



PUBLIC FUNDING AFTER McCOMISH

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Abstract

I describe the construct and observed efficacy of “Clean Elections” public funding programs in the American states, and the arguments associated with *McComish v. Bennett*, the most important public funding case heard before the United States Supreme Court to date. I explain the extent to which the Court's opinion in that case affects existing public funding systems, and how future ones can be engineered both to survive judicial scrutiny and to achieve their policy objectives.

Public Funding After McComish

By Michael Miller

In American politics, money matters. As the role of political money has changed over time, campaign finance reforms have tried to keep pace. Regulations have been constructed to restore fairness, opportunity, and integrity in American elections. While fair elections are essential to any democratic system, so is the absence of unreasonable restrictions on political speech. Even before the advent of mass media, money allowed political parties and individual candidates a greater ability to communicate with voters. That said, elections in America today are expensive, and the high price of running is often a barrier to entry for prospective candidates. Policies that seek to regulate the flow of money in politics must therefore straddle a fine line as the freedom of those with the means to project their voice collides with the need for broad democratic dialogue.

A number of jurisdictions in the United States have attempted to resolve this tension by implementing voluntary systems of public election finance. While public funding systems are variously constructed, the reasons cited for their creation are almost always the same: to control the growth of spending, to diminish the role of “special interest” contributors looking for political favors, to enhance electoral competition, and to improve representation. Whether these goals are attainable, or whether they should be pursued, are debatable propositions. Yet, the use of public election dollars in American politics has steadily expanded in the past quarter-century. Given the development of often-expensive policy under conditions of such uncertainty, it

is a worthwhile exercise to examine the state of public financing in America. This is particularly true given recent federal court activity in the area of campaign finance.

This paper will provide details of how public funding works in state elections, and will summarize the basic findings in the academic literature regarding the efficacy of public funding. Next, it will include a detailed analysis of Supreme Court action bearing on public funding. The paper closes with a consideration of the necessary structure of policy going forward.

Full Public Funding in the States

As with campaign finance regulation at the federal level, the decade after the Watergate scandal proved to be an active period for reform in the states. The construct of public funding programs is as diverse as the politics of the states themselves, nearly half of which currently employ public funding in some form (Panagopoulos, 2011). In the 1990s, Hawaii, Minnesota, and Wisconsin began offering direct subsidies to legislative candidates that covered a proportion of campaign spending, as dictated by a statutory spending limit. In the 2000s, Arizona, Connecticut, and Maine went further, implementing full funding systems designed to pay for all (or at least, most) of participating candidates' campaign expenses. The successful passage of these laws is part of a larger national movement called "Clean Money, Clean Elections;" accordingly, the laws are generally branded as "Clean Elections" programs.

While there is some variation in factors such as the manner in which funding is provided and/or how candidates qualify, the Clean Elections programs in each state display some shared characteristics. For instance, candidates qualify for subsidies by

raising a small amount of money, often from a predetermined number of individual contributors.¹ Once they prove their viability in this fashion, Clean Elections candidates receive public subsidies sufficient to wage an entire primary and/or general contest.² In return, participating candidates agree to raise no additional money and to abide by spending limits equal to their subsidy amounts. To encourage participation, the original structure of the programs allowed candidates running against those who opt out of the program to receive limited matching funds for their opponents' expenditures above the spending limit. The matching funds provisions were intended to guarantee financial parity for participating candidates in all but the most exceptional of circumstances.³ Thus, the vast majority of publicly funded candidates in Arizona, Connecticut and Maine assumed that they would compete at approximate financial parity, marking the electoral environment in these states as substantially different from that in most of the rest of America.

Is Public Funding Effective?

Efforts to gauge the efficacy of public funding programs have nearly always relied on their ability to address the core problems described above; namely, curbing the growth of campaign spending and fostering a more competitive environment. Generally speaking, previous analysis suggests that the size of the subsidy matters a great deal.

¹ Hereafter, I use the terms "Clean Elections" and "full funding" interchangeably. In Arizona, House candidates qualify by raising 220 contributions of exactly five dollars. Candidates in Maine's smaller districts must raise fifty of these "fives." In Connecticut, state house candidates must raise at least \$5,000 from a minimum of 150 contributors who reside inside of their district.

² Subsidy amounts vary by state, reflecting different average costs. Combined primary/general subsidy amounts are approximately \$6,000 in Maine, \$34,000 in Arizona, and \$35,000 in Connecticut in most cases.

³ Matching funds "triggers" were deemed unconstitutional by the United States Supreme Court in 2011. Arizona's matching funds program had been enjoined in 2010 pending federal litigation. I provide further details below. See also: Miller, 2008; Dowling et al., 2012.

For example, while partial subsidies have shown some promise in slowing spending inflation in Wisconsin (Mayer and Wood 1995), they have proven ineffective in New York City municipal elections (Kraus 2012; 2006) and Minnesota state campaigns (Schultz 2002). An early study of Minnesota found that public funds have helped private contributors to gain an aggregate dollar advantage over PACs (Jones and Borris 1985). However, Schultz (2002) found that Minnesota's partial public subsidies have not actually reduced the spending of PACs, which had simply channeled their money through soft money and lobbyists. Previous analysis has also found little competitive change in partially-subsidized elections (e.g., Jones and Borris 1985; Mayer and Wood 1995; Malbin and Gais 1998, 136; but see: Donnay and Ramsden 1995).

Yet, there is a growing body of research supporting the notion that full funding achieves at least some of its prime objectives. Examining spending patterns, the Government Accountability Office (GAO) found in a 2010 report that compared to the two elections prior to public funding implementation, spending in Maine House and Senate elections decreased and held steady, respectively (GAO 2010, 53), while spending overall has increased in Arizona since 2000 (GAO 2010, 59). However, Miller (2011a) notes that increased spending in Arizona is driven mainly by increased spending by challengers, who are in a much better financial position on average in publicly funded years. Indeed, the 2010 GAO report determined that the financial gaps between challengers and incumbents are smaller in both Maine (56), and Arizona (62) in the Clean Elections era.

On the question of competition, political scientists and policy analysts have largely focused on three questions: Whether Clean Elections changes the demographic

composition of the candidate pool, whether more candidates are likely to run in fully funded environments, and whether victory margins are narrower when public funding is present. Several studies have examined patterns of candidate participation in publicly funded elections. For example, Werner and Mayer (2007) find that Democratic challengers are more likely to accept public funding in Arizona and Maine. That same study determined that women in Maine and Arizona House (but not Senate) races are significantly more likely to accept public money than men, but the makeup of neither the overall candidate pool nor the legislative bodies is different after Clean Elections (Ibid.). Finally, a 2008 report by the National Association of Latino Elected and Appointed Officials found little evidence of increased numbers of Latino candidates after the implementation of Clean Elections (NALEAO 2008).

In terms of sheer candidate numbers, the GAO's report found little evidence that Clean Elections has increased the average number of candidates in state legislative elections, that it has raised the likelihood of third-party or independent candidates emerging (49), or that it has changed a dichotomous measure of election "contestedness", denoted as the presence of at least one more candidate than there are available legislative seats (GAO 2010a, 41). However, Miller (2011a) suggests that Arizona and Maine incumbents in both chambers are more likely to face a general election challenger in years when Clean Elections funding is available. In tandem, these findings suggest that public funding may pull candidates in from the margins, leading them to challenge an incumbent when no candidate would have run otherwise.

When candidates do emerge to challenge an incumbent, there is a growing, consistent body of evidence that they run more effective campaigns when they accept

full funding. Candidates who run with Clean Elections subsidies devote significantly less time to raising money (Francia and Herrnson, 2003) than their publicly funded counterparts; appear to re-invest that time into greater interaction with the voting public (Miller, 2013; Miller, 2011b). While the increased visibility of campaigns does not seem to spur turnout (Milyo, Primo, and Jacobsmeier, 2011), it does appear to increase the chances that the people who do turn out will continue voting down to the state house races on the ballot, thereby decreasing voter “roll-off” (Miller 2013). Moreover, analysis of competition in fully funded environments has repeatedly shown that incumbent victory margins are reduced when candidates accept public funding (GAO 2010, 35; Mayer, Werner and Williams, 2006; Werner and Mayer, 2007; Malhotra, 2008), but it is also worth noting that incumbents on average do not appear to be less likely to lose in publicly funded environments (GAO 2010, 35).

In sum, early evidence suggests that the size of the subsidy is a crucial determinant of campaign activities and efficacy. The availability of full funding (but not partial funding) seems to encourage the entry of some candidates, to alter the activities that they perform, and to bolster their vote totals on Election Day. In tandem with the fact that Clean Elections candidates accept no donations outside of their seed money and qualifying contributions, most Americans would likely see these as positive changes over the state of affairs in most elections. Yet, support for public funding programs is uncertain. Weissman and Hassan (2011) found that polling responses to questions about public funding are highly dependent upon the wording of the question, with much greater support (60%-70%) for questions stressing the combating of “special interests”

than the usage of taxpayer money (20%). When neutral phrasing is used, a majority of Americans (50%-65%) support public funding in principle (Ibid.).

Yet, from its inception, critics of public funding have targeted it in federal courts, generally on First Amendment grounds. And so, ten years after it first took effect in Arizona, Clean Elections was squarely in the middle of a case before the United States Supreme Court. The Court's decision would have powerful ramifications for the future of public funding, not only inside Arizona, but also for every other state.

Clean Elections at the Supreme Court

On March 28, 2011, the United States Supreme Court heard oral arguments in *McComish v. Bennett*, a First Amendment challenge to the matching funds provisions of Arizona's Clean Elections law.⁴ The question in *McComish* turned on the constitutionality of Arizona's matching funds provisions. Like those in Connecticut and Maine, the Clean Elections law in Arizona allowed for the provision of matching funds allocations to participating candidates when they were outraised or outspent; the extra subsidies mandated financial parity even when some candidates chose not to participate in the program. In Arizona primary elections, matching funds were triggered when money was spent. In general elections, participating candidates were matched either when their opponent reported raising money or when an independent expenditure was made against them. In either instance, expenditures beyond the publicly financed

⁴ The case is consolidated with *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*. Since they were argued together, I refer to both cases with the *McComish* citation.

candidate's subsidy amount were matched dollar-for-dollar to an aggregate limit of three times the original allocation.⁵

The importance of matching funds to participating candidates, as well as their uniqueness compared to the dynamics of a partially funded system, is perhaps best understood by a hypothetical comparison of publicly funded candidates in partially and fully funded states with spending limits of \$25,000 running against an opponent who raises and spends \$75,000. In a system of partial funding, in which a candidate receives a subsidy equivalent to 45% of the spending limit, a publicly funded candidate would still be facing a spending deficit of nearly \$64,000. In Arizona's Clean Elections system, however, the opponent's expenditures would trigger matching funds allocations, preserving funding equality. Since participating candidates can be outspent in only the most exceptional cases, matching funds provide a strong incentive for candidates to accept subsidies.

In 2008, Arizona state senator John McComish and a group of five other traditionally financed Arizona candidates brought a federal lawsuit challenging the constitutionality of Arizona's matching funds provision on the basis that it created disincentives to raise money and campaign for office. Their suit was joined by two independent groups, the Arizona Free Enterprise Club and the Arizona Taxpayer's Action Committee. Both of these groups had affiliated political action committees (PACs) that donated money to candidates; the groups therefore had legal standing to join the suit on the basis that like the traditional candidates, expenditures they made against publicly funded candidates (such as a television ad) would trigger a matching

⁵ This ceiling was somewhat lower in both Connecticut and Maine, where matching funds were capped at twice the initial grant level.

funds contribution to the candidate they advocated against. The case, which was first known as *McComish v. Brewer*, was first argued in the Arizona District Court in August of 2008, when the plaintiffs moved to enjoin the state from disbursing matching funds for the remainder of the 2008 election, and as noted above, had worked its way to the highest court in nearly three years later.⁶

In *Buckley v. Valeo* (424 U.S. 1 1976), the Supreme Court had ruled that spending money in a political campaign is tantamount to speech, and is therefore protected by the First Amendment. In *Buckley*, the Court found that restrictions may be placed on political speech only when the government could show a compelling interest for doing so, such as reducing either actual corruption or the appearance thereof. Thus, while the size of contributions to candidates could be limited (in an effort to prevent individuals from appearing to purchase favors), limitations on candidates' expenditures of their own personal funds were held as unreasonable restrictions on their speech.

In the *McComish* case, both the candidates and the independent groups argued that while there was no limitation on their spending in the text of the law, the incentives spawned by Clean Elections meant that the practical effect of the matching funds provisions was to make any reasonable non-participating candidate spend less money. As such, the petitioners argued that the matching funds rule violated their First Amendment rights by effectively chilling their speech (for a fuller description, see: Miller 2008). They therefore asked that matching funds be eliminated from the program. Arizona, in turn, argued that all candidates were free to participate in the program, there was no facial limitation on the spending of candidates who did not willfully accept one, and that consistent with the *Buckley* precedent, any indirect restrictions on political

⁶ Jan Brewer was the Attorney General of Arizona in 2008.

speech were justified by the reduced appearance of corruption in a publicly funded system.

On June 8, 2010, the Supreme Court enjoined matching funds in the 2010 election pending appellate action, and on November 29th, it granted certiorari and agreed to hear the case in early 2011.⁷ In the months leading up to the argument, more than two dozen amicus curiae briefs were submitted to the Supreme Court by outside groups and individuals. A number of briefs came from ideologically oriented interest groups, who wrote to share their view either that matching funds chilled speech or that the benefits from Clean Elections outweighed any burdens imposed on the speech of traditional candidates. Several political science and constitutional scholars offered empirical evidence and their expert interpretation; all of these briefs supported Arizona's contentions that its system was constitutional and/or that the program did not result in less speech (see: Panagopoulos et al., 2011; Corrado, Mann, and Ornstein, 2011; Kendall et al. 2011). The state of Maine argued for the constitutionality of matching funds in its own Clean Elections program (Bliss et al. 2011). Other states, including Iowa, Connecticut, Maryland, New Mexico, and Vermont, wrote to “share (their) view that public financing of state elections should remain available as a tool to restore public confidence” (Miller et al. 2011). The United States government made a similar claim (Katyal et al. 2011). Moreover, Miller (2008) showed that while traditional candidates often described a “chilling effect” of matching funds provisions on their speech, they often “gamed” the system by delaying expenditures until the very end of an election, when matching funds could not benefit their publicly funded opponents.

⁷ The petitioners had won during initial action in the Arizona District Court, while Arizona had prevailed at the 9th Circuit Court of Appeals. The petitioners subsequently requested an injunction pending their appeal.

As noted above, the case (U.S. 10-239) was argued at the U.S. Supreme Court in late March, 2011. The United States Department of Justice joined on Arizona's side, given its vested interest in defending the constitutionality of public funding programs. At the argument the petitioners reiterated their belief that the practical effect of matching funds was to chill speech, and that such an effect was unconstitutional under the *Davis* precedent. William Maurer, counsel for the petitioners (the traditionally financed candidates), wasted no time in getting to the point. The first sentences he said were: “This case is about whether the government may insert itself into elections and manipulate campaign spending to favor its preferred candidates. Arizona does this in a manner that is even more burdensome to free speech than the law at issue in *Davis v. FEC*.”

At issue in *Davis v. FEC* (128 S. Ct. 2759), was the so-called “Millionaire's Amendment” in the 2002 Bipartisan Campaign Reform Act (BCRA). The BCRA adjusted campaign finance rules in federal elections, doubling to \$2,000 the maximum amount that citizens had been allowed to donate to a candidate prior to its passage. However, the BCRA also required candidates to declare how much of their own money they intended to spend during the election; one spending more than \$350,000 of personal wealth “triggered” different contribution limits for her opponent, which were raised to \$6,000 to allow her to compete with the “millionaire” self-funder. Davis argued that the BCRA violated his First Amendment rights to use his own money for political speech, because he recognized that there existed an incentive to constrain his spending to less than \$350,000. In short, Davis' claim was grounded on the strategic considerations that the BCRA created. Although there was no statutory spending limit in the BCRA, Davis

asserted that the Millionaire's Amendment would lead a rational candidate to self-impose one.

In a 5-4 decision, the Supreme Court agreed with *Davis*, and struck down the triggers in the Millionaire's Amendment as a violation of the First Amendment. Importantly, the Court ignored the fact that, as the Brennan Center for Justice noted in its amicus brief, “there is no proof in the record that (the Millionaire's Amendment) has chilled any candidate expenditures or speech—much less the 'substantial' quantity of speech required to sustain a facial challenge” (Brennan Center, 2007). Writing for the majority, Justice Samuel Alito held that, “the unprecedented step of imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat is antithetical to the First Amendment.” In other words, the Court found that the law was facially unfair, and so its actual effects were meaningless.

Davis' argument was clearly similar to that of the traditional candidates and independent groups who brought suit in the *McComish* case. Rather than triggering higher contribution limits to the opponents of candidates who spent their own money above a certain threshold, the Clean Elections law triggered direct contributions from the state's fund to the opponents of traditional candidates who spent any money above a certain threshold. Maurer therefore argued that while the petitioners did not dispute that public election funding was consistent with the Constitution, the Court's decision in *Davis* had made triggering provisions unconstitutional. When Justice Ginsburg asked him whether the petitioners would object to the state simply giving all candidates the maximum subsidy (three times the original one) that matching funds would allow, Maurer responded:

“This case is not about whether the State of Arizona may provide campaign financing using public funds, nor is it about whether the ability of Arizona to ensure that those who receive the public funds can run effective campaigns. What this case is about is whether the government can turn my act of speaking into the vehicle by which my political opponents benefit with direct government subsidies.”

Indeed, Maurer argued that the benefit accruing to the opponents of traditional candidates in Arizona's Clean Elections system was greater than it was for opponents of self-funders in *Davis*, since in the latter case those opponents, “still had to go out and actually raise the funds that the Millionaire's Amendment permitted him to raise.” Maurer reasoned that since “elections are a zero-sum game” in which there can be only one winner, a benefit to one candidate necessarily constituted harm to the other. Thus, the petitioner's argument rested squarely on the *Davis* precedent. In raising and spending money above the spending limit, traditionally funded candidates were keenly aware that their actions would harm them by resulting in a contribution to their publicly funded opponent. Accordingly, there were clear incentives for them to withhold their political speech. Or, as Maurer said, “Our concern is that their speech is turning into the mechanism by which their political goals are undercut. So each time they speak, the more work that they do, the more their opponents benefit.”

Arizona's counsel, Bradley Phillips, argued that, “Public funding of elections results in more speech and more electoral competition and directly furthers the government's compelling interest in combating real and apparent corruption in politics.” Arizona defended matching funds by citing the available empirical evidence that no

candidate or group had withheld spending due to a fear of triggering matching funds, and also that aggregate spending had risen since Clean Elections was implemented. Mr. Phillips argued that in encouraging participation in public funding, matching funds, “combats corruption by providing for more candidates running, more political speech, and more electoral competition, all of which have happened in Arizona.”

William Jay, Assistant to the Solicitor General of the United States, echoed this position, saying, “the only consequence of running an independent expenditure...is that another party will get to run a responsive ad, and the sum of speech will be increased.” Moreover, Phillips argued that political spending was not a zero-sum affair; presumably, it was reasonable to expect that each candidate would think that her own message was superior. Thus, even political spending that triggered a direct contribution to one's opponent should render a net benefit:

“(The) petitioners assume that essentially this is a zero-sum game and that because if I spend \$10,000 the other guy is going to get \$10,000 to respond, that somehow that's a wash. Well, it's not a wash, first, because I think my speech is more persuasive so I'm going to do it anyway, because I'd rather get it out there; and secondly, because I may be spending my \$10,000 on getting out my voters, and I need to do that regardless. And that's why you don't see in the statistics any evidence that this actually suppresses speech.”

In short, the position of Arizona and the United States was that any burden on traditional candidates could not be too onerous, since there was no empirical evidence of suppressed spending by traditional candidates or groups. Moreover, the respondents

asserted that in encouraging participation in Clean Elections, matching funds aided the government in fulfilling its objective of reducing the appearance of political corruption.

The opinion was released in June. Writing for a 5-4 majority, Chief Justice John Roberts held that Arizona's arguments about preventing corruption were unpersuasive, since "reliance on personal funds reduces the threat of corruption." Roberts also rejected the argument that matching funds increased aggregate amounts of speech in the political system, noting that such an increase was asymmetrical as "any increase in speech resulting from the Arizona law is of one kind and one kind only—that of publicly financed candidates." Finally, in response to the state's claim that there was no evidence that candidates suppressed their speech in response to matching funds triggers, Roberts wrote that, "it is never easy to prove a negative"—here, that candidates and groups did not speak or limit their speech because of the Arizona law." In other words, the majority felt that the issue should turn not on empirical evidence, but on what it perceived to be a clear precedent in *Davis v. FEC*. As such, it did, "not need empirical evidence to determine that the law at issue is burdensome."

Rather, Roberts wrote that the matching funds provisions of Arizona's Clean Elections law did indeed create a real incentive structure that impeded the speech of the participating candidates, as the Millionaire's Amendment had for self-funders. The premise of public funding survived, since determining its "wisdom," in Roberts' view, was, "not our business. But determining whether laws governing campaign finance violate the First Amendment is very much our business." Roberts held that it was the delivery method, "in direct response to the political speech of privately financed candidates and independent expenditure groups," and not the size of the subsidies

involved, that failed to pass constitutional muster. Simply stated, the majority ruled that the matching funds provisions created a chilling effect that was so similar in practice to the Millionaire's Amendment that the law could not stand, regardless of external evidence. "If the law at issue in *Davis* imposed a burden on candidate speech, the Arizona law unquestionably does so as well."

Reform in the Future

Public funding survived the *McComish* case, but the message was clear: Incremental matching funds were over. Beginning with the 2012 election, candidates may still accept full funding via Clean Elections grants, but with no dollar-for-dollar matching funds provisions, there is a much greater likelihood that they will be outspent. It is unclear how impactful the loss of matching funds will be on how candidates view Clean Elections, and whether the absence of financial parity will curb participation. One possible result is that candidates will perceive a weaker incentive to run with public subsidies; this is particularly true for those who believe either that their opponent will control a relatively large sum or that their race may attract spending by outside groups. If enough candidates think this is likely, it is possible that, in the words of one legislator I re-interviewed in 2011, "the lawsuit, by gutting the engine of the program, has effectively killed Clean Elections." Notably, participation did trend downward in Arizona upon the suspension of matching funds: Half of all candidates participated in 2010, down from about two-thirds in 2008 (Arizona CCEC 2011).

However, there is little reason to believe that *McComish* will be a death knell for Clean Elections in the long term. Arizona campaign finance records indicate that of 767

Clean Elections candidates for the state house and senate between 2002 and 2008, only 87 received matching funds grants (and 30 of those candidates received less than \$10,000).⁸ Moreover, Dowling et al. (2012) report no evidence that non-participating candidates stopped spending money at the threshold when matching funds were available. It is possible that traditional candidates will unleash a torrent of pent-up money now that Clean Elections candidates cannot get matching funds, but if extra grants were triggered in only 11% of races to begin with, it seems premature to conclude that full funding programs cannot function as single-subsidy systems.

Indeed, in the days following the *McComish* decision, Connecticut Secretary of State Denise Merrill was publicly optimistic about the future of Clean Elections in her state, saying that, “while the supplemental grants are important in a world of high-spending self-funded candidates and independent expenditures, Connecticut proved last year (2010) that our system can and does work in the face of these challenges.” Merrill was alluding to the fact that Connecticut had suspended its matching funds triggers for the 2010 election in response to the federal court activity, but 70% of legislative candidates still participated that year, down only three points from the program's debut in 2008 (Connecticut SEEC, 2011). Connecticut's participation trend compared well with that in Maine, which did not eliminate matching funds for the 2010 election, and in which 77% of legislative candidates took Clean Elections funding in 2010, down slightly from 81% in 2008 (Maine Ethics Commission, 2011).

Can Public Funding Work?

⁸ Data are not available for 2000 in Arizona, nor are they readily available for Maine or Connecticut.

To paraphrase Mark Twain, rumors of the death of Clean Elections have probably been greatly exaggerated. Yet, it seems fairly apparent that public funding efforts in the post-*McComish* era will necessarily look different. While its decisions have narrowed the available policy options when it comes to campaign finance, it is important to note that the Supreme Court has consistently upheld the constitutionality of optional public funding programs established in *Buckley*, despite ample opportunity to strike them down. The Court has held that it is the government's prerogative to allow candidates to opt into public funding programs, since public subsidies help to reduce public perception of corruption. In no case since *Buckley* has the Court questioned whether this is a justifiable goal. Indeed, since Arizona and Maine implemented their Clean Elections programs in 2000, a number of other states, including Connecticut, New Mexico, and North Carolina, have followed for elections to at least some offices. Thus, there is no indication that public funding generally will cease to be part of the campaign finance reform toolkit in the near future.

That said, there are at least four realities that public funding advocates must confront. First, the fiscal difficulties that many states and municipalities faced in the "Great Recession" led to some public funding programs being placed on the fiscal chopping block. For instance, even though it had expanded public funding to judicial elections for the 2010 election, Wisconsin eliminated all public funding programs in 2011 when Governor Scott Walker's budget significantly weakened the program that was subsequently de-funded altogether by the Wisconsin Legislature. Wisconsin was not the only governmental body determining the fate of public funding in 2010-11. By a narrow margin, voters in the City of Portland, Oregon ended the city's 5-year-old public

funding program offering full subsidies to candidates for city offices in 2010. Opponents had cited its cost of nearly \$2 million during its existence as well as at least two instances in which candidates abused the program as rationale to terminate it. The experiences of Portland and Wisconsin therefore demonstrate that in a period of scarce government resources, voters must perceive public funding as a value-added policy if it is going to survive at all, much less function well.

Second, the direct partial programs of the 1980s and 1990s, such as those functioning in Hawaii, Minnesota, and Wisconsin (until 2010), are not likely to expand elsewhere. Evaluation of the efficacy of partial programs in terms of goals such as curbing spending growth or enhancing competition has been mixed at best (i.e., Kraus, 2006; 2011; Schultz, 2002; Malbin and Gais, 1998, 136; Mayer and Wood, 1995; Jones and Borris, 1985). Furthermore, Miller (2013) consistently demonstrates that partial programs appear to do little to alter the campaign activities, outlook, or traits of candidates relative to traditionally financed ones, and there is therefore little reason to suspect commensurate changes among the general electorate. While partial funding programs may reduce somewhat the influence of business, labor, or issue advocacy organizations, these relationships have not been fully studied. Considering what is known, there is little reason for states or municipalities that might be inclined to implement public funding to seek partial programs. Perhaps predictably then, partial funding has become less prevalent among public funding schemes.

Third, while the Court has not banned the provision of direct subsidies to candidates, its decisions in *Davis* and *McComish* have created some additional rules for the game. The main guideline for future programs is that campaign finance regulations

must apply evenly to all candidates, and cannot contain “trigger” provisions under which the activities of one candidate affect the financial position of another. While candidates in full funding states are still eligible to receive large grants capable of funding a viable campaign, the matching funds elements of Clean Elections laws--at least as originally designed--are no more. The major difference for participating candidates is that they are no longer assured of competing at financial parity with their opponents. It remains to be seen how the end of matching funds will affect the efficacy of public funding programs--if at all.

Fourth, recent federal court decisions beyond *McComish* have dramatically altered the regulatory landscape. The United States Supreme Court's 2010 decision in *Citizens United v. FEC* (558 U.S. 130 S. Ct. 876) held that corporate and union entities can spend freely to communicate a political message in elections, and the District of Columbia Circuit Court's decision in *SpeechNow.org v. FEC* (599 F.3d 686 (2010)) eliminated hard money limits on contributions to so-called “Super-PACs” that spend only on advertising and make no direct contributions to candidates or party units. As such, super PACs can (as of 2010) accept unlimited donations so long as their funds are used only for direct communication (and not contribution to or coordination with campaigns). Various other corporate structures require no donor disclosure at all. While it remains to be seen how these developments will affect the campaign finance environment in the long term, aggregate spending by non-party entities nearly doubled from 2008 to 2010, when corporate and Super PAC activity were first allowed (Campaign Finance Institute, 2010). An environment in which actors outside of political campaigns control a significant proportion of money spent will no doubt pose challenges for regulatory

systems like public funding that attempt to control spending by imposing limitations on candidates.

Concluding Thoughts

Most everyone wants elections to be fairly conducted, publicly focused, and reasonably competitive, since good representation is likely to follow. However, the road between public funding and such elections is not an expressway, and merely believing that subsidies of any size are a panacea does not make it so. Public funding makes elections more complicated. The structure of any future programs will lead to shifting incentives, altered behavior, and in some cases, pervasive gaming among affected candidate populations. Not all of these changes will be clearly positive. Nonetheless, before searching for the relationships we want to see, reformers must understand how the presence of public election funding changes the true conduct of their political campaigns. Future public funding schemes should adhere to at least four criteria.

First, if public funding is designed to foster greater electoral competition, then direct subsidies should be sufficiently large to approximate the cost of a meaningful campaign. Political science has consistently demonstrated that full funding (Mayer, Werner, and Williams, 2006; Werner and Mayer, 2007; Malhotra, 2008) but not partial funding (Jones and Borris, 1985; Mayer and Wood, 1995) spurs increased competition in legislative elections. While challengers may find success raising money from ideologically motivated individuals or those whom they know personally in a traditionally financed system (see: Francia et al., 2003), they are more likely to be seen generally as a poor investment by strategic donors, since they rarely win. Thus, a system in which

public funding pays for only part of the necessary costs of a campaign will not reduce the traditional funding disparity between challengers and incumbents, because challengers are likely to still have difficulty raising the other half. This is doubly true considering that Miller (2013) indicates the availability of public funding does not appear to draw more experienced candidates into the political arena, so the comparative advantage that incumbents enjoy in terms of institutional resources, funding lists, and general know-how is likely to continue to give them an edge in the absence of robust subsidies.

Miller (2011a) found that non-incumbent candidates in the states employing full funding schemes operate at financial parity with their opponents. While it remains to be seen whether the elimination of matching funds via the *McComish* decision will alter this dynamic, as noted above, matching funds were hardly a prominent feature in Arizona elections when they were legal, and there is little evidence that traditional candidates were purposefully withholding spending (Dowling et al., 2012). Moreover, the availability of matching funds is irrelevant for candidates merely looking for a means to attain financial viability that may not have otherwise existed. Full funding--regardless of whether a candidate may be outspent--allows challengers to make a respectable showing despite their institutional disadvantages.

Second, qualification requirements should be carefully considered. Public funding should be constructed in such a way as to encourage participation by a wide range of candidates while ensuring that those who accept subsidies will put the money to good use. In other words, if the qualification threshold is set too high, it will do little to encourage the emergence of new candidates, since the system will be much like a

traditional one that favors those with experience and connections. If the threshold is set too low, then the system runs a risk of inundation with ideologically extreme or novelty candidates. Opponents of public funding point out that the downside to allowing candidates to circumvent “market forces” in politics is that those forces often serve a valuable purpose. If candidates must raise money to be successful, then incumbents in particular argue that candidates who are strong fundraisers are likely leveraging attributes such as community ties and political savvy that would also make them good representatives. Furthermore, an inability to raise money may be the result of a dearth of these attributes. Alternatively, candidates may be unable to secure broad funding support as a result of ideological extremism that does not appeal to many voters. Indeed, there is some evidence that candidates who ran with full funding during the 2000s were more ideologically extreme (Masket and Miller, 2012).

Reformers should therefore be mindful of local conditions, and set qualification requirements in such a way as to preserve some element of “market forces” while still persuading high-quality candidates to run. The definition of a “quality” candidate is somewhat looser where public funding is available, since Miller (2013) demonstrates that large subsidies hold the potential to propel inexperienced candidates into the realm of “quality,” at least where campaign resources are concerned. With this in mind, if the goal of public funding is to encourage a wide range of views, and if the threshold is set appropriately, there is little reason to exclude third party candidates from participating, or to diminish their subsidy amount relative to major-party candidates.

Third, policies should encourage greater interaction between candidates and voters, either directly or indirectly. In explicitly encouraging candidates to seek small

donations via a six-to-one-match of contributions under \$175, the New York City Campaign Finance Act (CFA) provides a direct incentive for candidates to broaden their fundraising targets beyond the traditional sources. Indeed, there is evidence that donor pools under the CFA are more representative of the voting public (Malbin et al., 2012). By incentivizing contact with new segments of the electorate, the CFA likely heightens the salience of the election for more private citizens, since by donating they will be literally invested in the race. Other requirements are more straightforward, and foster more political information disseminated to voters. Clean Elections (in Arizona), the CFA, and the Fair Elections Now Act (FENA) presently before Congress all mandate appearance in at least one debate for candidates who accept public funding. Moreover, in Arizona, participating candidates appear in a “Clean Elections Voter Education Guide” that is distributed statewide, and includes personal statements and biographical information.

Beyond those direct incentives, subsidizing candidates can have indirect effects in voter engagement. Miller (2011b; 2013) finds that by essentially eliminating the effort necessary for fundraising, Clean Elections systems have heightened the level of interaction between candidates and voters, since the former rationally choose to spend time seeking votes. These efforts appear to pay off in the form of reduced voter “roll-off,” as voters in districts where state house candidates accept full public funding are significantly more likely to cast a vote in the state house election, as opposed to voting for the contests at the top of the ballot and leaving the polling place (Miller, 2013). Either by raising awareness of candidates and their issue positions, or by raising perceptions among the electorate about the importance of the office (or a combination of both), the

heightened interaction between candidates and voters during the campaign leads to more voting.

Fourth, if a public funding system is to deliver these benefits via direct subsidies, then there must be a spending limit. While partially funded candidates--who still must raise a proportion of their funding from private donors--exhibit no difference in the time they commit to either fundraising or voter interaction, those who accepted Clean Elections funding spent significantly less time raising money, and devoted more time to communicating with voters (see: Francia and Herrnson, 2003; Miller, 2011b; Miller, 2013). This narrative is consistent with the story frequently presented by reform groups about the likely effect of the FENA on the manner in which candidates use their time: Reduce the necessity of fundraising, and candidates will turn their attention to voters.

However, the key difference between Clean Elections and FENA is that the latter lacks a statutory spending cap, and as long as candidates may raise money, it is unrealistic to expect them to stop doing so in the era of the expensive media campaign. In failing to limit spending for participating candidates, the FENA therefore shows little potential to curb fundraising activities, nor to increase the attention that candidates devote to interaction with the voting public. In short, even if \$1 million is enough for most candidates to wage a visible campaign, the FENA rules create an arms-race mentality in which candidates have an incentive to continue building their funding arsenal. If altering candidate behavior is truly a goal of campaign finance reform, then the spending of participating candidates should be capped at a level very near the initial subsidy amount, as in Clean Elections systems.

References

Arizona Citizens' Clean Election Commission. 2011. "2010 Annual Report Including a Summary of the 2010 Arizona Statewide & Legislative Elections."

Blasi, Vincent. 1994. "Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All. *Columbia Law Review* 94(3):1281-1325.

Brown, Adam R. 2012. "Does Money Buy Votes? The Case of Self-Financed Gubernatorial Candidates, 1998-2008." *Political Behavior*. Forthcoming.

Campaign Finance Institute. 2010. "Non-Party Spending Doubled in 2010 But Did Not Dictate the Results." Retrieved June 13, 2012 from:

[http://www.cfinst.org/Press/PReleases/10-11-05/Non-](http://www.cfinst.org/Press/PReleases/10-11-05/Non-Party_Spending_Doubled_But_Did_Not_Dictate_Results.aspx)

[Party_Spending_Doubled_But_Did_Not_Dictate_Results.aspx](http://www.cfinst.org/Press/PReleases/10-11-05/Non-Party_Spending_Doubled_But_Did_Not_Dictate_Results.aspx)

Campaign Finance Institute. 2011. "State Limits on Contributions to Candidates 2011-2012 Election Cycle." Retrieved May 8, 2012 from:

http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2011-2012.pdf

Connecticut Secretary of State. 2011. "Secretary of State Merrill Reacts to McComish Case." Press Release. Retrieved June 12, 2012 from:

[http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0CGAQFjA](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0CGAQFjAF&url=http%3A%2F%2Fwww.sots.ct.gov%2Fsots%2Flib%2Fsots%2Freleases%2F2008%2F6.27.11_merrill_reacts_to_mccomish_decision.pdf&ei=VInXT9qTGsaE2wXBI_GADw&usg=AFQjCNHwQz3Wk3Lw4sOH1K25KMERDdmdgw)

[F&url=http%3A%2F%2Fwww.sots.ct.gov%2Fsots%2Flib%2Fsots%2Freleases%2F200](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0CGAQFjAF&url=http%3A%2F%2Fwww.sots.ct.gov%2Fsots%2Flib%2Fsots%2Freleases%2F2008%2F6.27.11_merrill_reacts_to_mccomish_decision.pdf&ei=VInXT9qTGsaE2wXBI_GADw&usg=AFQjCNHwQz3Wk3Lw4sOH1K25KMERDdmdgw)

[8%2F6.27.11_merrill_reacts_to_mccomish_decision.pdf&ei=VInXT9qTGsaE2wXBI_GA](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0CGAQFjAF&url=http%3A%2F%2Fwww.sots.ct.gov%2Fsots%2Flib%2Fsots%2Freleases%2F2008%2F6.27.11_merrill_reacts_to_mccomish_decision.pdf&ei=VInXT9qTGsaE2wXBI_GADw&usg=AFQjCNHwQz3Wk3Lw4sOH1K25KMERDdmdgw)

[Dw&usg=AFQjCNHwQz3Wk3Lw4sOH1K25KMERDdmdgw](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0CGAQFjAF&url=http%3A%2F%2Fwww.sots.ct.gov%2Fsots%2Flib%2Fsots%2Freleases%2F2008%2F6.27.11_merrill_reacts_to_mccomish_decision.pdf&ei=VInXT9qTGsaE2wXBI_GADw&usg=AFQjCNHwQz3Wk3Lw4sOH1K25KMERDdmdgw)

Connecticut State Elections Enforcement Commission. 2011. "Citizens' Election

Program 2010: A Novel Program With Extraordinary Results." Retrieved June 12, 2012

from:

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CFIQFjAA&url=http%3A%2F%2Fwww.ct.gov%2Fseec%2Flib%2Fseec%2Fpublications%2F2010_citizens_election_program_report_final.pdf&ei=r4jXT8qbEsLS2gW1ju2WBg&usg=AFQjCNEAUkf5DhL69iZ1wW1mDJEa9plQ4w

Donnay, Patrick D, and Graham P Ramsden. 1995. "Public Financing of Legislative Elections: Lessons from Minnesota." *Legislative Studies Quarterly* 20(3): 351-364.

Dowling, Conor. 2011. "Public Financing and Candidate Participation in Gubernatorial Elections." in *Public Financing in American Elections*. Costas Panagopoulos (ed.) Temple University Press.

Dowling, Conor M., Ryan D. Enos, Anthony Fowler, and Costas Panagopoulos. 2012. "Does Public Financing "Chill" Political Speech? Exploiting a Court Injunction as a Natural Experiment." *Election Law Journal*.

Francia, Peter L., and Paul S. Herrnson. 2003. "The Impact of Public Finance Laws on Fundraising in State Legislative Elections." *American Politics Research* 31(5): 520.

General Accounting Office. 2010. *Campaign Finance Reform: Experiences of Two States That Offer Full Public Funding for Political Candidates*. Washington, D.C.: United States Government.

Gross, Donald A., and Robert K. Goidel. 2003. *The States of Campaign Finance Reform*. Columbus: The Ohio State University Press.

Howell, Susan E. 1982. "Campaign Activities and State Election Outcomes." *Political Behavior* 4(4): 401-417.

Jones, Ruth S, and Thomas J Borris. 1985. "Strategic Contributing in Legislative Campaigns: The Case of Minnesota." *Legislative Studies Quarterly* 10(1): 89-105.

Krasno, Jonathan. 1994. *Challengers, Competition, and Reelection*. New Haven: Yale University Press.

Kraus, Jeffrey. 2006. "Campaign Finance Reform Reconsidered: New York City's Public Finance Program After Fifteen Years." *The Forum*. Volume 3, Issue 4: 1-27.

Kraus, Jeffrey. 2011. "Campaign Finance Reform Reconsidered: New York City's Public Finance Program After Fifteen Years." in *Public Financing in American Elections*. Costas Panagopoulos (ed.) Temple University Press.

La Raja, Raymond. 2008. "Candidate Emergence in State Legislative Elections: Does Public Funding Make a Difference?" Paper presented at the 2008 Temple IPA State Politics and Policy Conference. Retrieved from <http://www.unc.edu/depts/polisci/statepol/conferences/2008/papers/LaRaja.pdf> April 1, 2010.

Maine Ethics Commission. 2011. "Maine Clean Election Act Overview of Participation Rates and Payments 2000-2010." Retrieved June 12, 2012 from: <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0CFoQFjAE&url=http%3A%2F%2Fwww.mainecelelections.org%2Fassets%2Ffiles%2FEthics%2520Commission%2520Overview%25202000-2010%2520for%2520LVA%25201.19.11.pdf&ei=L6zXT5jJHYKW2gWx9pioDw&usg=AFQjCNFqbR8ZM8VAdiCbaOT1T6FSvYgigg>

Mablin, Michael J., Peter W. Brusoe, and Brendan Glavin. 2012. "Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States." *Election Law Journal* 11(1): 3-20.

Malhotra, Neil. 2008. "The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine." *State Politics and Policy Quarterly* 8(3): 263.

Mayer, Kenneth R, Timothy Werner, and Amanda Williams. 2006. "Do Public Funding Programs Enhance Electoral Competition?." In *The Marketplace of Democracy: Electoral Competition and American Politics*. Michael P. McDonald and John Samples, eds., Washington, D.C.: Brookings Institution Press.

Mayer, Kenneth R, and Timothy Werner. 2007. "Electoral Transitions in Connecticut: The Implementation of Clean Elections in 2008." Paper presented at the Annual Meeting of the American Political Science Association.

Mayer, Kenneth R, and John M Wood. 1995. "The Impact of Public Financing on Electoral Competitiveness: Evidence from Wisconsin, 1964-1990." *Legislative Studies Quarterly* 20(1): 69-88.

McGhee, Eric, and Raymond La Raja. 2008. "Campaign Finance: Timing and its Torments." In Chicago, IL. Available at: http://convention2.allacademic.com/one/mpsa/mpsa08/index.php?click_key=1andPHPS ESSID=d428250ccea0216da13fcc98ec71b858 [Accessed October 13, 2008].

Miller, Michael. 2011a. "After the GAO Report: What Do We Know About Public Election Funding?" *Election Law Journal: Rules, Politics, and Policy* 10(3): 273-290.

Miller, Michael. 2011b. "Public Money, Candidate Time, and Electoral Outcomes in State Legislative Elections." In *Public Financing in American Elections*. Costas Panagopoulos (ed.) Temple University Press.

Miller, Michael. 2013. *Subsidized Democracy: How Public Financing Changes American Elections, and How It Can Work in the Future*. Cornell University Press.

Miller, Michael. 2008. "Gaming Arizona: Public Money and Shifting Candidate Strategies." *PS: Political Science and Politics* 41(3): July. 527-32.

National Institute of Latino Elected and Appointed Officials. 2008. *How Much Help? Public Financing and Latino Candidates*. Washington D.C.: NALEO Educational Fund.

Nichols, Mike. 2009. "Anatomy of a Failed Idea." *Wisconsin Interest* 18(3).

Panagopoulos, Costas. 2011. "Introduction." In *Public Financing in American Elections*, Costas Panagopoulos, ed. Philadelphia: Temple University Press.

Primo, David. 2002. "Public Opinion and Campaign Finance." *Independent Review* 7(2): 207-219.

Schultz, David. 2002. "Special Interest Money in Minnesota State Politics." In *Money, Politics, and Campaign Finance Reform Law in the States*. David Schultz, ed. Durham: Carolina Academic Press..

Werner, Timothy, and Kenneth R. Mayer. 2007. "Public Election Funding, Competition, and Candidate Gender." *PS: Political Science and Politics* 40: 661-667.

Wertheimer, Fred, and Susan Weiss Manes. 1994. "Campaign Finance Reform: A Key to Restoring the Health of Our Democracy." *Columbia Law Review* 94(4): 1126-1159.

Woolley, Peter, and Tim Vercellotti. 2007. "Public Attitudes Toward the Clean Elections Initiative." Retrieved August 15, 2009 from:
http://eagletonpoll.rutgers.edu/polls/CE_FinalReport_11_07.pdf