiel*, and *Wilkinson* relied on different reasoning and reach competing conclusions. Reviewing Minnesota's trigger for independent expenditures the district court in *Day* concluded this mechanism did not inflict a cognizable injury. The Eighth Circuit disagreed. In *Rosenstiel*, a separate panel from the Eighth Circuit ruled that a Minnesota trigger for opt-out candidate expenditures does not inflict a cognizable injury. The *Wilkinson* court highly doubted that an opt-out candidate trigger imposed a cognizable First Amendment injury, and reasoned that even if it did, the trigger was acceptable because is was narrowly tailored to advance a compelling state interest.

This case law gives little comfort to reformers advocating adoption of campaign finance systems that include triggers. There is little common ground in these cases regarding what *should be* the central question; whether the trigger being reviewed inflicts a cognizable First Amendment injury. The answer to this question, in all of these cases, should have been a clear, unequivocal no. To reach this result and uphold the constitutionality of triggers reformers must articulate clearly the following two arguments: (1) permitting and encouraging a response to speech is not "chilling" and (2) constitutionally, campaign finance systems that include triggers deserve identical treatment as the public funding system upheld in *Buckley*.

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55. *Id.* at 1551.
56. *Id.* at 1552 (citations omitted). The court proceeded to conclude that even if the trigger was assumed to burden the First Amendment it would survive strict scrutiny.
57. *Wilkinson*, 876 F. Supp. at 928.
58. *Id.* (citations omitted).
59. *Id.*

A. Permitting and Encouraging a Response to Speech Is Not "Chilling"

According to the Eighth Circuit decision in *Day*, "the knowledge that a candidate who one does not want to be elected will [receive financial benefits] . . . chills the free exercise of that protected speech."[60] This conclusion contradicts First Amendment jurisprudence and runs counter to the purpose of the First Amendment. A candidate's First Amendment rights cannot be chilled by the "knowledge" that an opponent will be able to respond to his speech. The First Amendment is concerned with persecution, not reprisal. That is, it protects individuals from being persecuted—or chilled—from speaking. Its purpose is not to inhibit individuals from responding to speech. Otherwise, the First Amendment would be used not to foster the type of vibrant exchange of ideas necessary for democracy to flourish, but instead would serve to give one or more speakers hegemony of the market of speech.

There is a bright line between the government regulating speech and the government speaking. While the First Amendment forbids governments from silencing or coercing speech, it nevertheless allows governments to speak freely. In *West Virginia State Board of Education v. Barnette*[61] the Court struck a provision requiring school-aged children to join in a flag salute ceremony. The Court reasoned that forcing the expression of a view is as offensive as forbidding the expression of a view.[62] Likewise, in *Abood v. Detroit Board of Education*[63] the Court struck a law forcing public employees who were not members of a union to pay a fee equal to the dues of union members. In both of these cases the Court struck governmental efforts to regulate speech.

Yet governments are free to speak. Each year the federal government is one of the ten largest advertisers in the nation.[64] It spends over $500 million per year on hundreds of films, slide shows, television programs and radio broadcasts.[65] This spending is constitutional because it does not cause an actual interference with any person's First Amendment rights.

With the exception of the Eighth Circuit decision in *Day*, each court reviewing a trigger concluded that the trigger did not cause a cognizable First Amendment injury because the government was not actually inhibiting speech. According to the *Day* court the First Amendment claim failed because the "[p]laintiffs are free to make as many independent expenditures as they desire without restraint, censure or penalty by the Government."[66] The *Rosenstiel* court stated, "[t]hese inducements [for candidates to limit their spending], however, do not per se render the State's scheme coercive because they are not inherently penal."[67] Finally, before the *Wilkinson* court was willing to grant, for the sake of argument, that Kentucky's trigger causes an injury, it stated "[t]his court is not convinced that [the provision] impermissibly chills the speech of

60. Day v. Holahan, 34 F.3d 1356, 1360 (8th Cir. 1994).
61. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
62. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 804 (2d ed. 1988).
63. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).
64. TRIBE, *supra* note 62, at 807 n.12 (citing MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 7 (1983)).
65. *Id.*
66. Day v. Hayes, 863 F. Supp. 940, 947 (D. Minn. 1994).
67. Rosenstiel v. Rodriguez, 101 F.3d 1544, 1551 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1820 (1997).

privately-financed candidates simply because it enables the speakers' adversaries to respond."[68]

The purpose of the First Amendment runs counter to the goals of opponents of triggers. According to the Supreme Court, "the central purpose of the Speech and Press Clauses was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish."[69] The goal of opponents of triggers is exactly the opposite. By seeking to deter opt-in candidates from responding to expenditures by opt-out candidates and independent spenders, opponents of triggers desire to monopolize the speech market.

Examine a trigger's effect on the market of political speech. In a jurisdiction that provides $100,000 of public financing to candidates who agree to spend no more than this amount, one candidate accepts the $100,000 spending limit and her only opponent rejects the limit and spends $200,000. If this jurisdiction does not have a trigger the opt-out candidate will engage in twice as much paid speech as the opt-in candidate. With a trigger, the opt-in candidate will spend the same amount on speech as the opt-out candidate.

Most importantly, from the First Amendment point of view, the total amount of public discourse will be increased as a result of the trigger's subsidy. The opt-out candidate claims he is harmed because his speech would comprise only fifty percent of overall candidate spending as compared to the sixty-seven percent it would comprise without the trigger. However, the trigger would not cause an actual diminishment in the quantity of the opt-out candidate's speech—it would merely diminish his relative share of the total amount of speech. Thus, for example, while the amount of flyers the opt-out candidate may purchase would not be reduced, there would be a reduction in the percentage of flyers in the campaign paid for by the opt-out candidate.

The conflict between the goal of opponents of triggers and the purpose of the First Amendment becomes even more apparent outside the campaign context. Imagine a segregationist organization that announces it will spend $50,000 trying to convince parents not to participate in a school district's voluntary busing program. In response, the superintendent of schools announces that for every dollar spent discouraging parents from busing their children, the district will spend a dollar on a public relations campaign encouraging parents to participate. According to the Eighth Circuit decision in *Day*—and opponents of triggers—this organization would have a cognizable First Amendment claim because it is chilled by the "knowledge" that its speech will trigger the school district's spending.

This claim simply makes no sense. The First Amendment's purpose is to create an "uninhibited, robust, and wide open"[70] speech market so as to build a "healthy representative democracy."[71] A healthy democracy requires informed citizens. The parents in the above example would be less, not more, informed if they hear only the opinion of the segregationist organization. Likewise, voters are more informed when an opt-in candidate has the resources to respond to expenditures by opt-out candidates and

68. Wilkinson v. Jones, 876 F. Supp. 916, 928 (W.D. Ky. 1995).
69. Buckley v. Valeo, 424 U.S. 1, 93 n.127 (1976) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
70. *Id.*
71. *Buckley*, 424 U.S. at 93 n.127.

independent spenders.

The government's role in the broadcasting industry presents a useful analog. In a television market where "The NBC Nightly News with Tom Brokaw" and PBS's "The News Hour with Jim Lehrer" are shown at the same time, NBC could prove it loses some viewers to the government-funded PBS program. Yet any loss of market share NBC suffers is not thought of as a chilling of the network's First Amendment rights. Because democracy requires a diverse discourse, First Amendment jurisprudence embraces the government's financing of a competing speaker. According to the *Buckley* Court,

> 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, such as aid to public broadcasting and other forms of educational media, and preferential postal rates and antitrust exemptions for newspapers.[72]

Each of the decisions upholding triggers recognized that triggers advance, not chill, First Amendment rights because opt-in candidates are afforded the opportunity to respond to opt-out candidates and independent spenders.[73] The *Day* district court stated it most clearly: "To the extent the statute provides for increased debate about issues of public concern raised by independent expenditures, it promotes the free and open debate the First Amendment seeks to foster and protect."[74]

B. Constitutionally, Campaign Finance Systems with Triggers Deserve Identical Treatment as the Public Finance Provisions Upheld in *Buckley*

The public finance system for general election presidential candidates upheld by *Buckley* gave candidates $20 million if they agreed not to spend additional funds.[75] Congress did not arrive at this number randomly. It set this number by identifying the approximate market cost of running for office and attaching an adjustment mechanism to insure that inflation did not erode this amount's real value. To identify the market cost, Congress relied upon several factors, including, of course, the average spending of presidential candidates in prior elections. Looking to the prior behavior of candidates ensured that the amount the government was offering to candidates was sufficient to generate widespread candidate participation, but not so generous as to be wasteful of taxpayer funds.

The *Buckley* Court understood exactly Congress' intent.[76] If Congress desired to subsidize completely the campaigns of major party general election nominees, the Court reasoned, it had every right to do so. "Whether the chosen means appear bad, unwise, or unworkable to us is irrelevant."[77] This ruling put the Court's imprimatur on the following principle: governments may provide candidates with all of the re-

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72. *Id.* (citations omitted).

73. The *Wilkinson* court concluded, "The trigger provision promotes more speech not less." *Wilkinson*, 876 F. Supp. at 928. The court in *Rosenstiel* concurred, stating, "[T]he State's scheme promotes, rather than detracts from, cherished First Amendment values." *Rosenstiel*, 101 F.3d at 1552.

74. *Day*, 863 F. Supp. at 947.

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

76. *Id.* (identifying FECA's inflationary index); *see generally* S. REP. NO. 93-689, at 4-6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5587, 5590-92 (discussing public financing of all federal elections).

77. *Buckley*, 424 U.S. at 91.

sources necessary to run competitive campaigns.

Campaign finance systems that include triggers operate according to this same principle—they attempt to offer candidates an amount of campaign funds that will allow candidates to run competitive campaigns. The difference between a trigger and the presidential financing system upheld in *Buckley* lies simply in how the public subsidy amount is derived. The system upheld in *Buckley* was set by looking at expenditures made *in prior elections*. Campaign systems that include triggers are set by looking at expenditures made *during an election.*

Thus, triggers are merely a modernization device for campaign finance systems. Because of the vast increases in independent spending and spending by self-financed candidates, to set voluntary spending levels, governments must look at more than expenditures in prior elections. Otherwise, in an era where a national organization can use a mail-house to send glossy campaign literature to every voter in a given district in a matter of days, candidates would face too volatile of a campaign spending market. Providing candidates with adequate funds requires that campaign finance systems have a more time-sensitive market-correction device. In sum, triggers ensure that voluntary spending limits give candidates the same benefit they were given in the *Buckley* era—a level of funding that enables candidates to run competitive campaigns. Because they serve the same purpose as the public funding system upheld by the *Buckley* Court, triggers deserve identical constitutional treatment.

VI. CONCLUSION

A new generation of clashes between campaign finance systems and the First Amendment is coming to the federal courts. Responding to the explosion of independent spending and spending by self-financed candidates, reformers are seeking passage of campaign finance systems that will more effectively level the financial playing field among candidates. Triggers serve this purpose by giving financial benefits to candidates who agree to limit their spending but face independent spenders or candidates who do not agree to such limits. To overcome the hostile components of the three cases that have reviewed triggers, reformers must argue persuasively that (1) permitting and encouraging a response to speech is not "chilling" and (2) constitutionally, campaign finance systems that include triggers deserve identical treatment as the public funding system upheld in *Buckley*.