

WELFARE for POLITICIANS?

TAXPAYER FINANCING OF CAMPAIGNS



EDITED BY JOHN SAMPLES

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1. Introduction: Taxpayer Financing of Campaigns

John Samples

Candidates and parties need money to fight election campaigns. In the United States, this money comes largely from individuals and groups, not the government, that is, the taxpayers. Some critics decry such private financing of politics. They argue that private donations advance special interests and corrupt politics and government. Some of them argue that government should ban private campaign contributions in favor of public financing. Since public funding comes from everyone, they reason, it actually comes from no one, thereby precluding the influence of private interests on public affairs. That argument has found few converts at the national level. States and cities have been more willing to experiment with taxpayer support for campaigns.

The U.S. Congress has enacted public funding for congressional races only once, in 1991. At that time, President George H. W. Bush promised to veto any campaign finance legislation, a threat he later carried out. The House ended up 24 votes short of the two-thirds majority needed to override the veto; the Senate was 9 votes under the constitutional requirement. Even if Bush had changed his mind, the new law would still have been a symbolic gesture. The bill did not finance the public financing of congressional campaigns; it did not identify revenue to meet the proposed spending. The conference report on the bill “contained a sense of the Congress resolution that funding should not come from general revenues, increase the federal budget deficit or decrease spending on other programs.”¹ It would be funded, in other words, by some special tax mechanism like the presidential 1040 checkoff. Yet the legislation did not create that special mechanism, which means the heart of the law, even if passed, would not go into effect.

Since Congress enacted partial public financing for presidential campaigns in 1976, the nation has experienced seven presidential

elections costing upward of \$2 billion in total. Many experts believe that the presidential funding system now stands at a crossroads. If the program remains unchanged, it is likely to lack funding and relevance in the future. Advocates of public financing thus argue for throughgoing reforms and additional funding. My article in this volume on the presidential program along with Michael Malbin's companion piece assess its success, failures, and future.

The American states have been more open to taxpayer financing. Twenty-two states now have some version of public support for campaigns, almost all of which were enacted from 1974 to 1984. The success of those programs has been mixed at best.² Recently three states—Arizona, Massachusetts, and Maine—have passed initiatives creating full public funding of campaigns. The next four articles in this volume assess these new “clean election” programs. Thomas Finneran, the Speaker of the Massachusetts House, examines his state's effort. Patrick Basham and Martin Zelder look at the effects of public financing on competitiveness in Maine. Chip Mellor raises questions about the legal presuppositions of the Arizona law, while Robert Franciosi analyzes its assumptions and outcomes. Unlike much of the popular literature on these programs, these four articles raise questions about the justifications and consequences of taxpayer financing of elections.

Much of the cost of an electoral campaign comes from buying advertising to spread a candidate's message. As early as 1970, Congress passed a bill limiting spending on broadcasting. About the same time early proposals emerged to require the owners of broadcast media to provide “free” airtime to candidates and parties. Recently, Sen. John McCain (R-Arizona) has renewed this effort to impose a large part of the costs of campaigns on those who own shares in media firms through the provision of “free” airtime. Paul Taylor, the primary influence on McCain's bill, provides a defense and explication of free airtime. Adam Thierer and I raise some questions about Taylor's undertaking, while Laurence Winer looks critically at its legal foundation.

Two other articles cast their nets more widely. Several other nations have experimented with taxpayer financing of political campaigns. In an article that follows, Patrick Basham reports on the successes and failures of those experiments and the lessons learned for the United States. Jeffrey Milyo and David Primo review the

academic literature about money and politics to test the assumptions of taxpayer financing. They bring some balance to the discussions surrounding campaign finance, not least the question of governmental corruption. Milyo and Primo also suggest some ways to fruitfully study taxpayer financing in the future.

Before turning to these articles, I begin by explicating the moral and political background of public financing. Proponents usually insist that taxpayers must finance campaigns to vindicate certain democratic values. That view, it turns out, is held by a decided minority of Americans. Moreover, the assumption that public financing strives for the public good is open to question.

Taxpayer Financing and the Public Interest

Proponents claim government financing of campaigns serves the public interest in three ways: it advances the integrity of elections and lawmaking, promotes political equality, and fosters electoral competitiveness.

Corruption

The Supreme Court held in *Buckley v. Valeo* that the government has a compelling interest in preventing corruption or the appearance of corruption in campaigns and policymaking, an interest that may outweigh the First Amendment rights implicated in contributing to a political campaign. Allegations of corruption thus increase the probability that a law regulating campaign finance will pass constitutional muster.

Advocates of government financing claim the current system of largely private financing of campaigns fosters corruption (or its appearance) in several ways. They say campaign contributions buy favors from elected officials, the quid-pro-quo corruption noted in *Buckley*. Others say contributors receive favorable action on policies that attract little public attention and debate. Advocates also say private money fosters more subtle forms of favoritism; for example, members of Congress may allocate their time and effort in committees to help contributors.³ If private money corrupts, the advocates conclude, the private financing system should be abolished in favor of government financing.

In their contribution to this volume, Jeffrey Milyo and David Primo summarize the academic studies of Congress and campaign

contributions, almost all of which provide little evidence to support allegations of corruption.⁴ Having surveyed the field, even Andrew Geddis, a supporter of government financing, concludes, "One obstacle is that various studies have failed to produce the sort of evidence of a strong correlation between campaign donations and a representative's public actions needed to back up suspicions of general quid pro quo understandings."⁵ Should we not have strong evidence to uproot our current system of campaign finance, especially when money is tied to the exercise of free speech?

If corruption involves using public power for private ends, government financing itself provides an example of corruption; after all, the program takes money from everyone and gives it to particular interests. One might counter with Richard Briffault's argument that government financing cannot be corrupt because tax revenue "comes from everyone, and thus, from no one in particular."⁶ But that leaves out an important part of the story. Tax money used to finance campaigns may come from everyone, but it goes predominantly, and is designed to go predominantly, to particular interests and groups within the American polity. Government subsidies for ethanol are no less corrupt because everyone pays for them and neither are government subsidies to particular candidates.

Equality

Some Americans contribute to political campaigns, but most do not.⁷ For advocates of government financing, these differences create intolerable inequalities that are "in sharp tension with the one person-one vote principle enshrined in our civic culture and our constitutional law. Public funding is necessary to bring our campaign finance system more in line with our central value of political equality."⁸ Similarly, Public Campaign, a leading organization advocating taxpayer financing, argues that private financing "violates the rights of all citizens to equal and meaningful participation in the democratic process."⁹ The principle of one person-one vote means "one man's vote in a congressional election is to be worth as much as another's" because assigning different weights to different votes in various House districts would violate Article I, § 2 of the Constitution.¹⁰ The principle applies to state elections because of the equal protection clause of the 14th Amendment.¹¹ Is one person-one vote thus "our central value of political equality"? A look at American institutions suggests otherwise.

The representation of states in the U.S. Senate assigns different weights to different votes in different states. Because the Electoral College also recognizes state representation, the election of the president also accords greater weight to votes in small states compared with those in large states. Moreover, the Supreme Court has not subjected judicial elections to the principle of one person–one vote.¹²

One person–one vote applies only to voting. No American has a right to “equal and meaningful participation in the democratic process” if that means the whole of political life. In particular, the rights of association and speech set out in the First Amendment have been explicitly protected from government efforts to compel “equal . . . participation.” In *Buckley*, the Supreme Court noted that federal election law sought to equalize the influence of individuals and groups over the outcome of elections. The justices demurred:

But 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, which was designed “to secure ‘the widest possible dissemination of information from diverse and antagonistic sources,’ ” and “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”¹³

Far from being “our central value of political equality,” equal participation remains “wholly foreign to the First Amendment.”

Moreover, even if the government financed all campaigns, we would not have equal participation in elections. Proponents of government financing focus on one source of political inequality: money. They ignore all other sources of inequality such as a talent for speaking, the ability to write, good looks, media ownership and access, organizational ability, and so on. The proponents do not propose to restrain the many nonmonetary sources of influence perhaps because such talents are often found among the proponents of government financing of campaigns. The leveling impulse, they imply, should not restrict such political talents; only people with money should be excluded from political influence.¹⁴ Sometimes in public policy what is not regulated tells you more about a piece of legislation than what is covered. So it is with government financing of campaigns.

Enforcing equal participation would have other disadvantages. Imagine for a moment that politics aims at maximizing the preferences of citizens. If each voter holds his preference with equal intensity, simple majority rule will maximize aggregate preferences.¹⁵ Let's imagine, however, that a majority of voters are indifferent about imposing new restrictions on campaign finance; a minority, however, feel quite strongly that such restrictions violate the Constitution. In that case, simple majority rule over two alternatives may lead to less overall "satisfaction of preferences" because the intensity of preferences would be left out of voting.

Allowing freedom of speech and related spending helps take account of the intensity of preferences.¹⁶ In the *Federalist* no. 10, James Madison argued that majorities might override the intense preferences of religious minorities and wealthy individuals.¹⁷ We might also see freedom of speech and related spending as a way to allow such minorities to register intense preferences about public policy and thereby gain some protection from majorities who would always rule if each vote counts the same everywhere, every time.

Advocates of government financing may object that the intense preferences of the poor have no place in this model since they lack enough money to give to candidates or causes. In fact, the poor do not lack money for political contributions; they simply choose not to spend it contributing to campaigns. The average two-person poor household (annual income under \$10,000) in the United States spends a little more than \$500 annually on lotteries.¹⁸ In 2001, the United States had 9,540,000 households with an income of \$10,000 or less annually.¹⁹ Roughly stated, these households spend in total about \$5 billion annually on lotteries. The average poor household could, in other words, contribute to a candidate fully half the maximum legal limit during every two-year election cycle. But the poor apparently get more satisfaction out of playing the lottery than out of contributing to campaigns. That is their choice. But they could spend the money on candidates—it is obviously discretionary income—and thus make known the intensity of their preferences.

Proponents of government financing argue that public subsidies will enable new candidates to run who would otherwise be excluded from the race. They argue the candidates who now obtain funding reflect the investment and consumption preferences of wealthy and conservative individuals. They believe contributions reproduce the

inequalities of wealth in the economy and lead to a government that is unrepresentative of America.²⁰ This argument depends crucially on the stereotypical image of “fat cat” contributors devoted to conservative causes. Large donors may be unrepresentative of the United States as a whole—they do have more money than the average American—but that does not mean they hold vastly different political views than most Americans. In fact, a recent study indicates large contributors often identify themselves as Democrats and as liberal on the issues.²¹ That should not be so surprising. In 1998, National Election Studies found that almost one-third of the richest Americans identified themselves as liberals.²²

Finally, we should be clear how extensive, intrusive, and dangerous a government financing system would be. Keep in mind that the goal of equalizing financial resources in an election requires extensive control and oversight of all electoral spending. The election authority must immediately know about all spending by privately financed candidates and every dollar laid out by any group participating in an election. Public Campaign’s model legislation states that government-financed candidates must use a government-issued debit card that draws solely on funds in an account created by the government.²³ Those who believe government usually acts benevolently will not worry about such extensive oversight and control of political activity. Those who expect abuses when government takes total control over anything—and especially over campaigns—will worry.

Competition

Over the past 40 years, the percentage of the vote an incumbent member of Congress receives simply for being an incumbent has risen from 2 percent to 6 or 7 percent.²⁴ Similar increases in the advantages of incumbency have been observed in executive and legislature elections in the states.²⁵ Advocates of government subsidies say the need to raise large sums to challenge an incumbent explains why incumbents are hard to challenge. Government financing, they say, would overcome this barrier to entry by giving challengers tax money leading to a more competitive system.

Much depends on who designs the system of government financing. Spending levels strongly influence the competitiveness of challengers to incumbents. If a challenger can spend enough to make

his name and causes known, a government financing scheme might foster more competition. If legislatures enact the system, of course, incumbents will design and pass the law. They will be tempted to set spending limits low to favor their own reelections. For example, in 1997, Congress debated a government financing proposal that included spending caps: every challenger spending less than the proposed limits in Senate campaigns in 1994 and 1996 had lost; every incumbent spending less than the limits had won. Similarly, in the House, 3 percent of the challengers spending less than the proposed limits won in 1996, while 40 percent of the incumbents under the limits won.²⁶

Such legislative design issues may explain why government financing of campaigns has not *in fact* increased the competitiveness of elections. The leading study of government financing in the states concluded, "There is no evidence to support the claim that programs combining public funding with spending limits have leveled the playing field, countered the effects of incumbency, and made elections more competitive."²⁷ Believing that government financing will increase competitiveness seems to be a triumph of hope over experience.

Proponents of government financing may object that government financing laws passed by popular initiatives, not by incumbents, will enhance competition. Three states—Arizona, Massachusetts, and Maine—have recently passed full taxpayer financing of campaigns. The articles by Finneran, Mellor, Franciosi, and Basham and Zelder examine the outcomes of public financing in these states.

Congress also believed that the presidential public financing system would foster public debate and thereby electoral competition. My article in this volume asks whether the system has made American presidential elections more competitive compared with the fully private financing system it replaced.

The Paradox of Public Opinion

Public opinion polls have long indicated that majorities of Americans support campaign finance "reform." Surprisingly, polls also show that equally strong majorities oppose taxpayer financing of campaigns. Beyond surveys, more concrete and perhaps credible evidence shows Americans have little love for public financing of campaigns.

Public Opinion

Most polls show significant support for changing campaign finance regulations though the public assigns a low priority to such innovations.²⁸ At the same time, several polls suggest public disapproval of government financing of campaigns. In 1999, *CBS News* asked, "Public financing of political campaigns—that is, using tax money to pay for campaigns and prohibiting large donations from individuals and special interest groups—do you favor or oppose that?" Fifty-eight percent opposed government financing, while 37 percent supported it. Similarly, Rasmussen Research found in September 1999 that 56 percent of Americans opposed public funding of congressional campaigns. That same year a *Wall Street Journal/NBC News* poll indicated that only 17 percent of respondents thought tax funding for congressional candidates was the most important reform needed in campaign finance.²⁹ Some polls, especially one done at the behest of Public Campaign, show that the public supports government financing. It may well be that poll results in this area depend a great deal on wording.³⁰ Nevertheless, even when the wording of the question includes references to special interests, public financing does not attract majority support as noted in my article on taxpayer financing of presidential campaigns. On the whole, the public rejects public financing of campaigns.

Elections

The returns on ballot initiatives also paint a mixed picture. Maine passed its initiative in 1996 by a margin of 56 percent to 44 percent. Two years later, Massachusetts voters (by a 2-to-1 margin) approved an initiative modeled on the Maine legislation. Meanwhile, Arizonans approved comparable campaign finance restructuring, in the form of Proposition 200, by a narrow 51 to 49 percent margin. In 2000, two government financing initiatives lost badly. In Missouri, the Clean Money Proposition B lost by 65 to 35 percent, while in Oregon the Clean Money Measure 6 was defeated by 59 to 41 percent. Since 1996, voters in five states have passed judgment on government financing initiatives. Three have been approved and two have been rejected. We should also keep in mind that turnout to vote on the Maine and Arizona initiative reached 57 percent and 46 percent, respectively. That means the two initiatives passed with 32 percent

and 21 percent of registered voters in Maine and Arizona, respectively. We do not know if a majority of voters in either state supported full government financing of campaigns.³¹ The recent electoral history of “clean money” initiatives hardly suggests Americans are clamoring for government financing of campaigns.

Revealed Preferences

Polling may not be the best measure of public views on this issue. If I ask you whether you would like to own a Rolls Royce, you might well say yes in the abstract. Let’s say I give you enough money to buy a Rolls Royce. Faced with the actual concrete choice of whether to buy the car, you might elect to spend the money on other things. “Putting your money where your mouth is” better indicates a person’s views than simply responding to a telephone call.³²

Government financing schemes do allow citizens to “put their money where their mouth is” through tax add-ons or checkoff systems. States with such programs have experienced steady declines over the years in both participation and revenues. The declines were such that Minnesota had to appropriate \$1.5 million in 1993 to keep its program afloat.³³ My article in this collection explores the implications of declining participation in the presidential checkoff system. Americans who have the most experience with government financing of campaigns gradually withdraw their support. Their judgments should serve as a lesson for the rest of us.

Conclusion

Are Americans simply confused when they tell pollsters they want more regulation of campaign finance but do not want public financing of campaigns? Perhaps not. Both the support and the rejection have in common a distrust of government. If most Americans do not trust the government to do what is right because of campaign money, it makes sense that they would not trust public officials to spend money on political campaigns (including their own campaigns). Public distaste for public financing may well arise from the same attitudes that foster majority support for additional regulation of campaign finance.

Private Uses of Public Funding

Many Americans adopt a romantic view of politics and government. They believe that politicians and bureaucrats seek to achieve

the public interest through law and policy. In contrast, public choice analysts assume that individuals seek to advance their self-interest through politics and policymaking.³⁴ For example, the public choice theory of regulation assumes that “rational, self-interested individuals, groups, or industries seek regulation as a means of serving their own private interests.”³⁵ The reality of politics and government undermines the romantic view of many Americans, not least in the case of government financing of campaigns.

Private Uses of Government

How does politics work according to public choice? Start with the market. An economic market comprises a set of exchanges among individuals who seek to satisfy their preferences through trade. The process of exchange over time leads both to allocative efficiency in using social resources and to a particular distribution of wealth. Some people do not like those outcomes, especially if they have less wealth than they wish. These dissatisfied people urge government to intervene in the free market to improve their outcomes relative to what they would receive from open competition. Government may, for example, subsidize or directly transfer money from taxpayers to members of favored interest groups or industries. Governments may also regulate markets to reduce competition and thereby improve the prospects of individuals or groups who would do relatively worse under competition (i.e., if the regulation did not exist). To put some meat on these conceptual bones, let's look at some examples.

Government sometimes pays companies to produce goods or services that would not attract enough paying customers to survive in a competitive market. Ethanol is a motor fuel produced from corn. Since 1979, Americans have paid a tax subsidy of 54 cents per gallon of ethanol produced, a sum that by 2000 totaled more than \$11 billion.³⁶ Direct subsidies to farmers to grow and, in many cases, not to grow crops recently totaled \$20 billion annually.³⁷

Government also helps favored groups by limiting competition. For example, regulations protecting domestic firms from international competition transfer wealth from consumers to producers. Economists estimate that the steel tariffs enacted in 2002 will cost American consumers \$8 billion.³⁸ Similarly, airline regulations before

1978 limited competition and thereby transferred wealth from consumers to the managers and workers in the airline industry.³⁹

These special interests say the costs they impose on others serve the public interest. Those who receive the ethanol subsidy argue it contributes to American energy independence. Those who receive the farm subsidies say the money will preserve the small family farm and America's heritage. Trade protectionists often appeal to nationalism: American producers should be favored over foreign workers and owners whatever the cost. These claims of a larger purpose for government favors rarely have merit, a point to keep in mind as we look at government financing of political campaigns.

Direct Subsidies

Talk of purity and corruption aside, government financing proposals are typical special interest politics: They offer subsidies and regulatory protection to favored candidates. Political candidates require money to market themselves and their electoral program. Individuals and groups give money to candidates because they wish to advance their interests (the investment theory of contributions) or to express their political values (the consumption theory of contributions).⁴⁰ Candidates who seem likely to win (or compete well) or who espouse widely shared values attract sufficient funding to make their cases to the public.

The only candidates who seek or need government financing are those who lack appeal to donors. Such failure may be a personal setback. However, no one should care that a particular candidate or cause fails to attract enough support to run a campaign for office. No one loses sleep because investors do not capitalize buggy whip factories or projects to colonize Venus. Like a declining industry whose products find no buyers, failed candidates seek government subsidies for their campaigns for office.⁴¹

Who pays these subsidies? Advocates of government financing prefer that candidates be directly subsidized by the taxpayer. Richard Briffault, a law professor at Columbia University, defines government financing as a campaign finance system "in which candidates or political parties receive cash grants for campaign purposes from the public treasury."⁴² Public Campaign, an advocacy group that drafted the leading government financing model legislation,

notes that “the cost of establishing and maintaining a Clean Money / Clean Elections system will be borne principally by the public, via government funds.” It also warns that whatever revenue might be mustered for government financing “the money still has to come from the treasury, which means it’s a public expense.”⁴³

In practice, government financing schemes rely heavily though not exclusively on taxes. The federal system relies on a checkoff whereby a taxpayer directs a small part of his or her tax obligation to the presidential fund. Most states with partial government financing use either a checkoff system or a tax add-on whereby a citizen can increase his or her tax bill and direct the money to the government financing scheme.⁴⁴ The three states that have adopted full government financing rely on varied funding sources. Arizona imposes both an annual \$100 tax on lobbyists representing for-profit or commercial entities and a surcharge of 10 percent on all civil and criminal fines collected in the state.⁴⁵ Massachusetts relies on a checkoff and general tax revenues to fund its system; the law limits the whole appropriation to .1 percent of the state budget.⁴⁶ Maine funds its program through several sources; for the 2000 election, almost all the funding came from income taxes and a checkoff system.⁴⁷

Clearly, Public Campaign is correct. However artfully disguised, almost all funding for government financing schemes, especially for the full government financing model (the so-called “clean elections” model), comes from general tax revenues. Even when states do not rely on general taxes, government financing subsidizes favored candidates. The tax checkoff and add-on methods locate small contributors for a candidate. Normally, such search costs would greatly outweigh the \$1 or \$2 contribution generated from the donor. By socializing such search costs, checkoff systems foster contributions that would not exist otherwise. Such contributions should be considered in total as a subsidy to the candidates who receive them. Fines or fees, as in the Arizona case, devoted to a government financing scheme constitute a tax hike: if the fines or fees did not go to the candidates, they could be used to pay for other government costs, and citizens could receive a tax cut equal to the fines and fees. In other words, government financing means taxes are higher than they would otherwise be. The “fines and fee” option merely obscures the role of taxes in a government financing program.

Table 1.1
EFFECTS OF CONTRIBUTION LIMITS

Limit	Fixed Cost	No. of Contributors	Total Costs	Net Revenue
\$5,000	\$300	200	\$60,000	\$940,000
2,000	300	500	150,000	850,000
1,000	300	1,000	300,000	700,000
500	300	2,000	600,000	400,000
300	300	3,333	1,000,000	0

SOURCE: Author's calculations.

Protection from Competition

Under the Constitution, government may not prohibit altogether private contributions or spending in elections. Government-financed candidates face the danger that privately financed opponents may outspend them in the campaign. To meet this "threat" government financing schemes protect favored candidates through regulations and additional subsidies.

The 1974 Amendments to the Federal Election Campaign Act prohibit candidates who accept government financing for a presidential bid from raising private funds, thereby mandating exact equality of funding between the two major party candidates. Unless both candidates typically raised equal sums, government financing implied that at least one of the candidates would be protected from being outspent by the other.⁴⁸

Full government financing of campaigns controls private money in two ways: contribution limits and matching funds. Such laws often lower limits on contributions to candidates outside the government subsidy system. Arizona's law reduced by 20 percent existing contribution limits for candidates refusing to take public money.⁴⁹ Lowering limits does not prohibit candidates outside the subsidy system from raising money. It does, however, increase the cost of fundraising. Let's see how that would decrease electoral competition.

A candidate running for an office supported by private donors must raise enough money to be competitive. He must raise that minimal sum within contribution limits. Raising campaign funds incurs large fixed costs associated with identifying individuals willing to give up to the maximum allowed by law. Table 1.1 shows

the effects of lowering contribution limits on a hypothetical candidate who needs to raise \$1 million to be competitive with fixed costs of \$300 per contributor. As limits are lowered, the need to find more contributors to give the maximum (compared with a system with higher contribution limits) drives total costs up and net revenue down.

By reducing net revenue across the range, lowered contribution limits make it harder to run for office outside of the government financing system. All things being equal, higher costs for anything lowers the demand for it. By lowering contribution limits, government raises the transaction costs of running for privately financed candidates. That elevation in costs should lead to fewer privately financed candidates running against government-financed candidates. The rising sums in the "total costs" column also serve as an entry barrier to competition from privately financed candidates. It is much easier to run for an office if you must raise \$40,000 rather than \$400,000.

Public Campaign's model legislation also provides that "If participating candidates are outspent by nonparticipating opponents or targeted by independent expenditures, they may receive additional, matching funds with which to respond."⁵⁰ The Arizona law does not subject privately financed candidates to the spending limits of the law. However, if their spending exceeds the government-financed candidate, the latter receives funds to match the campaign spending of the nonparticipating candidate up to three times the original limit.⁵¹ The matching funds provision includes spending by independent groups that are not part of a privately financed candidate's campaign and yet are deemed to be supporting his candidacy.⁵² Taken together, these regulations and subsidies mean that a government-financed candidate will avoid being outspent by a privately financed opponent and by independent groups.

Recipients of the Subsidies

Who receives government subsidies for political campaigns? The laws in question set conditions to qualify to receive government funding. A typical condition would be that a candidate must raise one thousand \$5 contributions from a district to qualify for government support. This requirement can add up to contributions from as few as one-quarter of one percent of the voting age population.⁵³ This hardly indicates broad grassroots support for a candidate.

Experience indicates that government financing tends to favor certain types of candidates. The political scientists Michael Malbin and Thomas Gais found sharp partisan differences in candidate participation. They studied gubernatorial elections in 11 states from 1993 to 1996 and found that 82 percent of Democratic candidates took taxpayer funding, while only 55 percent of Republican candidates participated.⁵⁴ Their data on legislative elections in Minnesota and Wisconsin show a similar partisan divide.⁵⁵ Malbin and Gais attribute these partisan variations to the libertarianism of Republicans: candidates who philosophically oppose government subsidies often do not accept them. In other words, government financing in practice provides an advantage to nonlibertarian candidates.

Full government financing of campaigns in Arizona and Maine tells a similar story. In the 2000 election in Arizona, 41 percent of Democratic candidates and 50 percent of Green Party candidates received public subsidies for their campaigns; 8 percent of Republicans accepted government money in the general election, while no candidates of the Libertarian Party took the subsidy.⁵⁶ In Maine's 2000 election, 43.4 percent of Democratic Party candidates chose government financing compared with 24 percent of Republicans.⁵⁷

The Moral Dimension

Government financing of campaigns looks a lot like other political activity by individuals and groups that do not do well in private markets. Declining parts of the economy—say, small farmers and large steel mill owners—want government help to overcome their own mistakes or unfavorable economic changes. Similarly, candidates who have little appeal to voters and campaign contributors seek public subsidies (like farmers) and regulatory protections from competition (like steel mill owners).

Government subsidies for candidates, however, are crucially different from funding for ethanol. Government financing of campaigns takes money from taxpayers and gives it to a subset of all political candidates. For that reason, government financing seems either unnecessary or immoral. It is unnecessary if a taxpayer agrees with the candidate supported by the subsidy; the taxpayer may simply give the money directly to the candidate.

If, however, the taxpayer disagrees with the candidate, taxing him to support that candidate is immoral. An example will make clear

the immorality of the policy. Imagine I had the power to force Nick Nyhart, the Executive Director of Public Campaign, to contribute to the Cato Institute, thereby supporting the writing and marketing of the very arguments against government financing you are reading right now. Such compulsion would strike most Americans as wrong. We think individuals should not be forced to support ideas that contravene their deepest commitments, whether those commitments are religious, social, or political.⁵⁸ Government financing schemes, however, transfer money from taxpayers to political candidates and their campaigns. Inevitably they force liberals to support conservatives, Democrats to support Republicans, and vice versa.

Conclusion

Advocates of government financing of campaigns employ emotionally charged rhetoric at every turn. They implore us to “reform” the system to root out “corruption” and attain “clean elections.” The reality of government financing belies this expansive rhetoric. Such proposals, especially the “clean elections” variant, simply transfer wealth from taxpayers to a preferred set of candidates and causes. That preferred set inevitably excludes candidates who believe forced transfers of wealth are immoral (such as Libertarians and Republican candidates with a libertarian outlook). Not surprisingly, government financing in the states has favored candidates of the left (such as Democrats and third parties like the Greens). For that reason, government financing of campaigns serves private goals through public means. Far from being a reform, government financing offers more “politics as usual,” understood as the struggle to obtain special favors from government.

Those who wish to support the candidates and causes favored by government financing may do so now; they need only send their check to the candidate or cause they favor. Government financing forces all taxpayers to financially support candidates they would not otherwise support, candidates whose views they may find repugnant. On the question of government financing of campaigns, Thomas Jefferson should have the last word: “To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.”⁵⁹

Notes

1. "Campaign Finance, 1991–1992 Legislative Chronology." CQ Electronic Library, CQ Public Affairs Collection, catn89-0000013716. Originally published in *Congress and the Nation*, 89–92, vol. 8 (Washington, DC: CQ Press, 1993).
2. Michael J. Malbin and Thomas L. Gais, *The Day after Reform: Sobering Campaign Finance Lessons from the American States* (Albany, NY: Rockefeller University Press, 1998), pp. 22–23.
3. For a good review of the different allegations of corruption, see Andrew C. Geddis, "Campaign Finance Reform after McCain-Feingold: The More Speech–More Competition Solution," *Journal of Law and Politics* 16 (Summer 2000): 585–90.
4. For a recent review of the evidence, see Stephen Ansolabehere, John M. de Figueiredo, and James M. Snyder Jr., "Why Is There So Little Money in American Politics?" *Journal of Economic Perspectives* 17, no. 1 (Winter 2003): 105–30; and Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform* (Princeton, NJ: Princeton University Press, 2001), pp. 127–28.
5. Geddis, "Campaign Finance Reform after McCain-Feingold," p. 585.
6. Richard Briffault, "Public Funding and Democratic Elections," *University of Pennsylvania Law Review* 148 (December 1999): 579.
7. About 20 percent of individuals surveyed by the National Opinion Research Center in the mid-1980s reported having contributed "money to a political party or candidate or to any other political cause" in the past three or four years. See Codebook variable GAVPOL, question 352, available at www.icpsr.umich.edu/GSS/index.html.
8. Briffault, "Public Funding and Democratic Elections," pp. 577–78.
9. See Annotated Model Legislation for Clean Money/Clean Elections Reform, available at www.publiccampaign.org/model_bill/index.html. (Hereafter cited as PC Model.) This website does not have pagination. However, the reader may easily confirm the quote by using the search function of his or her browser. See also Molly Peterson, "Reexamining Compelling Interests and Radical State Campaign Finance Reforms: So Goes the Nation?" *Hastings Constitutional Law Quarterly* 25 (Spring 1998): 445. "Equality of opportunity to influence the political process, sometimes characterized as 'leveling,' should be recognized as a constitutionally compelling governmental interest."
10. Justice Black, opinion, *Wesberry v. Sanders*, 376 U.S. 1 (1964) at 7–8.
11. *Reynolds v. Sims*, 377 U.S. 577 (1964).
12. John E. Nowak and Ronald D. Rotunda, *Constitutional Law*, 6th ed. (St. Paul, MN: West Group, 2000), p. 969.
13. *Buckley v. Valeo*, 424 U.S. 1, 49 (1976).
14. Bradley A. Smith, "Some Problems with Taxpayer-Funded Political Campaigns," *University of Pennsylvania Law Review* 148 (December 1999): 614.
15. James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy in the Collected Works of James M. Buchanan*, vol. 3 (Indianapolis: Liberty Fund, 1992), p. 127.
16. This preference does not mean freedom of speech and related spending are identical to voting. It does mean they supplement voting in the political system.
17. James Madison, "Federalist No. 10," in *The Federalist*, ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961), pp. 58–61.
18. Charles T. Clotfelter, Philip J. Cook, Julie A. Edell, and Marian Moore, "State Lotteries at the Turn of the Century: Report to the National Gambling Impact Study

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Commission," June 1, 1999, Table 11, available at www.pubpol.duke.edu/people/faculty/clotfelter/lottrep.pdf.

19. See the Census Bureau, Table HINC-01, "Selected Characteristics of Households, by Total Money Income in 2000," available at http://ferret.bls.census.gov/macro/032001/hhinc/new01_001.htm.

20. Briffault, "Public Funding and Democratic Elections," p. 575.

21. John McAdams and John C. Green, "Fat Cats and Thin Kittens: Small Versus Large Campaign Contributions" (paper, 2002 Annual Meeting of the Midwest Political Science Association, April 2002). See Table 4, p. 21, which indicates that 34.6 percent of large contributors in this survey identify with the Democratic party. Also, 17.4 percent of large donors identify themselves as liberal or very liberal on economic issues. A significant percentage of donors also identify themselves as liberal or very liberal on social issues (38.1 percent), on foreign policy issues (21.1 percent), and racial issues (34.7 percent). And, 57 percent of the large donors thought that the United States has been spending too much on defense.

22. To be precise, 32 percent of Americans at the 96th income percentile and above identified themselves as liberal. See the National Election Studies, Center for Political Studies, University of Michigan, *The NES Guide to Public Opinion and Electoral Behavior* (Ann Arbor, MI: University of Michigan, Center for Political Studies [producer and distributor], 1995–2000), Table 3.1.1, available at www.umich.edu/~nes/neguide/2ndtable/t3_1_1.htm

23. See PC Model.

24. Stephen Ansolabehere, Charles Stewart III, and James M. Snyder Jr., "Old Voters, New Voters, and the Personal Vote," *American Journal of Political Science* 44 (January 2000): 17.

25. Stephen Ansolabehere and James M. Snyder Jr., "The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices 1942–2000," *Election Law Journal* (forthcoming).

26. Smith, *Unfree Speech*, p. 101

27. Malbin and Gais, *The Day after Reform*, p. 137.

28. William G. Mayer, "Public Attitudes on Campaign Finance," in *A User's Guide to Campaign Finance Reform*, ed. Gerald C. Lubenow (Lanham, MD: Rowman and Littlefield, 2001).

29. See the poll results available at <http://nationaljournal.com/members/polltrack/1999/issues/99campaignfinance.htm>.

30. Richard Morin, "Who Supports Public Campaign Financing?" *Washington Post*, June 5, 2000.

31. For Maine, www.state.me.us/sos/cec/elec/ref96n1.htm. I am indebted to Robert Franciosi of the Goldwater Institute for the numbers on Arizona.

32. See Robert Weissberg, "Why Policymakers Should Ignore Public Opinion Polls," Cato Institute Policy Analysis no. 402, May 29, 2001, available at www.cato.org/pubs/pas/pa-402es.html.

33. See Malbin and Gais, *The Day after Reform*, pp. 68–70, especially Tables 4-1, 4-2, and 4-4.

34. For an introduction to public choice, see Gordon Tullock, Gordon Brady, and Alan Seldon, *Government Failure: A Primer in Public Choice* (Washington, DC: Cato Institute, 2002). See also James M. Buchanan, "Politics without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications," in *The Collected Works of James M. Buchanan*, vol. 1 (Indianapolis: Liberty Fund, 1999), p. 46.

35. See Burton Abrams and Russell F. Settle, "The Economic Theory of Regulation and the Public Financing of Presidential Elections," *Journal of Political Economy* 86 (April 1978): 247.

36. See General Accounting Office, "Petroleum and Ethanol Fuels: Tax Incentives and Related GAO Work," Report no. RCED-00-301R, September 25, 2000, pp. 15–17.

37. See Chris Edwards and Tad DeHaven, "Farm Subsidies at Record Levels as Congress Considers New Farm Bill," Cato Institute Briefing Paper no. 70, October 18, 2001, available at www.cato.org/pubs/briefs/bp70.pdf.

38. Steven Pearlstein, "Bush Sets Tariffs on Steel Imports," *Washington Post*, March 2, 2002, p. E2.

39. Sam Peltzman, "The Economic Theory of Regulation after a Decade of Deregulation," *Brookings Papers: Microeconomics*, 1989.

40. Charles Stewart III, *Analyzing Congress* (New York: Norton, 2001), pp. 218–19.

41. A reader may object that the American political system favors the two major parties through ballot access laws and the plurality rule. Perhaps so, but that argument suggests the problem for third parties is the institutional context of American politics, not a lack of money. Government financing would only address the symptoms of the larger institutional malady.

42. Briffault, "Public Funding and Democratic Elections," p. 566.

43. See PC Model.

44. Malbin and Gais, *The Day after Reform*, p. 54.

45. See John Fry, "The Citizens 'Clean' Elections Act: A Cure as Bad as the Disease," *Arizona State Law Journal* 31 (Winter 1999): 1377.

46. Kevin Deeley, "Recent Legislation: Campaign Finance Reform," *Harvard Journal on Legislation* 36 (Summer 1999): 556.

47. See the original Maine initiative available at www.state.me.us/sos/cec/elec/intcon.htm#q3. The initiative provides \$2 million in general taxes to fund the system.

48. When the presidential system was established, the Republicans enjoyed an advantage in fundraising. Equalizing expenditure may have cost Gerald Ford the presidency in 1976. Abrams and Settle, "The Economic Theory of Regulation and the Public Financing of Presidential Elections."

49. Robert J. Franciosi, "Is Cleanliness Political Godliness?: Arizona's Clean Elections Law after Its First Year," Goldwater Institute, *Arizona Issue Analysis* 168 November 2001, p. 5. Available at www.goldwaterinstitute.org.

50. See PC Model.

51. See Fry, "The Citizens 'Clean' Elections Act," pp. 1377–78.

52. See PC Model.

53. PC Model states, "Based on discussions with expert signature gatherers and fund-raisers, and on the experience of the one locale in the U.S. that has been using a similar qualifying requirement (Tucson, AZ), the Working Group on Electoral Democracy set the requirement for a candidate running in a district with a population of approximately 500,000 (e.g., one congressional district) at 1,000 Qualifying Contributions. The Wellstone-Kerry bill sets the required number of Qualifying Contributions for U.S. Senate candidates at one-quarter of 1 percent of the voting age population of the state, or 1,000 such contributions, whichever is higher."

54. Malbin and Gais, *The Day after Reform*, p. 62.

55. *Ibid.*, p. 71, Table 4-9. In recent years, Minnesota legislative elections indicate fewer differences in partisan participation rates.

56. Franciosi, "Is Cleanliness Political Godliness," p. 8.

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57. See Chapter 5 in this book for more information. In the Maine House elections only five independent or minor party candidates received government assistance. This number seems too small to support any conclusions.

58. Of course, majorities do often compel minorities to financially support policies they find unwise. I have to pay taxes to build a road that I think endangers the environment. But compelling political speech through government financing is more like establishing a state church than like building a highway. Forcing me to contribute to an unwise highway project does not implicate my conscience and deepest convictions.

59. Thomas Jefferson, "A Bill for Establishing Religious Freedom," in *The Portable Thomas Jefferson*, ed. Merrill D. Peterson (New York: Viking Press, 1975), p. 252.

2. The Case against Taxpayer Financing: A View from Massachusetts

Thomas M. Finneran

In 1998 a small part of the electorate in Massachusetts approved the so-called Clean Elections ballot initiative. This law established taxpayer financing for candidates for state office who agree to observe spending limits. The specific limits and funding vary according to the office in question. The law covers candidates for the six statewide offices (Governor, Lieutenant Governor, Attorney General, Treasurer, Secretary, and Auditor), the Governor's Council, and the General Court (the Senate and the House of Representatives). The first election under the Clean Elections system took place in 2002. I have opposed this law for several reasons.

Public support for the so-called Clean Elections initiative is based on a raft of half-truths and illiberal theories. In general, the prevailing thought among those who support taxpayer-funded political campaigns can be summarized as follows: "Democracy is dying. The cancer that is killing it is the money in political campaigns. To restore democracy to health, we should inject more money into campaigns, albeit tax dollars, thereby leveling the playing field between incumbents and challengers to mute the effect of special interest donations."

My opposition to taxpayer-funded political campaigns is based on several arguments derived from more than 20 years of participation in electoral politics.

- I reject the premise that democracy in Massachusetts or in the United States is dying.
- I reject the premise that spending corrupts policymaking.
- I believe that the vehicle designed to bring "reform" to Massachusetts democracy, the 1996 so-called Clean Elections law, is deeply flawed, with nearly nonexistent controls and laughably low barriers of entry.

- I believe that ballot initiatives are dangerous in their simplistic and unamendable approach to complex issues, divorced from the realities of competing interests and choices, and corrosive of the constitutional framework of representative democracy.

Allow me to set out each argument in turn.

Democracy Lives

Proponents of taxpayer-funded political campaigns have argued that democracy is dying a slow death in the Commonwealth and across the nation. They base this claim on the dearth of contested House and Senate primary and general elections—supposedly due to the ability of incumbents to raise so-called “treasuries” of campaign donations to beat back challengers.

It should come as no surprise that there were fewer challenges to House seats in 2002 in Massachusetts than there were in the elections of 2000. The state budget had increased approximately 5 percent (nominally) over that time, providing ample opportunity for incumbent officials to fund new initiatives sought by the electorate and in many cases to bring state aid to their home districts. State funding for education, almost always the most popular public policy program among voters, has increased nearly \$7 billion in the last 10 years alone. Add to that a record 42 tax cuts that have been passed by the House and Senate during the last 7 years, and perhaps it becomes easier to understand an election atmosphere that lacks outrage and impetus for change.

Put succinctly, incumbents are motivated toward reelection. Tending to a constituency is critically important to achieve reelection. Yet a candidate’s (or a body of candidates’) interest, desire, and ability to serve and satisfy constituent services is disregarded by reform advocates as being even partially responsible for reelecting incumbents. In truth, it would be disingenuous to assume that the electorate in Massachusetts is perfectly satisfied with their representatives and senators, and false to declare that this alone could contribute to a decrease in legislative contests. It is equally disingenuous, however, to completely disregard the effect of recent state spending and tax cuts as well as the ability of an individual elected official to acquire state aid for programs in his district. It seems these recent actions constitute a body of reasons that explain the reduction in political contests better than the elementary diagnosis of “political

contributions" so freely thrown out during debate. In actual practice, challengers are primarily guided more by their perception of the incumbent's "vulnerability" on key issues than by their own ability to raise money. Those who discover political vulnerability then find the means to fund the campaign. The breadth and depth of the perceived vulnerability will determine the amount raised.¹ Votes are not "bought." Rather, they are found through the exposure of the political vulnerability and the proposal of alternatives. It is that process that is funded by campaign contributions.

It is also worthy of notice that reformers have paid no heed to the effect of redistricting, a wholly political process that typically gives preference to incumbent officials in the redrawing of district maps. The law does nothing to stop gerrymandering of districts on behalf of incumbents. To the contrary, the Voting Rights Act encourages majority-minority districts and allows those charged with redistricting to take political considerations such as party registration and voting patterns into account. Now, advanced computer software has made redistricting an even more precise process, thereby contributing to the success of incumbents.

Participation, Not Corruption

The advocates of taxpayer financing also assert that private campaign contributions are inherently corrupting. Absent from their claims is statistical evidence of any sort that might support their declarations that "corruptive" campaign contributions stymie electoral contests. They freely assert in the court of public opinion that campaign contributions are corrupting; and these claims go completely unchecked by the press and others. Auto insurance rates go up—blame that on the campaign contributions made by the auto insurance lobby. Electricity bills go up—blame that on the electric utility lobby. Prescription drug prices increase—blame that too on big pharmaceutical companies and their effect on the public policy by way of contributions to influential and pragmatic politicians. Yet there is no evidence for these libels nor is there any recognition of the broad array of social and economic factors that drive up the costs of the previously referenced products and services.

There is no evidence to support the supposed correlation between specific campaign contributions and changes in state laws or appropriations. It is malfeasant to make this false assumption without

controlling for changes in demographics, positive changes in real incomes, changes in voter/candidate preferences and attitudes toward campaigns, the power of name recognition associated with incumbents, the relative success and popularity of incumbents, and absolute changes within districts caused by decennial redistricting. In my personal experience, greater economic opportunities in other industries, intrusive state ethics disclosure laws, a loss of privacy, and the aggressive growth of ambush journalism are all factors that potential candidates have cited as reasons for failing even to consider running for public offices.

Several professors from the Massachusetts Institute of Technology have recently concluded a statistical analysis of so-called political “rent-seeking,” which pointedly refutes the claim that campaign contributions by big business lobbyists have secured the public policy agenda of the nation.² Their results are stunning in that they statistically refute every claim made by advocates of taxpayer-funded campaigns. The professors specifically researched why there is such a huge discrepancy between the amounts of money contributed to federal political campaigns and the changes in federal appropriations. They concluded that the premise that campaign contributions are a form of rent seeking—that is, it is a marketplace where contributions “purchase” influence or votes—strains basic economic principles.

They concluded instead that campaign contributions are a form of political participation or consumption. They also determined that approximately 80 percent of political donations come from individuals who are more likely to participate in campaigns in other ways as well (for instance, canvassing voters or holding political signs). The authors go on to say that trends in aggregate spending over the last 100 years are explained entirely by growth in personal income, not in rent seeking. In other words, if there were a real expectation of a “fair return” for contributions, such contributions would track more closely—that is, increase—to increases in federal appropriations than to increases in personal growth.

Finally, the authors determined that campaign spending, as a percentage of national income, did not grow during the last nine decades of the 20th century—if anything it probably has fallen. Campaign contributions are not increasing out of control, as taxpayer-funded campaign advocates would have you believe. Al-

though the study was about national political campaigns, the results are statistically significant and cannot be ignored. The authors' findings can surely be extrapolated and used to further understand our political situation in Massachusetts. This challenges the general public discourse about reform.

Problems with the Law

Advocates for taxpayer-funded political campaigns have held up the so-called Clean Elections model as a cure for an allegedly ailing democracy. Yet little attention is paid to the "reform" itself, its potential for fraud, and its embedded perverse incentives that invite limited or one-issue candidates—those candidates who are normally weeded out by a regular election process.

In the 2002 election, the first year that the Clean Elections law was enacted and available for candidates for state office, at least one candidate did in fact cheat the system. Again, the incentives are perverse. Candidates must simply collect the required number of signatures and collect the required number of small donations and thereby qualify for several tens of thousands of dollars (in a legislative race) or millions of dollars (in a gubernatorial race) to be spent at their discretion to further their political agenda.

Shortcomings of Ballot Initiatives

My final argument against taxpayer-funded political campaigns is a more fundamental one: I appreciate and trust and respect the representative form of government set up by the Massachusetts Constitution in 1782. I believe that ballot referendums can be useful tools to guide the legislative process. But I also believe there is ample opportunity for mischief and abuse, especially when dealing with complex public policy matters. I find it unsettling to think that a small group or special interest can hijack a state's legislative agenda via the ballot referendum.

The Clean Elections law illustrates why ballot questions are poor mechanisms for deciding complex issues. Funding of the Clean Elections advocacy group was provided by a small group of very wealthy, out-of-state donors. The gathering of the signatures required to achieve ballot placement was done by paid workers. The very question put to voters itself was deceptively misleading. Asking voters if they preferred "clean elections" (as opposed to

preferring “dirty” elections?) is akin to seeking their views of motherhood and apple pie. In the 1998 state election, the Clean Elections referendum was successfully passed by the voters on the basis of such manipulative ballot language. The same measure was reworded and placed before the electorate again in 2002 and was easily defeated by the largest referendum margin in the state’s history. In contrast to 1998, the 2002 ballot language clearly and fairly described how tax revenues would be used to pay for political campaigns. In this corrected form, voters rejected that use of tax revenues and saw the Clean Elections issue for what it really was: a form of political welfare and a blatant misuse of public funds.

Advocates may make a Machiavellian argument that the ends might justify the taxpayer-funded means, but I find that to be weak, circular logic—logic that is debunked by a slew of one-issue candidates holding opposite positions on popular or important funding priorities. Such perversions of the referendum process have blossomed into a whole cottage industry of people eager to see their own special interests pursued, whether it be “clean” elections, animal rights, or socialized health care. As a result, the useful referendum measure has been hindered across many states. In Massachusetts, opposing certain ballot initiatives is deemed to be legislative leadership, while opposing certain others is vilified as democratic treason.

The Real Special Interests

Advocates for taxpayer financing in Massachusetts talk a lot about the alleged influence of special interests. But we should examine more closely those who are really making self-serving arguments.

The alleged public outcry for taxpayer-funded political campaigns has been coming from fringe activists whose demand for public funds is driven by the widespread resistance to their political agendas as well as by the refusal of private citizens to provide financial support for radical social and economic proposals. Ironically, it is doubtful that these same advocates for political and personal subsidies would support so enthusiastically this measure if libertarian, anti-tax, or pro-business candidates applied for Clean Elections funds to run for House and Senate seats. Alas, we are unlikely to enjoy such a spectacle of hypocrisy because the ideological inclination of these latter candidates is in strong opposition to public expenditures for private or personal objectives.

Advocates for taxpayer-funded campaigns are also strongly supported by the media, which also have a strong financial self-interest to see a Clean Elections-type law passed in this state. Most campaign contributions go to media enterprises in the form of political advertising, both in the print media and on the airwaves. A Clean Elections law would raise the amount of spending on such advertising to untold amounts, benefiting those specifically who claim the moral high ground on this issue.

Of course, one might present to the media a specific challenge to their editorial words and their corporate actions. If money in politics corrupts, then we should not infuse the process with more money (albeit “clean money”). Better we should make it unnecessary to raise large treasuries in the first place. To wit, force news outlets, both print and electronic media, to offer free and equal political advertising in the name of good public policy. Ironically, this idea has not even been broached in our state, failing to be offered once in the newspapers or on television as a viable alternative to “improve” the electoral process. When a similar idea was put forward in Congress the media’s attack on it was predictably ferocious and self-serving.

Conclusion

Taxpayer funds spent on political campaigns—to buy balloons, bumper stickers, and buttons—are taxes diverted from other public policy initiatives. Tax expenditures for education, public safety, transportation, and certain forms of health care enjoy broad public support. Indeed, our present system of competitive and representative democracy has been remarkably successful in providing for the necessary health, education, and welfare of our citizens. Elected officials at all levels of government try to sift the incessant demand and clamor of claims on the public fisc to arrive at a mix and balance of interests and services. Our constitutional respect for individual liberty and freedom, as well as for private property and individual enterprise, have combined to give us the highest standard of living in the history of the world. That is no accident. Our political and economic systems have proved themselves over the long course of history. The hostile attacks of those who espouse different political and economic systems conveniently ignore the blessings of liberty and economic opportunity. They also conveniently overlook the

toxic histories of nations, cultures, and systems that place the state at the center of society.

Notes

1. Academic studies confirm my observation. See Jay Goodliffe, "The Effect of War Chests on Challenger Entry in U.S. House Elections," *American Journal of Political Science* 45 (2001): 830–44.

2. Stephen Ansolabehere, John M. de Figueiredo, and James M. Snyder Jr., "Why Is There So Little Money in U.S. Politics?" *Journal of Economic Perspectives* 17, no. 1 (Winter 2003): 105–30.

3. Three Lessons from Arizona

Chip Mellor

With high-blown rhetoric and promises to clean up corruption in elections, several states have passed a handful of campaign finance laws in recent years. Supporters of these laws hail them as the future of American politics. Yet experience to date should give all but the most partisan proponent reason to be wary of such a future. Indeed the lessons to be drawn from state experiments in campaign regulation reveal three consistent infirmities: (1) dubious constitutionality, (2) perverse incentives, and (3) chronic underfunding. Each of these alone denies the fundamental premises of campaign finance reform. Taken together, they constitute a fatally flawed intervention in electoral politics that threatens the very institution of American democracy. This article explores these three lessons and the real-world impact they have had in states that have led the way in campaign finance reform.

A Look at Arizona's Citizens Clean Election Act

In 1998 Arizona voters approved Proposition 200, the Citizens Clean Election Act, during the November general election. Spearheaded by the Arizonans for Clean Elections, this initiative purported to improve the integrity of Arizona state governmental practices, encourage political participation, and protect the Arizona voters' right of free speech under both the state and federal constitutions.¹

Before the Act was implemented, election campaigns in Arizona were subject to statutory funding limitations. As stated in findings adopted by the Arizona electorate through its approval of Proposition 200, the Citizens Clean Election Act was enacted to remedy the problems arising from the strong impact that special interest funding has on state elections. Various ills listed in the introductory section of the Act include (1) the facilitation of elected officials' acceptance of large contributions from special interest groups over which they

have governmental jurisdiction, (2) the favoring of incumbents to the detriment of their challengers, (3) the marginalization of the Arizona majority's influence, and (4) the maintenance of a system whereby qualified candidates unable to secure private funding are discouraged by the prohibitive start-up costs of running a campaign.²

The new system initiated by the Act provides public campaign financing for qualifying candidates. In accepting publicly funded campaign money, these candidates agree to limit their contributions and expenditures. For candidates who do not wish to receive public funds for their campaigns, the Act reduces the cap on donor contributions by 20 percent.³ Nonparticipants are free of the spending limitations of the Act, but should their total spending exceed the sum given to their publicly funded opponent, the public fund administrators would distribute a matched sum to that candidate.⁴

To be eligible for the public funding, a qualified candidate must collect a specified number of \$5 contributions from registered voters. The number of contributions needed to qualify varies depending on the office sought.⁵ The contribution monies are then routed to the Clean Elections Fund. Once certified, a qualified electoral candidate will then be able to collect public funds, distributed in varying amounts based on the office, race, and existence of opposition candidates.⁶

Money is distributed to the Clean Elections Fund in several ways: (1) a checkoff system wherein taxpayers contribute \$5,⁷ (2) a dollar-for-dollar tax credit of either \$500 or 20 percent of taxes owed, whatever amount is greater, (3) a \$100 annual fee imposed on certain types of lobbyists,⁸ and (4) a 10 percent additional surcharge imposed on civil and criminal fines. The latter category includes fines assessed for criminal offenses and civil penalties such as traffic violations and motor vehicle infractions.⁹

This last category, surcharges imposed on civil and criminal fines, presents problems of constitutionality.¹⁰ The collected surcharge fees from parking tickets and motor vehicle infractions are deposited into the Clean Elections Fund and from there are distributed to various campaigns of qualifying candidates. An Arizona resident who pays the fee for a parking ticket fine to the parking violation office will also be contributing to the candidacy of a political candidate, perhaps even one with whom he disagrees. The act of giving funds to a political campaign is a form of political speech, and just

as First Amendment rights are implicated when an individual is prohibited from contributing money to the political campaign of his choice, the opposite is also true.¹¹ That is, First Amendment freedoms are infringed upon when individuals are compelled to make contributions for political purposes.¹²

In the seminal case *Buckley v. Valeo*,¹³ the United States Supreme Court upheld a publicly financed campaign system against a First Amendment challenge. By checking off a box on their tax forms, taxpayers could donate a small amount of their tax liability to a presidential campaign fund.¹⁴ The Court declared that the fund was similar to any appropriation from the general revenue but for the fact that the amount collected derived from the total number of taxpayer authorizations.¹⁵ Congress need not provide taxpayers the ability to specifically designate the recipients of the funds.¹⁶

This precedent established that public campaign financing is not, in its very nature, unconstitutional. Nonetheless, in *Buckley* the Court only examined a system in which taxpayers could voluntarily donate part of their tax liabilities. The government did not *compel* donations to the presidential fund nor did it single out specific groups or individuals to bear the burden of campaign financing.

When confronted with the issue of compulsion, the Court has struck down subsidies for political speech in two instances that are particularly pertinent to Arizona's Citizens Clean Election Act. First, in *Abood v. Detroit Board of Education*,¹⁷ the Court invalidated a union practice whereby teachers who were not union members were forced to contribute service fees equal to the dues charged union members. This system of mandatory payment ensured that no teacher would gain a free ride by accepting the benefits derived from the collective bargaining of the union, while refusing to contribute to its cause. These funds, however, also went to political campaigns and the expression of political beliefs. The Court held that the fees collected from the nonunion teachers could not be distributed to such political causes; the union could only constitutionally expend funds on activities or causes germane to its position as a representative of the teachers for collective bargaining purposes. Nevertheless, this ruling did not limit the union's ability to spend money on political matters, as long as the funds were collected from teachers who did not object to the political or ideological causes supported.

Second, the Supreme Court ruled in *Keller v. State Bar of California*¹⁸ that the California State Bar could not use its mandatory membership

dues to fund political activities such as endorsing a gun control initiative because such an issue was not germane to the associational goals of the State Bar.¹⁹

Both of these cases show that voluntary associations may compel members to subsidize organizational speech related to the purposes of the association (e.g., collective bargaining). Even this power is circumscribed by First Amendment concerns, however, because collected funds may only subsidize speech that is germane to the purposes behind the association. When an involuntary association exists, then the rationale for compelled subsidization disappears.²⁰ The surcharges tacked on to parking ticket fines in Arizona constitute speech subsidized by individuals who have not joined a voluntary association. The surcharges are thus unconstitutional compelled speech.

The Supreme Court later extended the holding of *Abood* to compelled speech that was not political. In *U.S. Department of Agriculture v. United Foods, Inc.*,²¹ the Court invalidated a federal statutory scheme that enabled the Secretary of Agriculture to establish a Mushroom Council with the authority to impose assessments upon fresh mushroom handlers. The assessments could be distributed to mushroom research activities but often were expended on generic advertisements promoting mushrooms.²² United Foods, Inc., a Tennessee-based agricultural corporation, challenged the system of mandatory assessments as a violation of its First Amendment rights.

In finding that the statutory scheme was unconstitutional, the Court noted that in contrast to the associations in the *Abood* and *Keller* cases, the Mushroom Promotion, Research, and Consumer Information Act did not require any sort of “group action” except that pertaining to speech in the form of generic advertisements.²³ The statute compelled contributions for purposes of the speech alone and did not constitute part of a larger regulatory scheme that would justify the subsidies for associational purposes.²⁴ Upholding the statute would rob the *Abood* and *Keller* cases of their significance, the Court noted, because then speech could be found to be germane to itself.²⁵ This would then qualify almost any type of compelled speech as constitutional.

Following the analysis in the cases discussed earlier, the surcharges imposed on Arizona parking ordinance violators would seem obviously to constitute speech germane only to itself. The individuals faced with the additional percentage on their parking

finer have not voluntarily associated for a greater purpose that would justify mandatory assessments, and the compelled speech they are subsidizing bears no relation to their "association." Some of those fined may prefer not to speak at all and would rather the surcharge not be distributed to any political campaign.

Supporters of Arizona's Citizens Clean Election Act argued that the surcharge provision was constitutional because it distributed funds neutrally among viewpoints. This rationale arises from the recent United States Supreme Court decision *Board of Regents of the University of Wisconsin System v. Southworth*.²⁶ In this case the Supreme Court found the examination of whether compelled speech was germane to the purposes behind an association inapplicable to the university context. A group of students at the University of Wisconsin-Madison challenged the university's system of collecting a mandatory student activity fee. The funds collected from the students under this program were used to support various student organizations on campus. The students protesting the mandatory fee found the political and ideological views expressed by some of these organizations to be offensive.

While at first glance it would appear that the same analysis found in the *Aboud* and *Keller* cases should also apply in this instance, the Supreme Court considered the test antithetical to the goals of higher education institutions. Colleges and universities seek to facilitate a broad range of speech, particularly that arising from student initiative. Therefore, engaging in the inquiry of whether a certain form of speech is germane to the purposes behind the University of Wisconsin-Madison would serve to diminish and discourage student expression. The Court noted in this opinion that it was not "for [us] to say what is or is not germane to the ideas to be pursued in an institution of higher learning."²⁷

The mandatory fee program did not run afoul of the First Amendment as long as the University distributed the funds collected in a viewpoint-neutral way, neither favoring nor disfavoring any group.²⁸ This method enabled the University to create and support an atmosphere of open dialogue while also acknowledging the First Amendment rights of students objecting to certain views expressed by campus student organizations.

Supporters said the Citizens Clean Election Act did not discriminate among viewpoints in distributing funds and, hence, was constitutional. Nevertheless, this proposition represents a clear misunderstanding of the Court's holding in the case. The Arizona civil and

criminal offense surcharge provision does not have the unique mission of fostering the discussion of diverse views as did the University of Wisconsin. This alone makes *Southworth* and its holding inapplicable to the surcharge provision of the Citizens Clean Election Act. Moreover we do not yet know if the distribution of funds will be neutral among viewpoints since there is no threshold voluntary association among those Arizona residents who receive parking tickets and are forced to pay a surcharge. Unfortunately, the Arizona Supreme Court agreed with the *Southworth* rationale and upheld the program.²⁹

It should also be noted that in *Southworth*, the university did not distribute the mandatory student activity fee to those groups with a "primarily political orientation."³⁰ Likewise, the university restricted the student organizations from using the student activity fee funds for lobbying purposes.³¹ This indicates that the Supreme Court, in determining the constitutionality of a mandatory student fee, did not examine a system wherein collected funds were distributed to partisan political activities. This important distinction illustrates how the *Abood* and *Keller* line of cases establish the correct framework for analyzing the constitutionality of the Citizens Clean Election Act. Arizona is not the final word in campaign finance constitutionality. It is only a matter of time before the United States Supreme Court will have to decide which precedent controls.

Even if we assume that a voluntary association exists among those assessed an additional fee on Arizona civil and criminal fines, the involuntary surcharge should ultimately fail the germaneness inquiry. The fee aims at providing a steady source of money to Arizona to fund an otherwise underfunded system.³² No other rationale has been advanced for the coercion of funds from those individuals suffering the misfortune of a parking or motor vehicles fine. The Supreme Court has indeed stated, "We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself."³³

Consequences of Public Subsidies for Political Campaigns

Arizona

In addition to infringing upon First Amendment rights, the Citizens Clean Election Act creates a system favoring subsidized candidates over those who choose to opt out of public funding. Qualifying

candidates receive a certain sum for primary and general elections and, if facing an unsubsidized individual in the race, also obtain matching funds (to a limit of three times the base amount) for campaign expenses and for independent expenditures made by or on behalf of unsubsidized opponents. An unsubsidized individual will expend additional time raising private funds, yet will face contribution limits. A private individual's choice to donate to an unsubsidized candidate's campaign is diluted, as any subsidized opposition candidate will receive matched funds based on the amount given.

Recently, Clint Bolick, the vice president and national director of state chapters for the Institute of Justice in Washington, D.C., examined the poor incentives created by Arizona's Citizens Clean Election Act. Democratic gubernatorial candidate Janet Napolitano, a Democrat, won the 2002 Arizona governor's election, defeating Republican candidate Matt Salmon in a state with "3-2 Republican registration advantage."³⁴ Napolitano sought the qualifying \$5 contributions for public funding from labor union members and received \$615,000 the day after the primary. In contrast, Salmon, having faced two subsidized opponents in the primary, entered the race against Napolitano with his private funding already overextended. Napolitano initiated a negative campaign against Salmon while he sought additional funding and then benefited from matched funds when the Arizona state Republican party made \$200,000 in independent expenditures for Salmon. Napolitano also received help from independent expenditures made on her own behalf; Democratic Party Chairman Jim Peterson spent \$2.3 million of his own fortune.³⁵ Of course, Salmon was unsubsidized and received no matching benefit based on Peterson's contribution.

As Bolick clearly illustrates, not only did Napolitano receive more than \$2.25 million in taxpayer subsidies, but her status as a publicly funded candidate freed her from the time constraints and expenses involved with fundraising, a luxury that her unsubsidized opponent did not have.

Although it sought to eliminate special interest influence, the Citizens Clean Election Act has in practice only made the problem worse. Napolitano turned to labor union workers to collect the qualifying \$5 contributions to qualify for subsidies. Napolitano succeeded in obtaining the qualifying contributions and, ultimately, becoming governor of the state, in large part because of the union support

she cultivated. Mike Newcomb, a former Democratic gubernatorial candidate, claims that he was unable to qualify for public funding for the 2002 election because the United Food and Commercial Workers union leaders decided to back Napolitano. These leaders, having already placed their support behind a Democratic candidate, denied Newcomb the opportunity to pitch his candidacy before the whole union.³⁶ Napolitano's use of Clean Election Act funds for her campaign did not "level the playing field," as it were, but instead enabled Napolitano to effectively shut out another Democratic candidate seeking union support. The suggestion that the Act minimizes the effect wealthy special interests have over state politics clearly rings false. Napolitano, in collecting her qualifying contributions from union members, will be indebted to their interests to the same extent had she accepted "unclean" contributions from union leaders.

The Citizens Clean Election Act subsidizes candidates with minimal or no public support. Bolick cites two pertinent instances of such abuse in his article. The independent gubernatorial candidate Richard Mahoney, subsidized by the Arizona taxpayers to the tune of \$1.7 million, funneled most of his money into negative attack ads against Salmon and Napolitano, while three Libertarian state legislature candidates collected \$86,636 in public funds and used the money for gourmet dinners at various food establishments. A political candidate's ability to raise funds indicates his popular support; removing this electoral barrier often facilitates the entry of fringe or bogus candidates, not those otherwise qualified candidates who do not have personal fortunes or boundless fundraising resources.

The Citizens Clean Election Act system has often been carried out inconsistently and with a partisan bias. Consider the prejudicial confusion surrounding Matt Salmon's expenditure reporting. Colleen Connor, the Clean Elections Commission Executive Director, declared on August 22, 2002, that Salmon failed to timely report \$150,000 worth of expenditures. Five days later, on August 27, 2002, she recanted the accusation. At a press conference on August 29, 2002, Connor again proclaimed that Salmon failed to report expenditures on time. She stated that \$484,000 of expenditures, rather than the previous amount of \$150,000, had been belatedly reported. The following day, Connor declared that the official amount of expenditures Salmon failed to timely report was \$147,000. After a quick

review, Connor and her staff had determined that Salmon was still in violation of the Act's reporting requirements, just to a lesser extent than previously thought.³⁷ Such miscalculations become ever more suspect when one also considers that 15 of the 19 Commission-initiated investigations were levied against Republicans.³⁸

In February 2003, the Clean Elections Commission ultimately fined Salmon \$3,472 for his reporting violations during the Republican primary. Connor alleges that Salmon could have faced a \$200,000 penalty for his infractions. Consequently, on the same day that the Commission levied the penalty against him, Salmon filed a \$3.2 million claim against the group for harm inflicted upon him due to selective enforcement practices.³⁹ Salmon has since dropped his lawsuit, saying that he just wants to move on.

Maine

In November 1996, Maine established the Clean Election Act. Candidates participating in this public campaign financing program are prohibited from accepting additional contributions and must agree to limit their spending.⁴⁰ In order to qualify for public funding, Maine candidates must collect a specified number of \$5 qualifying donations from registered voters. However, the Maine Clean Election Act also allows candidates to collect seed money for expenses related to candidate qualification. An individual may donate no more than \$100 to a candidate as seed money, and these funds may not be spent after the candidate is certified as a Clean Election Act candidate.⁴¹ Gubernatorial candidates may receive \$50,000 total in seed money, and State Senate candidates can only collect \$1,500. An individual seeking a seat in the State House of Representatives is limited to a seed money aggregate of \$500.⁴² General individual contributions to nonparticipating candidates are set at a limit of \$500 per election for the gubernatorial office and \$250 for other offices.⁴³

The mandatory sources of the Maine Clean Election Fund are varied and include (1) qualifying contributions collected by participating candidates, (2) \$2 million of tax revenue, (3) \$3 tax checkoff donations, (4) unspent seed money contributions, (5) unspent fund revenues given to a qualifying candidate who has lost the primary or general election, (6) any leftover fund revenues from candidates who withdraw during the election cycle, (7) voluntary donations, and (8) fines collected for late filings and violations of the Act.⁴⁴

The statute also provides additional funding sources to be used in the year 2006 should the Act not provide sufficient monies to participating candidates. These sources are transfers from the General Fund for the years 2007 and 2008 up to the amount of \$2 million for each year.⁴⁵

Maine has also established a matching funds system to encourage candidates to accept public financing. An unsubsidized candidate who spends more than a publicly financed candidate's expenditure ceiling will trigger the distribution (to the participating candidate) of matching funds in the amount equal to the excess, up to two times the initial allocation.⁴⁶ This provision also considers the independent expenditures made on behalf of unsubsidized candidates to determine whether matching funds should be given. Some groups have already got around this provision, making independent expenditures vague enough to avoid triggering matching funds. Maine Unlimited, a Republican political action committee, sponsored negative ads against several Democratic Senate candidates in 2002. These attack ads did not release matching funds to the subsidized opponent candidates, because they did not mention a specific candidate name nor instruct viewers to vote in a certain way.⁴⁷

Maine's Clean Election Act has not been immune from challenge. In 1999 a group consisting of legislative candidates, campaign contributors, political action committees, and the Maine Libertarian Party challenged the Maine Clean Election Act and the contribution limits contained therein. Plaintiffs raised several complaints against the Clean Election Act, many of them focusing on the poor incentive structures built into the system:

1. The statute coerces candidates to participate in the public-funding scheme.
2. The matching funds provision effectively punishes nonparticipating candidates for accumulating campaign funds.
3. Candidates who choose not to accept public funding are labeled as "dirty," therefore putting them at a disadvantage.
4. Independent expenditures over which unsubsidized candidates do not have control trigger matching funds allocations.
5. Reporting procedures established for those candidates who opt out of the system are especially burdensome.
6. Those unsubsidized candidates who do not run in a primary are disadvantaged when subsidized candidates receive money for primaries.

7. The public funding system is inadequate as a whole and does not provide sufficient amounts of money to those who decide to become certified.

The District Court retained the issue of the constitutionality of the contribution limits, eventually upholding contribution limits pertaining to House and Senate candidates, and dismissing the other related claims for lack of standing and ripeness.⁴⁸

The District Court rejected the plaintiffs' other arguments and held the Clean Election Act to be constitutional. In particular, the District Court noted that the matching funds provision did not infringe upon the plaintiffs' First Amendment rights of speech and advocacy,⁴⁹ and the independent expenditure reporting requirements complied with the dictates of *Buckley*. The First Circuit affirmed the District Court's ruling.⁵⁰

As for the argument that the Maine statute created a coercive system whereby even those candidates objecting to public campaign subsidies felt obligated to participate, the appellate court found that burdens accompanied the benefits that certified candidates enjoyed.⁵¹ This "proportionate mix of benefits and detriments to candidates seeking public funding"⁵² provided a safe balance that led some candidates to seek certification, while others chose not to exercise such an option.

Although the First Circuit may not have invalidated the Maine system, its opinion in *Daggett v. Webster* recognizes the inequities inherent in the Maine program. For instance, the appellate court made a strained argument for the constitutionality of using independent expenditure amounts in determining matching funds allocations:

We cannot say, however, that the matching funds create an exceptional benefit for the participating candidate. Maine's Act does not provide an unlimited release of the expenditure ceiling. It allocates matching funds for the participating candidate of only two times the initial disbursement. Thus, a nonparticipating candidate retains the ability to outraise and outspend her participating opponent with abandon after that limit is reached. Further, the nonparticipating candidate holds the key as to how much and at what time the participant receives matching funds.⁵³

This declaration hardly makes the case that the matching funds system does not disadvantage a nonparticipating candidate. It only

weakly asserts that once the publicly funded candidate reaches the limit of his matching funds, his unsubsidized opponent can outspend him. Even a declared “constitutional” system like this will dramatically alter the incentive structure, effectively forcing candidates opposed or indifferent to public funding to accept subsidization to compete on an equal basis. It may seem worthwhile to subsidize candidates who are neither wealthy nor inclined toward fundraising, but that goal should not burden a nonparticipating candidate’s desire to run supported by private rather than public funds. The line separating a coercive system from a fairly “proportionate” mixed one is thin and all too easily traversed.

Underfunded Campaign Finance Funds

States will find, on the basis of past experiences, that it is hard to obtain enough funding for public financing programs. These programs require vast sums of money that would otherwise be obtained through private means. Voluntary income tax checkoff systems give taxpayers the ability to donate money while also receiving a small amount back, but in practice these programs have not become a major source of campaign funding.

To remedy the problem, states have enacted mandatory fees and surcharges to supplement public funds. When applied to a certain class of individuals, such as lobbyists or parking ordinance violators, these charges significantly increase the monies flowing into the Clean Election Fund, but also raise constitutional questions due to the compulsion involved. Arizona’s assessment of a \$100 mandatory fee on registered lobbyists representing either commercial, for-profit, or nonprofit groups composed of trade or commercial associations was found to be unconstitutional as an infringement on First Amendment rights.⁵⁴

Vermont

Similarly, Vermont’s imposition of a 5 percent tax on lobbyist expenditures was invalidated for singling out a protected activity for special treatment. The fact that the lobby tax was viewpoint-neutral did not persuade the Supreme Court of Vermont to uphold it.⁵⁵ Accordingly, Vermont’s Clean Elections fund is supplemented by corporate annual report fees.⁵⁶

Florida

In the past Florida assessed a 1.5 percent fee on all contributions to political parties, excluding those donations received from political committees and in-kind contributions. Revenue derived from this surcharge was deposited into the Election Campaign Financing Trust Fund. The Supreme Court of Florida found this provision unconstitutional in 1992 for burdening First Amendment rights because individuals were compelled to contribute to causes and candidates they did not support. The state's attempt to eliminate corruption from the electoral process was found to be overly burdensome to those political parties singled out for fees, and the Court indicated that less intrusive means that did not infringe upon the challengers' First Amendment rights were available.⁵⁷

Massachusetts

In Massachusetts, public funding for Clean Elections participating candidates has engendered dramatic and far-reaching consequences. In October 2001 the director of the Office of Campaign and Political Finance and the Secretary of the Commonwealth of Massachusetts faced a county court suit in which Clean Elections law supporters requested a declaratory judgment that any Massachusetts state election run without candidate access to the funds provided by the Clean Elections law would be unlawful.⁵⁸ The supporters also sought injunctive relief against the director and the Secretary, seeking distribution of Clean Elections funds.

Although \$23 million sat in the Massachusetts Clean Elections Fund in February 2002, the legislature did not appropriate such funds for distribution to candidates during the 2002 election cycle.⁵⁹ Democratic gubernatorial candidate Warren Tolman, already certified as "clean," received a judgment in the amount of \$811,050.⁶⁰ This award created a serious problem for the state, however, as the director could not allocate money that had not been appropriated. State lawmakers did not repeal the Clean Elections law nor did they appropriate money to the fund. Accordingly, the Supreme Judicial Court gave Clean Elections supporters the green light to auction off state-owned property to raise money for the fund.

In July 2002, the first sale of state property involved a 72-acre parcel in Lakeville, Massachusetts, the site of the old Lakeville Hospital. Town officials allege the property's value approached \$24 million, but the parcel garnered only \$2.4 million at auction, falling

short of both its actual value and the \$2.6 million needed at the time to fund the Clean Elections candidates.⁶¹ Two plots of land in Concord, Massachusetts, were slated to be sold with the Lakeville property, but protests from Concord officials succeeded in stopping such measures, in part because elections officials expected the Lakeville property sale to satisfy the Clean Elections funds deficit.⁶² One of the Concord lots, located near Walden Pond State Park, contained graves from the Colonial era, causing the Massachusetts Historical Commission to join the town officials challenging the sale.⁶³

State-owned SUVs, station wagons, and snowplows were the first items placed on the auctioning block, while Clean Elections supporters threatened to put the office furniture of legislators on sale as well.⁶⁴ At one point even parts of the Worcester County Jail, namely a building housing 80 minimum-security inmates and a water tower, were scheduled for auction.⁶⁵

These forced sales generated animosity even among those in support of Clean Elections funding, leading the legislature to include \$3.8 million in its 2003 fiscal year budget for candidates opting to run under the Clean Elections system.⁶⁶ In addition, the Massachusetts legislature asked the electorate in a 2002 statewide nonbinding referendum whether it agreed with taxpayer money funding political campaigns. Seventy-five percent of the voters responding answered in the negative.⁶⁷

Massachusetts repealed its Clean Elections law in the summer of 2003. The state left in place earlier provisions for public financing of up to \$750,000 for gubernatorial candidates, with lesser amounts for other statewide candidates. Potential problems with funding remains an unresolved matter.

Meanwhile, Warren Tolman, the gubernatorial candidate who received \$2.5 million in public funds upon the sale of the Lakeville property, finished fourth in a four-way Democratic primary.⁶⁸

Conclusion

By establishing revenue-starved programs that require coercion to maintain operations, states have created taxpayer subsidies that infringe upon the First Amendment rights of those forced to give money to Clean Elections funds. A viewpoint-neutral distribution of the collected funds does not immunize such programs from constitutional challenge. Individuals may choose not to speak, that is, not

to contribute funds for a political purpose, and yet be forced to do so upon the payment of a parking ticket. The optimistic goals of Clean Elections law, namely the prevention of corruption and special interest political domination, must not be achieved at the sacrifice of other vital rights such as freedom of speech.

Public financing putatively aims at helping potential candidates to seek offices without being burdened by fundraising responsibilities, therefore enabling a greater variety of individuals to enter the electoral race. The matching funds provisions of these campaign systems grant additional public money to subsidized candidates whose non-participating opponents benefit from independent expenditures made on their behalf. However, the knowledge that one's donation to a favored candidate could increase the taxpayer funds allotted to an opponent may chill some donors from contributing at all. In addition, those nonparticipating candidates on whose behalf independent expenditures are made often do not control such spending and therefore experience a true disadvantage at the hands of the system.

Taken to its logical conclusions, the expansion of the public finance system promises a future with political campaigns controlled (and funded) by a governmental monopoly. Free speech, innovation, and creativity—the very catalysts of effective democracy—will be strangled by such a monopoly. When that happens, the demise of America's grand experiment in representative government will not be far behind.

Notes

1. Arizona Revised Statutes (ARS) § 16-940(A) (2002).
2. ARS § 16-940(B).
3. ARS § 16-941.
4. ARS §§ 16-952(A) and 16-952(B).
5. ARS § 16-950(D).
6. ARS § 16-951.
7. Fearing that without prompting, Arizona citizens would fail to participate in the program, the state launched a widely ridiculed ad campaign featuring a cartoon character named Five Dollar Bill. The \$600,000 campaign included a chili-cookoff and assorted media placements. It failed to generate enthusiasm or participation for the checkoff. See Tim Keller, "Five Dollar Bill a Cheap Trick: Clean Elections Gimmick Masks Flawed Funding Process," *Arizona Republic*, September 8, 2001, p. B7.
8. This provision was later struck down in *Lavis v. Bayless*, slip. op., No. CV 2001-006078 (Maricopa County Super. Ct. Dec. 21, 2001). The plaintiffs, represented by the Institute for Justice, challenged the fee imposed on lobbyists as the following:

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(1) a prior restraint on the right to petition the government for the redress of grievances and (2) viewpoint discrimination in violation of both the United States and Arizona Constitutions.

9. ARS § 16-954.

10. On June 17, 2002, the Court of Appeals of Arizona, Division One, held that ARS § 16-954(C), authorizing a surcharge on civil and criminal fines, was an unconstitutional restriction on free speech. See *May v. McNally*, 49 P.3d 285 (Ariz. Ct. App. 2002). The Supreme Court of Arizona later reversed this ruling on October 11, 2002, finding the surcharge provision of the Act to be a constitutional means of funding the Citizens' Clean Elections Fund. See *May v. McNally*, 55 P.3d 768 (Ariz. 2002), *cert. denied*, 123 S. Ct. 1583 (2002).

11. See *Abod v. Detroit Board of Education*, 431 U.S. 209, 234 (1977).

12. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.")

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

14. Only 11.5 percent of taxpayers checked "yes" on their returns for use by the Presidential Election Fund in 1999. Wall Street Journal, May 24, 2000, p.1.

15. *Buckley* at 91.

16. Bradley A. Smith, "Campaign Finance Regulation: Faulty Assumptions and Undemocratic Consequences," Cato Institute Policy Analysis no. 238, September 13, 1995.

17. *Abod* at 209.

18. *Keller v. State Bar of California*, 496 U.S. 1 (1990).

19. *Id.* at 14, 16.

20. *U.S. v. United Foods, Inc.*, 533 U.S. 405, 413 (2001) (stating that "it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place").

21. *Id.*

22. *Id.* at 408.

23. *Id.* at 415.

24. *Id.*

25. *Id.*

26. *Board of Regents v. Southworth*, 529 U.S. 217 (2000).

27. *Id.* at 232.

28. *Id.* at 233.

29. See *May v. McNally*, 55 P. 3d 768 (Ariz. 2002).

30. *Southworth* at 225-26.

31. *Id.*

32. In 2000, Arizona raised \$1.94 million through the \$5 voluntary income tax checkoff system while the surcharge on civil and criminal fines brought in \$4.67 million. "Arizona's Law-Breaker Funded Campaigns," *Political Finance and Lobby Report* (February 20, 2003).

33. *United Foods, Inc.* at 415.

34. Clint Bolick, "Fundraising Arizona: We've Just Seen the Future of Campaign Finance Reform, and It Isn't Pretty," *Weekly Standard*, December 2, 2002, p. 23.

35. "Redefining 'Clean'; Our Stand: First Publicly Funded Campaigns Reveal Plenty of Dirt Piled in the Corners," *Arizona Republic*, December 1, 2002, p. V4.

36. "Flaw in Clean Elections Lets in Special Interests; Our Stand: Qualifying Funds a Dark Corner," *Arizona Republic*, August 17, 2002, p. B10.

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37. Chip Scutari, "Salmon Fined \$10,000 for Campaign Error; Ex-Governor Candidate then Files \$3.2 Mil Claim vs. State," *Arizona Republic*, February 26, 2003, p. 9B.
38. Chip Scutari, "Clean Elections Ruling Doesn't End the Fight," *Arizona Republic*, October 12, 2002, p. 7B.
39. *Ibid.*
40. Maine Revised Statutes Annotated (MRS) 21-A § 1125(6) (2003).
41. MRS 21-A §§ 1122(7) and (9).
42. MRS 21-A § 1125(2).
43. MRS 21-A § 1015(1).
44. MRS 21-A §§ 1020-A, 1124(2), and 1127.
45. MRS 21-A §§ 1124(2)(B)(1) and (2)(B)(2).
46. MRS 21-A § 1125(9).
47. Paul Carrier, "'Clean Elections' Law Popular But Needs Polishing: Incidents from the Last Election that Clash with the Spirit of Maine's Law Lead to Calls for Revisions," *Portland Press Herald*, February 21, 2003, p. 1A.
48. See *Daggett v. Webster*, 81 F. Supp. 2d 128 (D. Me. 2000).
49. See *Daggett v. Webster*, 74 F. Supp. 2d 53, 58 (D. Me. 1999).
50. See *Daggett v. Webster*, 205 F.3d 445 (1st Cir. 2000).
51. *Id.* at 471.
52. *Id.* at 472.
53. *Id.* at 468.
54. *Lavis v. Bayless*, slip. op., No. CV 2001-006078
55. *Vermont Society of Association Executives v. Milne*, 779 A.2d 20 (Vt. 2001).
56. Vermont Statutes Annotated 11A, §§ 1.22(a)(16) and (17).
57. *State of Florida by Butterworth v. Republican Party of Florida*, 604 So. 2d 477 (Fla. 1992).
58. *Bates v. Director of Office of Campaign and Political Finance*, 763 N.E.2d 6 (Mass. 2002).
59. *Id.* at 12, 17.
60. *Id.* at 30, 31; Benjamin Gedan, "Clean Elections Auction Falls Short: Lakeville Land Sale Brings Just \$2.4M," *Boston Globe*, July 11, 2002, p. B7.
61. Benjamin Gedan, "Clean Elections Auction Falls Short," p. B7.
62. *Ibid.*
63. Frank Phillips, "Payday Could Turn Tide for Tolman," *Boston Globe*, June 27, 2002, p. B1.
64. Karen Foerstel, "States' Publicly Funded Campaigns Could Provide Future Federal Model," *Congressional Quarterly Weekly* (May 25, 2002); John McElhenny, "Lawmakers Approve Funding Clean Elections Law for this Year," *Providence Bulletin* (Massachusetts Edition), July 19, 2002, C-03.
65. Rick Klein, "Planned State Auction Had Escape Clause," *Boston Globe*, June 20, 2002, p. B7.
66. Shaun Sutner, "Schools Do Better in Tight Budget; Clean Elections Money in Plan," *Worcester Telegram & Gazette*, July 19, 2002, p. A1.
67. Ed Hayward, "Voters Go for Change in State Bilingual Ed," *Boston Herald*, November 6, 2002, p. 4.
68. Joanna Weiss, "Measure Takes Aim at Clean Elections Bill Would Repeal '98 Financing Law," *Boston Globe*, November 27, 2002, p. B1.

4. Elections in Arizona, Clean and Unclean

Robert J. Franciosi

A small quiz to test your memory of the 2002 election: Which state elected a Mormon Republican for governor and overwhelmingly voted against spending taxpayer money to support political candidates? Which state elected the Democratic candidate for governor who campaigned using the state's system of public funding? The answers, respectively, are Massachusetts and Arizona.

On the short list of states that have a so-called Clean Elections system for publicly financing candidates for office, the state of Arizona is as prominent as a saguaro cactus. A supposedly conservative state in the mountain west—the home state of Barry Goldwater—finds itself in the company of Yankee states like Massachusetts, Vermont, and Maine. Not only is Arizona the odd man out among Clean Elections states, it also is the leader among them. Arizona's Clean Elections law is the most thorough in the nation. It covers all elected offices for state government, so it is more comprehensive than Vermont's system; and its drafters were clever enough to ensure adequate funding through an earmarked revenue source, so the system does not suffer from lack of funding as it does in Massachusetts.

In its preamble, the Citizens Clean Election Act promises that public funding of elections

[W]ill improve the integrity of Arizona state government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech under the U.S. and Arizona Constitutions. Campaigns will become more issue-oriented and less negative because there will be no need to challenge the sources of campaign money.¹

It promises, in short, that public financing of political campaigns will end nearly every evil that is supposedly afflicting modern American democracy.

Arizona's public-financing law passed in 1998. In 2002, more than \$12.8 million of public funds was doled out to candidates running for offices from governor down to mining inspector. There is no question that public funding of candidates has affected politics in Arizona, although not always in ways backers of the system had hoped. Two of the top headlines of the 2002 campaign concerned the chairman of the Democratic Party pumping \$2.3 million of his personal fortune into the party for the campaign, and the self-immolation of the gubernatorial candidate who used public funding to accuse his opponents of being soft on child molesters and polygamists.²

At the height of the campaign season in 2002, 49 candidates—nearly 19 percent of those running—found themselves mired in regulatory proceedings before the commission responsible for implementing Arizona's Clean Elections law. Candidates faced audits, fines, and even being stricken from the ballot for various infractions. The leading Republican candidate for governor, who was privately funded, was subject to a widely condemned, on-again-off-again investigation on the eve of the primary election.

The two election cycles under the Clean Elections law have seen voter turnout and the number of candidates rise, and the margins of victory fall. However, Arizona's Clean Elections law went into effect almost simultaneously with two other major election reforms, so the pure effect of public financing has yet to be sorted out. Public financing has had no demonstrable effect on governance in the state. Legislators who ran as government-funded candidates have voted no differently than those who accepted private donations. In sum, Arizona's Clean Elections system has proven to be costly, burdensome, and occasionally dangerous to fair elections and First Amendment rights—all in return for marginal benefits.

Origins of Clean Elections in Arizona

True to the state's 1912 birthday at the height of the Progressive era, voters and legislators in Arizona have been quite willing to experiment with the latest reforms advanced by both the left and the right. Arizona has the most far-reaching school choice laws on the books, and voters have put into place term limits, a supermajority requirement for tax increases, and an independent commission for legislative redistricting.

This willingness to try out new ideas—abetted by the initiative process—has made Arizona residents some of the chief experimental rats in the laboratory of democracy. National activist groups looking for victories in trophy states have poured hundreds of thousands of dollars into campaigns for ballot initiatives to implement the reforms they are pushing. Ironically, this was the case for Arizona's Clean Elections initiative. Arizonans for Clean Elections, the committee behind the 1998 initiative Proposition 200, spent more than \$900,000, 75 percent of which came from large out-of-state donors. Hundreds of thousands of dollars came from the Washington, D.C., foundations Campaign Action Fund and the Coalition to Defend America's Working Families. The Massachusetts-based Solidago Foundation and Peace Development Fund were also significant donors. George Soros personally contributed \$100,000; Barbra Streisand, listed as a "self-employed entertainer," donated \$1,500; and columnist Molly Ivins chipped in \$100. A graduate student at Southern Connecticut State College was able to spare \$7,500 from what must have been a meager scholar's income to support the passage of the Clean Elections law in Arizona.

The opposition to Proposition 200, made up mostly of trade associations and business lobbyists, managed to spend a grand total of only \$53,000. However, the nearly 17-to-1 spending advantage enjoyed by advocates of public financing did not translate directly into a similar margin at the ballot box. Proposition 200 passed by a 51 percent to 49 percent margin, and once they narrowly approved the Clean Elections system, Arizona voters apparently went home and forgot all about it. A 2001 poll, conducted after the first election with publicly funded candidates, found that 8 percent of Arizonans knew that the Clean Elections law related to publicly financing candidates. Another 28 percent knew, or guessed, that it had something to do with regulating campaigns, and 4 percent believed it dealt with environmental issues.³

Recent polls have claimed to find stronger support for the Clean Elections initiative among Arizona voters. A June 2002 poll found that 51 percent of those asked favored, in general, mixed public-private funding of campaigns, 25 percent believed that political campaigns should be funded solely through private means, and 15 percent favored solely public funding. An October 2002 poll found that 64 percent of likely voters answered "Yes," 16 percent said "No,"

and 20 percent responded “Don’t know” to the question “Do you think the Clean Elections law and public funding for candidates is good for Arizona?” However, not much stock should be placed on any one poll regarding Clean Elections. As the 2002 election in Massachusetts proved, it is possible to get any response from the public on Clean Elections one wishes simply by phrasing the question a certain way. In Massachusetts, a statewide, nonbinding question that asked whether “taxpayer money” should be used to support political campaigns received a resounding “No” vote. However, voters approved several local ballot questions that asked whether “public funding” should be given to candidates who abide by fundraising and spending limits. If the difference in wording between “taxpayer money” and “public funding” was enough to change voters’ minds, it is reasonable to conclude that a majority of the public does not yet have full understanding or a settled opinion of this complex system.⁴

The Clean Elections Law⁵

Proposition 200 put into place a system to provide public funding to candidates choosing to receive it, created various earmarked funding sources to obtain the needed funding, and created a Citizens Clean Elections Commission of appointed officials to enforce and promote the law. The commission has full regulatory powers to write regulations; issue subpoenas; and audit, fine, and even strike from the ballot candidates, whether or not they have accepted public funding. The commission is also responsible for providing information to voters and holding debates that are required for publicly funded candidates. Although described as voluntary, the Clean Elections law affects privately supported candidates as well. It lowered the cap on private donations by 20 percent, and imposed new reporting requirements on privately supported candidates and independent individuals and organizations that engage in campaign activity.

Money for the campaign subsidies was originally designed to come from four sources:

- A \$100 fee imposed solely on lobbyists for for-profit companies and trade associations. Lobbyists for nonprofit organizations such as environmental groups, labor unions, cities and towns, and activists for social causes were exempt. Symbolic more than anything else, this funding source would have provided only

3 percent of annual revenue for campaign subsidies. The fee was struck down as an unconstitutional restraint on free speech.

- A 10 percent surcharge on civil and criminal penalties. The main source of funding for the subsidies, the surcharges accounted for approximately 60 percent of Clean Elections funds in 2002.
- A \$5 checkoff on the state income tax form. If a taxpayer chooses the checkoff, \$5 of his tax payment is diverted from the general fund to the Clean Elections fund. As an incentive to the taxpayer to make the checkoff, an additional \$5 is deducted from his tax liability. Thus, the state's general fund loses a total of \$10 for every taxpayer who ticks the box. The checkoff was promoted heavily by the commission during the 2002 tax season with a \$600,000 promotional campaign featuring "Five Dollar Bill," a cartoon character dressed in cowboy boots and hat with a bolo tie. No official evaluation has been made of Five Dollar Bill's effectiveness, but as of July 2002 \$3.2 million had been diverted to the Clean Elections fund since the beginning of the year, compared with \$2.3 million for all of 2001.⁶
- A tax credit that allows taxpayers who donate to the Clean Elections fund to deduct it dollar-for-dollar up to \$500 or 20 percent of their tax liability, whichever is greater. Through September 2002, the fund received approximately \$100,000 in private donations, 1.1 percent of its total revenue.

To be eligible to receive public funds, a candidate must gather a certain amount of \$5 qualifying contributions. The number of contributions needed depends on the office sought (Table 4.1). For every contribution, a reporting slip must be filled out in triplicate. The candidate then submits the slips to the secretary of state for certification. Candidates who are certified as eligible must not accept private donations aside from a nominal amount that may only be received and spent during preliminary "exploratory" and "qualifying" periods.

Participating candidates are eligible to receive public subsidies up to the full amount of the spending limits shown in Table 4.1. Unopposed and independent candidates receive less. Candidates from districts dominated by one party have their subsidies front-loaded to the primary. If the opposing candidate and independent organizations combined spend more than the expenditure limit, the

Table 4.1
QUALIFYING CONTRIBUTIONS AND SPENDING LIMITS

Office	Number of Qualifying Contributions Required	Spending Limits for Primary	Spending Limits for General Election
Governor	4,000	\$409,950	\$614,930
Secretary of State	2,500	86,310	129,460
Attorney General	2,500	86,310	129,460
Treasurer	1,500	43,150	64,730
Superintendent of Public Instruction	1,500	43,150	64,730
Corporation Commissioner	1,500	43,150	64,730
Mine Inspector	500	21,580	32,370
Legislator	500	10,790	16,180

SOURCE: Citizens Clean Election Commission of Arizona.

participating candidate is eligible to receive matching funds up to three times the limit.

To ensure that participating candidates get their matching funds in a timely fashion, the Clean Elections law imposes quite heavy reporting requirements on privately supported candidates. Candidates must file a report when their spending or available funds reach certain thresholds. In addition, they must file weekly reports starting two months before the primary election, and file daily reports during the two weeks before an election. Groups and individuals who make independent expenditures for or against candidates must also comply with the same reporting requirements.

In the 2000 election, \$1.9 million in subsidies was disbursed to candidates. In 2002, the commission distributed \$12.5 million to candidates, less than the \$17.6 million that it originally estimated.⁷

Regulating Politics

During the rollout of the Clean Elections law before the 2000 election, the commission did its best to adhere to the law's goal of leveling the playing field among political candidates. This led to the commission's examination of some very small pebbles indeed. Did privately supported candidates have to report their expenditures on

haircuts? Could candidates serve hors d'oeuvres at parties to gather contributions? These riddles continued into the election. Should the commission reimburse subsidized candidates for signs that were vandalized?⁸

During the 2000 election the commission also had to deal with several cases of fraud and abuse. Two candidates pled guilty to forging qualifying signatures. Their admission to committing a felony cost them their right to vote. The commission also looked into the case of a candidate who used the public money she received to hire her mother and sister as consultants, buy furniture, rent movies, and pay restaurant and cell phone bills.⁹

It is probably no surprise that the most onerous portion of the system by far has proved to be the reporting requirements. In a briefing for campaign treasurers before the debut of the Clean Election Act in 2000, the state's elections director offered the following advice to her audience: "[G]o back to campaign headquarters and trick somebody else into doing the job."¹⁰ During the 2000 election, candidates complained about the burden reporting requirements placed on their campaigns. Privately funded candidates who were unopposed by government-funded candidates wondered why they had to fill out paperwork mostly designed to ensure the prompt receipt of matching funds.¹¹

The tribulations of the Clean Elections system during the 2000 election were for the most part petty chicanery, the burden of paperwork, and relatively minor regulatory disputes—matters for the most part relegated to the state's weekly political newspaper or the "insider" columns of the dailies. In the 2002 election cycle, however, the commission's regulatory actions had increased dramatically in number as had the potential gravity of their consequences and the amount of public attention they received. During the election, the commission staff was swamped by 73 complaints—19 generated by staff and the rest from candidates and citizens—about alleged violations of the Clean Elections law. Complaints regarding participating candidates dealt with being truant for required debates, accepting donations from prohibited sources, and seeking to exceed the spending cap by underreporting spending. Seemingly ordinary citizens, such as Sun City retirees, perused the spending reports of candidates and filed complaints over suspicious items such as a lack of reported travel expenses and lowball payments for web-site design.¹²

For privately funded candidates, complaints invariably revolved around failures to report spending on time. The candidates almost always pleaded confusion on the part of themselves and their staffs. After a sufficiently apologetic letter promising to be more prompt in the future, candidates were typically let off with a fine. Two cases, however, were more sensational. A candidate for attorney general failed to file 6 reports on time, including one that was 60 days late. The executive director of the commission recommended a \$10,000 fine and disqualification from the ballot. However, the spectacle of a candidate being removed from the ballot in the name of a law intended to increase competition was avoided. The penalty was reduced to only the fine.¹³

The second case involved the leading Republican candidate for governor. Three weeks before the primary election, the state elections director, Jessica Funkhouser, raised concerns about allegedly late reporting of expenses by the favored Republican candidate, Matt Salmon, who was running with private support. The following week the Clean Elections Commission, after looking into the matter, and at the recommendation of the commission's executive director, Colleen Connor, voted not to levy a fine. Two days later in a hastily called press conference, Connor charged that the Salmon campaign had failed to report \$484,000 on time, and called for further investigation. The following day commission staff admitted to a \$337,000 overestimate of the alleged late-reported spending, after the error was pointed out to them by a reporter.¹⁴ An apology was dispatched to the Salmon campaign. Nevertheless, the following Wednesday—six days before the primary—the commission voted to investigate the Salmon campaign. He faced a substantial fine and the possibility of being removed from the ballot.¹⁵

Questions and accusations of political bias came from all quarters. The commission's deputy director, who was put on administrative leave and later dismissed, charged that the investigation was politically motivated. Connor changed her mind after a meeting with Funkhouser, who was the deputy of Salmon's chief opponent. Several of the state's newspapers ran disapproving editorials, and even one of the Democratic candidates for governor stated that Salmon was being treated unfairly.¹⁶

In a year of accounting scandals, it is perhaps no surprise that the entire matter revolves around a dispute over accounting. Salmon,

like many candidates and including one of his opponents, reported expenditures on a cash basis.¹⁷ Connor, after initially admitting to being confused about what the law required, insisted that candidates should report on an accrual basis.

Although some may dismiss the entire imbroglio as the product of an overworked or incompetent staff, the matter brings into relief several problems inherent in the Clean Elections system. First, the rapid pace of political campaigns makes fair and thorough enforcement difficult. On the one hand, a quick decision risks penalizing a candidate without cause, an especially grave outcome if the penalty is disqualification. On the other hand, a careful and deliberate handling of a violation leaves a candidate under the cloud of investigation during the heat of a campaign.

Second, and more important, the matter emphasizes the danger of making any regulatory body a gatekeeper to political office. There is always the risk of political bias seeping in when regulators decide who gets investigated and who doesn't, and what penalties should be meted out. Of the 19 investigations initiated by the commission staff during the 2002 election cycle, 15 were of privately funded candidates, and 16 were of Republicans. The non-partisan nature of the Clean Elections process has been questioned before. In 2000, one of the Republican candidates for a seat on the Corporation Commission charged that the group responsible for the mandated Clean Elections debates, the League of Women Voters, was closely aligned with the Democratic Party, and had taken positions on issues that were contrary to his own. Also in 2000, a little over one month before the primary election, one of the Clean Elections commissioners, wearing another hat as a lobbyist for a political action committee advocating expanded government health insurance for the poor, sued more than a dozen state legislators. Amazingly enough, she saw no conflict in both regulating the campaigns of legislators and suing them in pursuit of a separate cause.¹⁸

Clean Elections Effect on Campaigns

The intended effect of Clean Elections funding, as with all subsidy programs, is to encourage production, in this case of political candidates. Nevertheless, with Clean Elections, as with other regulatory schemes, there is the danger that red tape will serve as a barrier to protect incumbents from competition. It is difficult to predict ahead

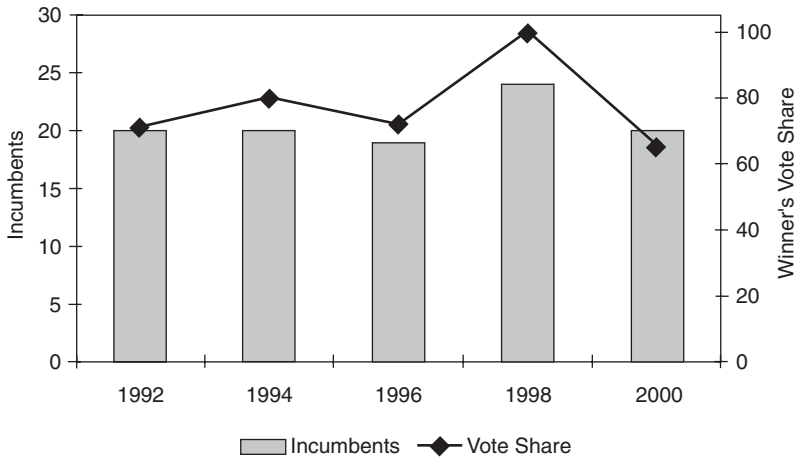
of time which effect would dominate. Many are of the opinion that the money given to the candidates is insufficient, especially for statewide races.¹⁹ In addition, obtaining the qualifying signatures has proven to be an arduous task—unless a candidate is able to call on a ready-made grassroots network such as organized labor. One Democratic hopeful for governor failed to garner the required signatures, and a Republican gubernatorial candidate did not get her funding until three weeks before the primary election. In general it seems the attraction of government money has outweighed the regulatory hurdles, and Arizona has enjoyed, or suffered from, an increase in the number of candidates. The 2000 election saw a modest 10 percent increase compared with 1996; 2002 saw a jump of 33 percent in the number of candidates compared with 1998.

In the Clean Elections law first campaign cycle, 25 percent of candidates chose to accept government subsidies. Subsidized candidates displayed a marked ideological tilt: 73 percent were Democrats, and 7 percent belonged to the Green Party. In the 2002 election, 52 percent of the candidates chose public funding, with subsidized candidates being spread more evenly across the parties; 51 percent were Democrats and 43 percent were Republicans. Even a handful of Libertarian candidates accepted public funding.

It is difficult to determine if public funding in Arizona made campaigns more competitive because the advent of Clean Elections has been contemporaneous with other significant changes in the state's electoral system that might be expected to increase competition. The 2000 election was the first in which legislative seats were vacated because of term limits. The 2002 election, of course, came after redistricting which, due to another reform enacted by Arizona voters in their perpetual quest to reform politics, was carried out by an independent commission charged to redraw district boundaries to eliminate safe seats and make races more competitive.

Figure 4.1 provides an indicator of the competitiveness of senate campaigns in Arizona over the previous five campaign cycles; the graph shows the median of the victor's vote share for the 30 races for a senate seat, and the number of incumbents running each year. The competitiveness of races tends to cycle, with races being more competitive during presidential election years because of the greater ease in recruiting candidates. During the decade the typical victor's share remained above a formidable 60 percent. In 1998 most candidates won with majorities reminiscent of elections in the old Eastern

Figure 4.1
COMPETITIVENESS OF SENATE RACES



SOURCE: Office of the Secretary of State for Arizona.

Bloc. In 2000 we see a drop in the median winner's vote share to 65 percent.

Table 4.2 tries to separate the effect of term limits from that of Clean Elections law. The first row compares the medians of the winner's share in Senate races for open seats and races with publicly funded candidates. Races that featured both were omitted. The competitiveness of both types of races was identical and below the overall median share. The next row compares the median change in competitiveness from 1998 to 2000 for open-seat races and races with publicly funded candidates. Although an open seat typically meant a 43-percentage-point reduction in the winner's share of votes, a publicly

Table 4.2
COMPETITIVENESS OF SENATE RACES, 2000

	All Seats	Clean	Open Seat
Median winner's share of votes	0.65	0.57	0.57
Median change in winner's share of votes 1998–2000	–0.07	–0.04	–0.43
Number of observations	30	7	7

Table 4.3
 NUMBER OF PRIMARY CANDIDATES RUNNING FOR
 STATEWIDE OFFICES, 2002

Office	Number in Previous Year Open	Previous Year Open	Number in 2002
Governor	7 (7)	1990	9 (7)
Secretary of State	5 (4)	1994	5 (4)
Attorney General	5 (3)	1998	5 (4)
Treasurer	3 (2)	1998	3 (3)
Superintendent of Public Instruction	4 (4)	1994	6 (5)

NOTE: Number of major party candidates are in parentheses.

SOURCE: Office of the Secretary of State for Arizona.

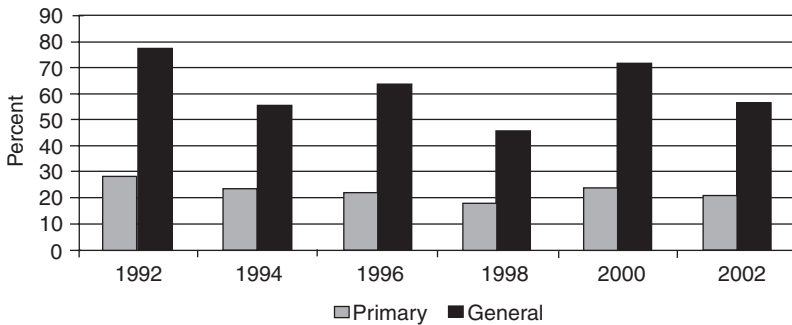
funded candidate only caused a 4-percentage-point decrease. Thus, a large portion of the increase in competitiveness in 2000 may tentatively be credited to open seats due in part to term limits.

The 2002 election was the first election for major statewide offices under the Clean Elections system. Furthermore, all five major offices were also open seats. Of the 33 major party candidates running for statewide office, 27 accepted government funding. Table 4.3 compares the number of candidates vying in the primary election for the five major statewide offices in 2002 with the number who ran the last time the seat was open. In general, it appears that public funding can be credited with one more major party candidate for each office.

Although candidates were more numerous and races closer, voters were not significantly more interested. Figure 4.2 shows the percentage of registered voters who actually voted in the past six primary and general elections. Turnout did increase in the 2000 elections compared with 1998, but in 2002 it dipped down to a level below those of a decade earlier.

It is difficult to provide objective measures of how negative or “issue-oriented” campaigns have been under Clean Elections. Although public funding has allowed some new voices to be heard, again it is hard to say whether these new voices have had any impact on governance in Arizona. It is more evident that Clean Elections

Figure 4.2
VOTER TURNOUT



SOURCE: Office of the Secretary of State for Arizona.

did little to reduce the role of money or special interest groups in state elections. As of this writing, the final reports for the 2002 election cycle have yet to be turned in. However, according to the reports submitted through the end of October, the Republican Party raised \$2.6 million, while the Democratic Party accumulated \$5.6 million. Both parties raised about the same amount from political action committees.

Large party war chests allowed candidates to exploit a rather obvious loophole in the Clean Elections law by running with public funding while having a significant amount of spending made on their behalf by independent organizations. This loophole gives publicly funded candidates an advantage under current law since they are entitled to funds matching independent expenditures made on behalf of their opponents. Yet privately funded candidates do not receive matching funds for independent expenditures made on behalf of their publicly funded opponents. Thus, the entire goal under Clean Elections of leveling the playing field is subverted.

The addition of third-party candidates makes the situation even more complicated. During the 2002 campaign, Richard Mahoney, an independent, publicly financed candidate for governor, requested \$700,000 in funds from the Clean Elections fund to match expenditures made by the Democratic Party on behalf of its candidate Janet Napolitano. The Clean Elections Commission denied the request on the grounds that the money spent by the Democratic Party only

attacked the Republican candidate and did not expressly call for the election of the Democratic candidate. One commissioner who supported Mahoney's petition commented afterward to the press, "I believe this independent expenditure is a way to get around the Clean Elections law. I think this is outrageous and I'm afraid it's going to get worse. I think the voters need to decide whether independent expenditures should be allowed."²⁰

Although public funding gave fringe and dark-horse candidates a higher soapbox, the laurels, at least for the major races, went to familiar faces on the political scene, many of whom were forced to move on to new offices due to term limits. The additional candidates did little to influence the terms of the debate or move the frontrunners in their direction on issues. Even with public funding, calculated political strategy beat open debate and competition. The chairman of the state's Democratic Party aggressively recruited a stable of candidates and worked to ensure that they received little opposition in their primary races.²¹ One Democratic aspirant for governor, Mike Newcomb, tried to pin down Napolitano on her position on right-to-work laws, and for his efforts received a call from a union official telling him to "shut up." Newcomb also complained that the unions had prevented him from appealing to their membership for the \$5 qualifying contributions, and in fact he was unable to obtain enough signatures.²²

In one race, a relative newcomer and dark-horse candidate did defeat a well-financed political veteran. In the 2002 Republican primary for attorney general, publicly funded Andrew Peyton Thomas, in a campaign that emphasized his social conservative views, bested two privately funded moderates, including former President of the State Senate John Greene. This outcome is rather ironic since one of the main impetuses for the high-minded tinkering with Arizona's election system—Clean Elections, open primaries, and independent redistricting—was to break an alleged conservative stranglehold on the state.²³ Thomas eventually lost in the general election to a political veteran: the former Phoenix mayor and gubernatorial candidate Terry Goddard.

The Republican primary for attorney general was also the latest illustration that public funding has not changed political debate in a way that the backers of public funding might have hoped. Thomas sent out mailers accusing one of his opponents of being a defender of

child molesters and the other as sympathetic to a radical homosexual agenda. His campaign tactics drew reprimands from officials in the state Republican Party. The most ironic complaint about the campaigning style of some publicly funded candidates came from Democrat Ken Chevront. Chevront ran in 2000 using public funds. In 2002 he returned to relying on private support, and after running afoul of the Clean Elections Commission regarding the timing of a mailing, referred to the commission as "Big Brother." Chevront also complained that the tactics of his 2002 publicly funded primary opponent, schoolteacher Kathryn Mitchell, were the nastiest he had seen—even worse than when he had faced "far right-wing opponents."²⁴

By far the most spectacular use of public funding for bare-knuckle campaigning was by Richard Mahoney, an independent candidate for governor. Fluent in Spanish, a graduate of Princeton, the holder of advanced degrees in law and economics, son of a political activist and Kennedy insider, and himself an author of a book on the Kennedys, Mahoney was a former secretary of state and political maverick with eclectic political views. Although the type of candidate who would seem to benefit most from public funding, he never broke into double digits in any public opinion poll before the election.²⁵ Mahoney received widespread opprobrium for television advertisements he ran against both his Republican and Democratic opponents regarding a polygamist sect living in northern Arizona. The ads accused the Democratic candidate, the erstwhile attorney general, of overlooking alleged child abuse by the sect, and stated that the Republican candidate, a Mormon, would be soft on polygamists.²⁶

After what was considered dirty campaigning by some publicly funded candidates during the 2000 election, the Clean Elections Commission considered asking candidates to take an oath swearing not to conduct a campaign that "falsifies, misrepresents or distorts the facts, including, but not limited to, malicious or unfounded accusations creating or exploiting doubts as to the morality, patriotism or motivation of any party or candidate." The commission wisely refrained from infringing on candidates' First Amendment rights in this way, but the possibility of such an action—a voluntary oath was actually implemented in Maine—demonstrates the dangerous leverage public funding has over freedom of speech.²⁷

The Effect of Public Funding on Government Policy

The 2000 election saw 14 publicly funded candidates elected to the state legislature: 11 Democrats and 3 Republicans. Eight of the 14 were incumbents. After the first legislative session with publicly funded legislators in 2001, lobbyists claimed to see little difference due to the Act. Publicly funded legislators on the other hand claimed to feel free from interest group pressure. When asked to point to a specific instance, one legislator mentioned being able to resist pressure from his constituents over votes regarding archaic sex laws. Another cited his votes on abortion. Both issues are controversial and incite a lot of passion, but it is hard to argue that big money interests have distorted legislative decisions on these topics.²⁸

For a more rigorous test of what effect public funds had on legislative action, I compared legislator votes on bills considered during the 2001 session to the positions taken by 40 interest groups on the same bills. The positions of various interest groups on bills before the legislature were discovered by combing the newsletters, position papers, issue alerts, and end-of-session wrap-ups issued by those groups during and after the 2001 session. The end result was a list of 40 interest groups and the positions they had taken on more than 200 bills.

For each of the 90 legislators, I created a score by counting how many times that legislator's votes were consistent with the positions taken by each of 40 groups with an interest in legislation that year. For bills that reached a vote on the floor of either house, the positions of interest groups on each bill were matched to the votes of individual legislators. A legislator was considered to vote with an interest group if he or she voted for bills supported by the group or against bills opposed by the group. A legislator was considered to have voted against the group if he or she did the opposite. Each legislator's score, then, is how many times he or she voted with a particular interest group.

Table 4.4 gives a list of the interest groups included in the study along with the average and standard deviation of legislator voting rates. Voting rates are each legislator's score divided by the total number of votes on bills of interest to that group. Thus, it is the percentage of how often a legislator voted with a particular interest group. Table 4.4 shows that the Arizona legislature was in an amenable mood during the 2001 session. The average legislator score for

Table 4.4
LEGISLATOR INTEREST GROUP VOTING RATES, 2001

Group	Mean Legislator Voting Rate	Standard Deviation
AARP	.9288	.0988
American Federation of State, County, and Municipal Employees	.8158	.1445
Arizona Alzheimer's Association	.8630	.1756
Arizona Association of Chiefs of Police	.9457	.0991
Arizona Association of Community Health Centers	.7083	.1281
Arizona Association of Counties	.8947	.0731
Arizona Association of Industries	.6821	.1794
Arizona Association of Realtors	.8645	.1430
Arizona Catholic Conference	.6958	.3814
Arizona Cattlemen's Association	.6851	.1941
Arizona Chamber of Commerce	.7919	.1776
Arizona Contractor's Association	.7411	.1340
Arizona Education Association	.7602	.1875
Arizona Hospital and Healthcare Association	.9117	.1070
Arizona Library Association	.7126	.4008
Arizona Medical Association	.9129	.1593
Arizona Multihousing Association	.8115	.3939
Arizona Municipal Water Users Association	.5627	.1467
Arizona Newspaper Association	.2911	.1091
Arizona Nurses Association	.9339	.1072
Arizona Pharmacy Association	.8402	.1801
Arizona Police Association	.9318	.0866
Arizona Public Health Association	.8197	.1910
Arizona Retailers Association	.3401	.2270
Arizona Right to Life	.4151	.2041
Arizona Rock Products Association	.7833	.1797
Arizona School Boards Association	.7193	.1137
Arizona Society of CPAs	.8962	.1551
Arizona State Rifle and Pistol Association	.2833	.3922

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Table 4.4
LEGISLATOR INTEREST GROUP VOTING RATES (*continued*)

Group	Mean Legislator Voting Rate	Standard Deviation
Arizona Tax Research Association	.5879	.1734
Center for Arizona Policy	.3885	.3568
Children's Action Alliance	.8827	.1742
Firearms Action Committee—Tucson	.2611	.3209
Greater Phoenix Chamber of Commerce	.7213	.1602
League of Arizona Cities and Towns	.8491	.1356
National Federation of Independent Businesses	.7047	.2436
National Rifle Association	.7605	.3671
Planned Parenthood	.6395	.4706
Sierra Club	.4811	.1664
State Bar of Arizona	.8287	.1482

SOURCE: Author's data and calculation.

most groups is well over .500, with only 13 having an average score below .700.

Regression analysis was used to single out the effect of being publicly funded on the legislators' interest group scores. In addition to controlling for being a publicly funded candidate, I also controlled for party affiliation, legislative chamber, and whether the legislator was from an urban or rural district. The results of the analysis, shown in Table 4.5, are expressed in terms of odds ratios. An odds ratio greater than one indicates that legislators of that type tended to vote with that interest group, and an odds ratio less than one suggests the opposite.

The results show that, in general, publicly funded candidates voted no differently than privately funded candidates. Publicly funded candidates did stray from their colleagues when it came to four interest groups—the Arizona Alzheimer's Association, the Arizona Cattlemen's Association, the Arizona Municipal Water Users Association, and the National Federation of Independent Business—but there is no apparent pattern.

Publicly funded legislators voted no differently than privately funded ones on issues regarding the environment (Sierra Club), guns

Table 4.5
ODDS OF VOTING WITH INTEREST GROUP

Group	Clean Elections	Democrat	Adj. R- squared
AARP	2.09	3.11	0.22
American Federation of State, County, and Municipal Employees	0.66	1.44	0.19
Arizona Alzheimer's Association	2.40*	1.78*	0.22
Arizona Association of Chiefs of Police	1.13	1.28	0.02
Arizona Association of Community Health Centers	1.12	1.33*	0.06
Arizona Association of Counties	1.14	2.30*	0.29
Arizona Association of Industries	1.16	0.37*	0.43
Arizona Association of Realtors	1.27	1.08	0.21
Arizona Catholic Conference	0.91	3.80*	0.53
Arizona Cattlemen's Association	0.57*	0.58*	0.21
Arizona Chamber of Commerce	1.49	0.48*	0.35
Arizona Contractor's Association	0.87	1.31	0.07
Arizona Education Association	1.05	1.15	0.22
Arizona Hospital and Healthcare Association	1.25	3.71*	0.33
Arizona Library Association	1.00	18,554.96*	0.50
Arizona Medical Association	0.99	1.11	0.005
Arizona Multihousing Association	0.69	219.87*	0.40
Arizona Municipal Water Users Association	1.73*	0.67*	0.16
Arizona Newspaper Association	0.87	0.97	0.23
Arizona Nurses Association	1.69	1.88*	0.34
Arizona Pharmacy Association	1.23	0.71*	0.04
Arizona Police Association	1.41	2.83*	0.33
Arizona Public Health Association	1.98	3.57*	0.30
Arizona Retailers Association	0.75	0.39*	0.34
Arizona Right to Life	0.99	0.95	0.31
Arizona Rock Products Association	0.84	1.32*	0.04
Arizona School Boards Association	1.12	1.42*	0.08
Arizona Society of CPAs	1.00	0.99	-0.03
Arizona State Rifle and Pistol Association	0.74	0.53*	0.18

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Table 4.5
ODDS OF VOTING WITH INTEREST GROUP (*continued*)

Group	Clean Elections	Democrat	Adj. R- squared
Arizona Tax Research Association	1.21	0.33*	0.55
Center for Arizona Policy	0.70	0.61*	0.06
Children's Action Alliance	1.11	1.56*	0.17
Firearms Action Committee—Tucson	0.89	3.05*	0.61
Greater Phoenix Chamber of Commerce	1.03	0.39*	0.41
League of Arizona Cities and Towns	0.92	2.15	0.25
National Federation of Independent Businesses	1.70*	0.45*	0.46
National Rifle Association	0.79	0.51*	0.37
Planned Parenthood	1.00	215.77*	0.17
Sierra Club	1.07	2.29*	0.41
State Bar of Arizona	0.89	0.95	0.08

SOURCE: Author's data and calculation.

(Firearms Action Committee—Tucson, National Rifle Association), social issues (Center for Arizona Policy, Planned Parenthood), and welfare (Children's Action Alliance, Arizona Catholic Conference). Interestingly, Clean Elections legislators tended to vote for general business groups (Arizona Association of Industries, Arizona Chamber of Commerce, Greater Phoenix Chamber of Commerce, and the National Federation of Independent Business), but the difference is significant only in the case of the latter.

This is quite different from the effect of party affiliation, which is very often significant (75 percent of the time) and consistent with expectations taken from the conventional left-right split of the parties. Democrats were 44 percent more likely than Republicans to vote in support of the public employees' union, 50–60 percent less likely to support business groups (except, curiously, for the Arizona Rock Products Association), 2.3 times more likely to support the Sierra Club, and 216 times more likely to support Planned Parenthood.

Conclusion

Backers of Arizona's Clean Elections law hoped to drive the moneychangers from the temple of state government, and on the face

of it they have very nearly succeeded. Fifty percent of legislative candidates and all but six major party candidates for statewide office campaigned in 2002 with public funds. Public funding, however, has yet to usher in a new millennium of political campaigning. It has not had a significant impact on voter turnout, and the level of campaign discourse remains the same. Public funding has introduced new voices, but not from the direction expected. The Green Party has disappeared, and the more left-wing Democratic candidates for governor futilely tried to move the party's leading candidate in their direction. A publicly funded Republican candidate running for attorney general on a socially conservative platform was able to beat two moderates in the primary race. Public funding has so far had little impact on legislation. The handful of publicly funded candidates elected in 2000 voted no differently than their privately funded colleagues in the same party.

Arizona's experiment with Clean Elections law has demonstrated the danger of public funding. Like any regulatory system, Clean Elections law consumes both the time and the resources of the regulated. The tactic of using regulation to distract and hinder a competitor has also appeared. Clean Elections law puts candidates at the mercy of regulators who may not agree with their views. Finally, the funding can be used as leverage to stifle political speech.

Arizona's Clean Elections law is protected by a provision in the Arizona Constitution that makes it impossible for the legislature to repeal voter initiatives. A lawsuit by the Institute for Justice may strip Clean Elections law of its primary source of funds, but, even if successful, the tax incentives, commission, and reporting requirements will remain in place. A group being led by Rep. Jeff Flake is launching a voter initiative to repeal the Act. Supporters of the law are also looking at ways to modify it. For the immediate future at least, Arizona will likely continue its role as the chief subject in the Clean Elections experiment.

Notes

1. Arizona Revised Statutes (ARS) § 16-940 (2002).
2. Mark Flatten, "Dems' Leader Pours \$2.4M into Party," *Scottsdale Tribune*, October 30, 2002, p. A1, and "Governor's Race Hits 'All-Time Low,'" *Scottsdale Tribune*, October 13, 2002, p. A1.
3. Howard Fischer, "Clean Elections Act? It's a Mystery to Most," *Arizona Daily Star*, December 18, 2001.

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4. Jim Daly, "3 Local Districts Have Extra Ballot Question; Advocates Force Clean Elections Issue," *Patriot Ledger* (Quincy, MA), November 4, 2002, p. 7; Rick Klein, "Voters Mix the Message on Clean Elections," *Boston Globe*, November 12, 2002, p. A1.

5. The provisions of Arizona's Clean Elections law are section 16-940 through 16-961 of the (ARS).

6. Dave Maass, "Clean Elections Hires Firm to Promote Tax Contribution," *Arizona Capitol Times*, May 4, 2001, p. 11; Arizona Department of Revenue, *Tax Facts* (December 2001–July 2002): 3.

7. Citizens Clean Elections Commission, "Candidate Account Summary," available at www.ccec.state.az.us/ccescr/elections/2000/candAccts.asp; "Revenues and Expenditures through October 2002"; "Projected Participating Candidate Funding," available at www.ccec.state.az.us/ccescr/finance/partcandfund00.asp.

8. "Clean Elections Buried in Forms and Substance," *Arizona Capitol Times*, August 13, 1999, pp. 5–7; "Elections Panel Faces Deadline on Rule Making," *Arizona Capitol Times*, November 12, 1999, pp. 18–19; "Stolen Signs Not Covered by 'Clean' Money," *Arizona Capitol Times*, March 9, 2001.

9. "Clean Candidate Pleads Guilty to Fraud," *Arizona Capitol Times*, December 8, 2000, p. 14; "Political Insider: 2 Runs for Senate Defied Logic; Another Was Likely Hubris," *Arizona Republic*, November 19, 2000, p. B12.

10. "Clean Elections Process Too Muddy for Candidates," *Arizona Republic*, October 8, 1999, p. B8.

11. Robbie Sherwood, "Fund Law Confounds Candidates," *Arizona Republic*, July 30, 2000, p. B1.

12. Daniel Burnette, "7 Expenditure Complaints Filed Against Candidates," *Arizona Capitol Times*, August 16, 2002, pp. 7–8.

13. Christina Leonard, "Candidate in Trouble Over Late Finance Data," *Arizona Republic*, August 17, 2002, p. B1; Le Templar, "State AG Hopeful Green Agrees to \$10,000 Penalty," *East Valley Tribune*, August 23, 2002, p. A10.

14. An independent audit eventually found that \$98,000 in spending was reported late.

15. Chip Scutari, "Salmon Gets Scrutiny on Late-Reported Expenditures," *Arizona Republic*, August 23, 2002, p. B6; Mark Flatten, "Salmon's Accounting Methods Questioned," *East Valley Tribune*, August 30, 2002, p. A1; Howard Fischer, "Agency Flubs Salmon Spending," *East Valley Tribune*, August 31, 2002, p. A8; Howard Fischer, "Irregularities Found in Bayless' Finance Records," *East Valley Tribune*, September 4, 2002, p. A9; Mark Flatten, "Salmon Billing Reports Probed," *East Valley Tribune*, September 5, 2002, p. A6.

16. Mark Flatten, "Politics Blamed for Probe," *East Valley Tribune*, September 6, 2002, p. A1; Le Templar and Mark Flatten, "Officials Blast Clean Elections," *East Valley Tribune*, September 7, 2002, p. A1; Unsigned editorial, "Un-clean' Law," *East Valley Tribune*, September 1, 2002, p. F2; Unsigned editorial, "Our opinion: Clean Elections Law Spawning a Muddy Mess," *Tucson Citizen*, September 6, 2002; Unsigned editorial, "Clean Elections on Troubling Path," *Arizona Republic*, September 9, 2002.

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19. Daniel Burnette, "Raising \$5 Contributions Not So Easy for 'Clean' Candidates," *Arizona Capitol Times*, January 11, 2002, p. 11; Robert Robb, "Election Reformers Zinged by Reforms," *Arizona Republic*, September 13, 2002, p. B11.

20. Daniel Burnette, "Panel Rejects Mahoney Plea for \$700,000 in Matching Funds," *Arizona Capitol Times*, October 11, 2002, p. 16.

21. Robert Robb, "The Party Bo\$\$, How 1 Democrat Is Controlling State's Politics with His Wallet," *Arizona Republic*, November 3, 2002, p. V3.

22. Robbie Sherwood, "Union Said 'Shut Up,' Candidate Contends," *Arizona Republic*, August 14, 2002; Unsigned editorial, "Flaw in Clean Elections Lets in Special Interests," *Arizona Republic*, August 17, 2002.

23. Mark Flatten, "Conservatives Score Big in State Primaries," *East Valley Tribune*, September 12, 2002, p. A4.

24. Beth DeFalco, "Legislative Fight Decidedly Bitter," *Arizona Republic*, September 12, 2002, p. B4; Mark Flatten, "GOP Challenger's Mailing Blasts His 2 Opponents," *East Valley Tribune*, August 19, 2002, p. A5; Christina Leonard, "Clean Elections System 'Unfair,'" *Arizona Republic*, September 6, 2002, p. B6; Chip Scutari and Elvia Diaz, "Parties Split on Elections Funds Reform," *Arizona Republic*, September 7, 2002, p. B1.

25. Chip Scutari, "Wild-Card Campaign Too Wild for Some," *Arizona Republic*, October 23, 2002, p. B1.

26. Mark Flatten, "Governor's Race Hits 'All-Time Low,'" *Scottsdale Tribune*, October 13, 2002, p. 1.

27. Bill Coates, "'Clean Money' May Be Tied to Sanitized Campaigns," *Arizona Capitol Times*, February 26, 2001, p. 1.

28. Dave Maass, "'Clean Elections' Lawmakers: What Effect Did They Have?" *Arizona Capitol Times*, June 1, 2001, p. 15.

5. Does Cleanliness Lead to Competitiveness? The Failure of Maine's Experiment

Patrick Basham and Martin Zelder

Although it is a state of only modest size and influence, Maine finds itself on the cutting edge of the national movement to restructure campaign finance through taxpayer financing of political candidates. On November 5, 1996, voters passed the Maine Clean Election Act by ballot initiative. That was the first piece of state or federal legislation to offer taxpayer financing to state-level candidates who voluntarily accept spending limits and refuse private contributions. The legislation applied to state senate and house candidates beginning with the 2000 primary and general election campaigns.

The November 2000 election was the first test of this new campaign finance system, and the Maine legislature sworn in on December 6, 2000, comprised the first set of elected officials chosen under this system. Unquestionably, as Dan Harris reported, "Maine is now engaged in an electoral experiment."¹ The success or failure of Maine's experiment may significantly influence the fortunes of comparable campaign finance restructuring efforts at both the state and the federal levels.

The continuing political pressure in Massachusetts in favor of taxpayer financing draws considerable energy from the erroneous but widespread impression that Maine's taxpayer financing experiment has been successful.² After a single election cycle, Glenn Cummings, a member of the Maine House of Representatives, and Ed Youngblood, a member of the Maine State Senate, pronounced that "there was a lot more competition for office."³ Ellen S. Miller, a prominent supporter of taxpayer financing, forecast that "Maine's success will make that state a beacon for others."⁴ According to the Richard M. Neustadt Center for Communications in the Public Interest, "The Maine Clean Election Act is now a model for ballot

and legislative initiatives in other states, and is being watched closely by observers around the country.”⁵ The lobbying group Public Campaign, the leading national advocate for Maine-style campaign finance regulation, says, “Maine is the good news political story in a year of record-breaking fundraising.”⁶ Assessing the Maine elections, Nick Nyhart, Public Campaign’s executive director, declared:

We are extremely pleased with the way the system worked. It . . . leveled the playing field, freed candidate time to talk to the voters, encouraged qualified people to run and improved the debate. These laws show the nation what comprehensive campaign finance reform can, and should, look like.⁷

The taxpayer financing experiment in Maine is clearly a critical component of a larger strategy on the part of advocates of campaign finance regulation. According to journalist Robert Dreyfuss:

Part of the rationale for advancing reform in the states is that ultimately the movement will have an impact in Washington. If enough states can implement Maine-style reforms, and if those reforms take effect without the collapse of civilization, gradually the idea will gain favor in Congress.⁸

Hence, the *Boston Globe* argues that the so-called Maine plan should serve as a “blueprint” for national campaign finance regulation.⁹

Over the past 28 years, 51 campaign finance–related initiatives, referenda, and constitutional amendments have appeared on state and local ballots. Forty-one of those ballot measures have been successful. By early 1997 at least 10 states had a full taxpayer financing proposal either being considered by the legislature or en route to the electorate via a ballot initiative. In June 1997 the Vermont legislature passed a Maine-style regulation. The good news for supporters of taxpayer financing continued apace: in November 1998 two taxpayer financing initiatives won at the ballot box. In liberal Massachusetts, voters (by a two-to-one margin) approved a “clean money” initiative modeled on the Maine and Vermont legislation. Meanwhile, the more libertarian Arizona electorate approved a comparable campaign finance plan involving taxpayer financing, in the form of Proposition 200, by a narrow 51 to 49 percent margin. For the clean money movement those were auspicious developments.

The 2000 elections brought the taxpayer financing winning streak to an end. On November 7, 2000, two clean money ballot initiatives lost badly at the polls. In Missouri a proposition lost by 65 to 35 percent, while Oregon's analogous referendum was defeated by 59 to 41 percent.

Consequently, a turning point has been reached in the struggle over taxpayer financing at the state level. Proponents of taxpayer financing see Maine and other states as experiments that will lead to taxpayer financing of congressional elections. Reflecting on the voting in Maine, one pro-regulation commentator observed: "To be parlayed into success nationally, the state laws must work as demonstrations. Here the evidence, although hardly definitive, is encouraging."¹⁰

Voters, however, seem less convinced of the virtues of funding campaigns from the public purse, although no clear trend has emerged in state initiatives. In this context, the actual consequences of Maine's experiment become vitally important. Unfortunately, advocates provide little, if any, empirical evidence to support the accolades for Maine's recent electoral experience. The empirical evidence presented in this article indicates that taxpayer financing in Maine has not lived up to the expectations of its proponents.

This study provides a detailed and rigorous statistical assessment of Maine's 2000 and 1998 elections to answer the following questions:

- Was Maine's first taxpayer-funded election in 2000 more competitive than the last privately funded election of 1998?
- Did taxpayer financing increase the competitiveness of primary elections?
- What influence did incumbency have on the competitiveness of the election results?
- What influence did term limits have on the competitiveness of the election results?
- What was the impact of taxpayer financing on the participation of independent and minor party candidates?
- What are the lessons of Maine's taxpayer financing experiment for other states and for Congress?

The Campaign for Taxpayer Financing

Impetus for the Maine Clean Election Act arose in part because the cost of campaigning in Maine has increased in the past two

decades. Advocates of taxpayer financing of state elections asserted that rising campaign costs led to noncompetitive campaigns. As evidence, they pointed out that as recently as 1992, 31 percent of primaries were contested; by 1996, that figure had fallen to 22 percent. Regulators argued that the decrease was directly attributable to the onerous necessity of fundraising among family, friends, constituents, and special interest groups.¹¹

Although campaign restructuring activists agreed on the nature of the problem, Maine's politicians were not convinced. During a period of several years, the legislature defeated more than 40 campaign finance regulation bills. Advocates of taxpayer financing decided to circumvent the legislature and put the issue directly to the people in a ballot initiative in 1996.¹²

Maine voters supported the MCEA proposal by a 56 to 44 percent margin. According to Democratic pollster Mark Mellman, the appeal of the clean money campaign was its very simplicity.¹³ However, that simplicity should not be confused with a simplistic political marketing plan. Remarking on the sophisticated campaign that prompted passage of the MCEA, Robert Dreyfuss recounts:

To make the idea more palatable to voters . . . Public Campaign and its allies—after conducting polls and focus groups and consulting with spin doctors—poured the old wine of public financing into the new bottle of the “Clean Money Option.” Public Campaign has chosen to emphasize the result . . . rather than the mechanism, and to present its proposal as bold and sweeping. Partly as a result of these tactics, solid coalitions of citizen groups have emerged from the states.¹⁴

Arguably, the ballot initiative succeeded only because organized opposition was nonexistent. Few voices pointed out, for example, that taxpayers' dollars would be spent on political campaigns that most taxpayers do not support, that extremists and fringe candidates could qualify for taxpayer financing, and that this restructuring plan might be better characterized as nothing more than welfare for politicians. An advocate of taxpayer financing uninvolved in the Maine campaign noted:

In Maine . . . there was no organizational opposition, literally nobody on the other side. . . . Plus, Maine is a good-government state, and they had a lot of prominent people saying that they were for it. And with all that, they only got 56 percent.¹⁵

How Does the MCEA Work?

Maine's system funds all qualifying candidates, regardless of party affiliation or lack thereof: "Political party membership (or nonmembership) is not a factor in determining whether a certified candidate receives taxpayer financing to finance an election campaign."¹⁶ To be eligible for taxpayer financing, a candidate must raise a number of \$5 "qualifying contributions" from registered voters in his or her own district. At the outset of the campaign, each tax-funded candidate is allowed to raise a modest amount of seed money from private sources to assist in raising the necessary qualifying contributions (at least 50 for house candidates, at least 150 for senate candidates, and at least 2,500 for gubernatorial candidates). According to the *Candidate's Guide to the Maine Clean Election Act*:

Depending upon the office the candidate is seeking, he or she may accept limited contributions from private sources for a limited time and for a limited purpose. No single contribution may exceed \$100 per individual (including the candidate and the candidate's family), and the total amount of "seed money contributions" a candidate may accept is limited to \$500 for candidates for State Representative, \$1,500 for candidates for State Senate, and \$50,000 for gubernatorial candidates.¹⁷

In return, the candidate receives a fixed sum of taxpayer money and agrees not to raise any private money during the primary or general election campaigns.

In 2000, qualifying candidates received taxpayer financing equivalent to 75 percent of the average amount spent by candidates in their districts during the past two campaigns (1996 and 1998). If a tax-funded candidate is being outspent by a privately funded candidate, "the Act anticipates that possibility and provides a mechanism—called 'matching funds'—for the certified candidate to try to stay financially competitive with the opposing nonparticipating candidate."¹⁸ The tax-funded candidate will receive additional dollar-for-dollar (so-called equalizing) funds "equivalent to the amount reported as excess by the nonparticipating candidate."¹⁹ In Maine, the additional funding is "limited to two times the amount originally distributed."²⁰

The law restricts how tax-funded candidates may spend the public funds: as the campaign guide notes, "Revenues from the MCEA

fund must be used for campaign-related purposes. The Commission will establish and publish guidelines outlining permissible campaign-related expenditures.²¹ Under a system of taxpayer financing, therefore, the state government, not the individual candidate, has the final word on how candidates conduct their campaigns.

Nonparticipating candidates may continue to raise money privately or to use their own financial resources to fund their campaigns. However, the MCEA caps private contributions at just \$250 per donor for legislative candidates and \$500 for gubernatorial candidates who decline taxpayer financing. Such restrictions encourage candidates to accept taxpayer financing by making it harder to raise private money. More broadly, they raise serious constitutional questions under the free speech guarantee of the First Amendment to the U.S. Constitution.

The Cost of Clean Money

Maine's new campaign finance system is certainly not cheap. In mid-1998, MCEA was projected to cost Maine taxpayers \$2.4 million annually. The most recent analysis, however, suggests that the actual cost for 2000 was more than \$3 million. Taxpayers pay most of the bill for the MCEA. The official sources are listed below—only the first three provide significant amounts of money.²²

- State income and sales taxes (\$2 million annual contribution)
- Voluntary tax return checkoff of \$3 per taxpayer (\$750,000 collected in 2000)
- \$5 qualifying contributions (\$150,000 collected in 2000)
- Higher lobbyist registration fees
- Unspent seed money contributions
- Unspent MCEA funds after unsuccessful primary campaigns, all general election campaigns, and all candidate withdrawals
- Penalties (late report filings and any MCEA-related civil fines)
- Voluntary donations

Clean Money and the Courts

When passed, the MCEA was challenged in federal court in separate suits by the American Civil Liberties Union, which has opposed a variety of campaign finance regulation proposals on First Amendment grounds, and the National Right to Life Committee.²³ The

ACLU challenged the constitutionality of the taxpayer funding provision as well as the lower contribution limits, the qualifying contributions, and the increased lobbyists fees. The National Right to Life Committee challenged the constitutionality of the matching funds provision and the contribution limits.

The MCEA's authors anticipated constitutional objections. Its supporters argued that participation in the MCEA is *voluntary* and thus consistent with the U.S. Supreme Court's 1976 *Buckley v. Valeo* decision, which found that *mandatory* spending limits violated the First Amendment right to free speech. The *Buckley* majority said voluntary taxpayer financing (such as the current presidential campaign funding system) passed constitutional muster.²⁴

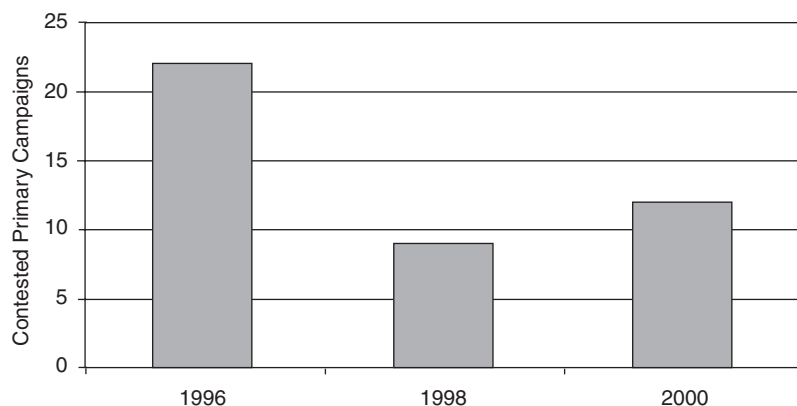
In November 1999, Federal District Judge D. Brock Hornby upheld the constitutionality of one MCEA provision: taxpayer financing to those candidates who abide by spending limits and agree not to take private funds.²⁵ Hornby found that a voluntary campaign funding system benefits both candidates and the public by expanding political speech. At that time, he did not rule on another aspect of the legal challenge—the constitutionality of the lowered contribution limits applicable to privately funded candidates—leaving unanswered the question of how far contribution limits can be lowered before they are considered an unconstitutional restraint on speech. The U.S. Supreme Court had previously affirmed \$1,000 contribution limits while lower courts had rejected most \$100 contribution limits.

In January 2000, Hornby upheld \$250 contribution limits for candidates for the Maine state legislature.²⁶ He rejected the plaintiffs' free speech arguments, writing that the contribution limit "significantly reduces the potential threat for actual corruption from large contributions and . . . the appearance of corruption." With this decision, along with his November 1999 ruling, Hornby affirmed the constitutionality of all aspects of the MCEA, and the state of Maine proceeded with its new system of taxpayer-funded campaigns.

The Competitiveness of Maine's 2000 Elections—Overview

Contrary to media reports and the self-congratulatory proclamations of special interest groups, the MCEA did not result in a substantially more competitive election in 2000 than took place under private funding in 1998.

Figure 5.1
 CONTESTED PRIMARY RACES (1996–2000)



SOURCE: Authors' calculations.

Assessing the competitiveness of Maine's 2000 elections is a complex task. The pronouncements about a "more competitive" 2000 election lack empirical content, let alone specificity. Following the arguments and assumptions of campaign finance activists, we took the 1998 election results as our pre-MCEA baseline and, breaking down the 2000 election results in a number of ways, performed a series of comparisons that assessed whether the 2000 election was more competitive than the 1998 election.

Specifically, whether districts with at least one clean election candidate (clean districts) had more competitive races in 2000 can be assessed by statistical comparison of electoral characteristics such as victory margins, the frequency with which candidates were opposed (contestedness), and the frequency with which incumbents were in the race (openness). If the use of Clean Election rules led to greater competition, that should be manifested in narrower margins, fewer unopposed candidates, and fewer incumbents running.

Primary and Electoral Participation, 1998–2000

As evidence of increased competitiveness, Public Campaign and other advocates of taxpayer financing cited an alleged 40 percent increase in the number of contested primaries in 2000.²⁷ As Figure 5.1 shows, there was indeed a marginal improvement in the number

Table 5.1
DISTRICTS WITH CLEAN ELECTIONS CANDIDATES,
NUMBER AND PERCENTAGE (percent), 2000

	House	Senate	Combined
Districts with 0	53 (35.1)	10 (28.6)	63 (33.9)
Districts with 1 or 2	98 (64.9)	25 (71.4)	123 (66.1)
Districts with 2	18 (11.9)	10 (28.6)	28 (15.1)
	n = 151	n = 35	n = 186

SOURCE: Authors' calculations.

of contested primaries. In 2000, there were 12 contested primaries, an increase of 3 over the number contested under private funding in 1998. Of course, in proportional terms the 33.3 percent (not 40 percent) increase may appear impressive. However, it is useful to compare the experience of prior elections. The privately financed campaigns of 1996, for example, produced 83 percent more contested primaries than the "competitive" taxpayer-financed campaigns of 2000. That suggests that the type of financing—taxpayer or private—does not decisively influence the number of competitive primaries in Maine.

More extensive evidence is provided by analysis of general election results from 1998 and 2000. Table 5.1 details the extent of candidate participation in the taxpayer financing system. The majority of Maine districts featured at least one clean candidate in 2000; 65 percent of house districts (98 of 151) had at least one clean candidate, as did 71 percent (25 of 35) of senate districts. Among these clean districts, only a minority in either chamber involved two clean candidates—in the house, 18 of 98 districts (18 percent) had two such candidates, while in the senate, 10 of 25 districts (40 percent) featured a pair of clean opponents.

Overall, 33 percent of all candidates for senate and house seats chose the taxpayer financing option, and 27 percent of incumbents volunteered to run under the new system. There was a considerable difference in participation rates between the two major parties. State-wide, 43 percent of Democratic Party candidates chose taxpayer

Table 5.2
CANDIDATE PARTICIPATION IN THE MCEA, 2000

Number of Seats with MCEA Candidate	Percentage of All Seats	MCEA Candidates	Percentage of All Candidates
Senate: 25 (of 35)	71.4	35	48.6
House: 63 (of 151)	41.7	81	28.9

SOURCE: Authors' calculations.

financing, while fewer than one in four Republican Party candidates chose it. There was also an important difference between senate and house candidates, regardless of party affiliation. Almost half of all senate candidates, but fewer than 30 percent of house candidates, chose the taxpayer financing option.

More than 70 percent of the races in the 35-seat state senate featured at least one taxpayer-funded candidate (Table 5.2). Almost 50 percent of senate candidates chose the taxpayer financing option. Hence, the senate elections provide a sound basis for analyzing the effect of the MCEA on competitiveness. A little more than 4 of every 10 races for the 151-seat state house had at least one taxpayer-funded candidate, and just over one in four house candidates chose the taxpayer financing option (Table 5.2). Although less proportionally influential than their senate counterparts, these candidates for the house were sufficiently numerous to provide a second important source of data for analyzing the MCEA's effect on the competitiveness of the state's electoral process.

Remarkably, fewer than one in five minor party and independent candidates chose taxpayer financing, a smaller fraction than found for major party candidates. This fact contravenes the assertion that the ordeal of private fundraising bars minor party candidates. If the assertion were correct, the allure of free (that is, taxpayer-subsidized) campaigning would surely release considerable pent-up demand among the allegedly underfunded and unheard voices of grassroots Maine politics. Clearly, this anticipated democratic deluge did not materialize.

We also compared the number and electoral success of independent and minor party candidates in 1998 and 2000 (Table 5.3). Despite the lure of a free electoral ride, courtesy of taxpayer financing, the

Table 5.3
INDEPENDENT AND MINOR PARTY CANDIDATES, 1998 AND 2000

Chamber	Independent/ Minor Party Candidates		Three-Way Races		Independent/ Minor Party	
	2000	1998	2000	1998	2000	1998
Senate	4	5	3	3	1	1
House	25	12	11	8	1	1

SOURCE: Authors' calculations.

number of independent and minor party candidates for senate seats actually *fell* from five in 1998 to four in 2000. The situation was different, however, in the house, where the number of independent and minor party candidates rose from 12 in 1998 to 25 in 2000. However, 6 of the 13 additional independent and minor party candidacies were courtesy of the state Libertarian Party, and none of them accepted taxpayer financing. The number of three-way races for house seats also increased from 8 to 11 (of 151 seats) between 1998 and 2000. In the senate, the number of three-way races remained the same—just 3 of 51. Further, the results for independent and minor party candidates did not improve between 1998 and 2000. In the senate, one independent candidate was victorious in both 1998 and 2000; in the house, the number was also just one in both elections.

Electoral Trends, 1998–2000

Beyond mere electoral participation, the central issue to be considered is the effect of the MCEA on electoral outcomes. Before specifically comparing results for clean and nonclean districts, it is instructive to examine general shifts in the pattern of results between 1998 and 2000. This comparison reveals that, although there was little change in margins or in the frequency of unopposed candidates, the likelihood that incumbents were running rose dramatically between 1998 and 2000. With regard to margins of victory, Table 5.4 indicates that for all races (including those in which the candidate was unopposed), the average margin for the combined sample (house and senate) fell by 3.3 percent between 1998 and 2000, but that change was not statistically significant. Within this overall result, house margins fell by 1.5 percent (also insignificant), and senate margins

Table 5.4
AVERAGE MARGIN OF VICTORY, 1998 AND 2000 (percent)

	All Races			Contested Races		
	House	Senate	Combined	House	Senate	Combined
1998	40.4	35.1*	39.4	21.8	23.9	22.3
2000	38.9	24.2*	36.1	20.2	20.9	20.4
	n = 151	n = 35	n = 186	n = 94	n = 29	n = 123

NOTE: * indicates that 1998 and 2000 margins are significantly different at the 5 percent level.

SOURCE: Authors' calculations.

Table 5.5
UNOPPOSED INCUMBENTS, 1998 and 2000

	2000	1998
Senate	1	5
House	32	34

SOURCE: Authors' calculations.

fell by 10.9 percent (significant at the 5 percent level). When only contested races (races from either year with an unopposed candidate were excluded) were analyzed, the reduction in margins was insignificant in all three cases, including the senate.

We also compared the number of incumbents who ran unopposed in the two elections. As shown in Table 5.5, in 2000 only one state senator ran unopposed, four fewer than in 1998. In the state house, 34 representatives ran unopposed in 1998; in 2000, the number fell by just 2 to 32. Is this an indication of a more competitive electoral environment? Perhaps, but not for the reason articulated by advocates of taxpayer financing.

Table 5.6 reveals that, in fact, two of the four newly competitive senate seats resulted from term limits coming into effect in 2000, while four of the newly competitive house seats were term limited.

Table 5.7 shows that the frequency with which districts featured races with only one candidate did not change significantly in the house (falling from 22.5 to 21.2 percent), although the drop in unopposed candidates from 14.3 to 2.9 percent was nearly significant in the senate ($p = .1032$). This significant change in the senate is not

Table 5.6
TERM LIMITS AND UNOPPOSED INCUMBENTS, 2000

	Newly Competitive Seats Resulting from Term Limits
Senate	2
House	4

SOURCE: Authors' calculations.

Table 5.7
UNOPPOSED CANDIDATES, 1998 AND 2000 (percent)

	House	Senate	Combined
1998	22.5	14.3	21.0
2000	21.2	2.9	17.7
	n = 151	n = 35	n = 186

SOURCE: Authors' calculations.

Table 5.8
OPEN SEATS, 1998 AND 2000 (percent)

	House	Senate	Combined
1998	77.5*	88.6*	79.6*
2000	12.6*	17.1*	13.4*
	n = 151	n = 35	n = 186

NOTE: * indicates that the 1998 and 2000 percentages are significantly different at the 1 percent level.

SOURCE: Authors' calculations.

surprising, given the margin results discussed earlier. Significantly closer margins across all senate races in 2000, but not in contested races, imply that the overall margin reduction was driven by the substantial reduction in single-candidate races.

The one general, statistically significant change between 1998 and 2000 involved the frequency with which seats were open (that is, the frequency with which incumbents chose not to run). This fell dramatically in both the house and the senate during this two-year interval (Table 5.8), dropping from 77.5 to 12.6 percent in the house and from 88.6 to 17.1 percent in the senate. In other words, while

Table 5.9
MARGIN, CLEAN AND NONCLEAN DISTRICTS OF SUCCESS, 2000
(percent)

Districts	All Races			Contested Races		
	House	Senate	Combined	House	Senate	Combined
Nonclean	34.1	18.5	31.7	18.8*	18.5	18.8**
Clean	41.4	26.5	38.4	24.5*	23.5	24.2**
	n = 151	n = 35	n = 186	n = 119	n = 34	n = 153

NOTE: * indicates that the nonclean and clean margins are significantly different at the 10 percent level; ** indicates that they differ at the 5 percent level.

more than three-quarters of the 1998 races did not involve an incumbent, more than 80 percent of the 2000 races did.

Statistical Analysis of Electoral Competition in 2000

This general examination of electoral trends in Maine does not directly address, however, the impact of the MCEA. To address this impact directly, statistical comparisons can be made that control for whether or not a district was clean. This section describes a statistical analysis that evaluates how electoral competition in 2000 differed in clean and nonclean districts.

Consider first how margins in the 2000 election compared in clean and nonclean districts (Table 5.9). Although no significant difference in margins between clean and nonclean districts was found when the full sample of contested and uncontested races was studied, an intriguing finding arose in the analysis of contested races. Specifically, a focus on only those districts with contested races in 2000 revealed that margins in contested house races were 19.1 percent higher in clean districts than in nonclean ones, a difference significant at the 10 percent level. Although the analogous difference in margins for the senate, 5.0 percent, was insignificant, the 5.2 percent difference for the full sample was significant at the 5 percent level. In other words, in 2000, clean districts exhibited dramatically higher margins in the house and higher margins overall.

In addition, the likelihood of an election featuring a single candidate was unaffected by the MCEA. In fact, in 2000, a *higher* proportion

Table 5.10
UNOPPOSED SEATS IN CLEAN AND NONCLEAN DISTRICTS, 2000
(percent)

Districts	House	Senate	Combined
Nonclean	18.9	0.0	15.9
Clean	22.4	4.0	18.7
	n = 151	n = 35	n = 186

SOURCE: Authors' calculations.

Table 5.11
OPEN SEATS IN CLEAN AND NONCLEAN DISTRICTS, 2000
(percent)

Districts	All Races			Contested Races		
	House	Senate	Combined	House	Senate	Combined
Nonclean	35.8*	13.3	33.3*	31.7*	22.2	30.0*
Clean	0.0*	7.5	3.3*	0.0*	14.3	3.1*
	n = 151	n = 35	n = 186	n = 117	n = 30	n = 147

NOTE: * indicates that the nonclean and clean margins are significantly different at the 1 percent level.

of candidates in clean districts than in nonclean districts ran unopposed in both the house and the senate, although the differences were not statistically significant (Table 5.10).

Finally, clean and nonclean districts can also be compared with regard to the percentage of districts with open seats, or districts in which incumbents were *not* running in 2000 (Table 5.11). Whereas 35.8 percent of house seats in nonclean districts were open in 2000, 0 percent of house seats in clean districts were—a statistically significant difference. While a smaller proportion of senate races were open in clean than in nonclean districts (7.5 vs. 13.3 percent), this difference was insignificant. In the combined house-senate sample, however, the difference in openness (33.3 percent in nonclean districts compared with 3.3 percent in clean districts) was significant.

The preceding results imply that clean districts were significantly different from their nonclean counterparts in terms of two important electoral outcomes in 2000: average margin and likelihood of an incumbent to run. In both cases, however, the difference is contrary

to the effect predicted by the supporters of the MCEA. The evidence for 2000 indicates that clean districts had *higher* margins and were more likely to have incumbents running than nonclean districts.

Statistical Analysis of the Change in Electoral Results between 1998 and 2000

Such evidence may be misleading, though, in that it may be that clean districts had wider margins and more entrenched incumbents to begin with (a common claim) and differed in other characteristics as well. To address this concern, we must perform a simple statistical analysis to examine both how clean and nonclean districts differed in electoral outcomes in 1998 *and* how outcomes changed between 1998 and 2000, as well as conduct a regression analysis to control for other relevant differences across districts.

Victory Margins

If the significantly wider margins found in the house and overall in clean districts in 1998 were a byproduct of those districts being less competitive to begin with, then those margins should be significantly wider in 1998. The evidence, however, does not support this hypothesis (Table 5.12). Averaged across both uncontested and contested elections, there was no significant difference in the 1998 margins between clean and nonclean districts. When only contested elections are analyzed, however, clean senate districts exhibit margins that are *almost* significantly higher ($p = .1001$, just short of conventional significance at 10 percent), with a measured difference of 10.1 percent (27.4 percent in clean districts, 17.3 percent in nonclean districts). For the combined house-senate sample, the 4 percent difference in 1998 margins is again almost significant at the 10 percent level

Table 5.12
MARGIN IN CLEAN AND NONCLEAN DISTRICTS, 1998 (percent)

Districts	All			Contested		
	House	Senate	Combined	House	Senate	Combined
Nonclean	39.3	25.6	37.1	21.5	17.3	20.7
Clean	41.1	39	40.7	24.0	27.4	24.7
	n = 151	n = 35	n = 186	n = 117	n = 30	n = 147

SOURCE: Authors' calculations.

Table 5.13
AVERAGE CHANGE IN MARGIN OF VICTORY IN CLEAN AND
NONCLEAN DISTRICTS BETWEEN 1998 AND 2000 (percent)

Districts	All Races			Contested Races (1998 and 2000)		
	House	Senate	Combined	House	Senate	Combined
Nonclean	-5.1	-7.0	-5.4	-2.6	-0.9	-2.3
Clean	0.4	-12.5	-2.2	-0.9	-3.9	-1.7
	n = 151	n = 35	n = 186	n = 94	n = 29	n = 123

SOURCE: Authors' calculations.

($p = .1086$). This evidence indicates, then, that in 1998 margins in house races in clean districts were not significantly higher than those in nonclean districts, implying that the difference found for 2000 reflects the impact of the MCEA.

More direct analysis of this issue can be achieved through examination of how the *change* in margins between 1998 and 2000 differs for clean and nonclean districts. Table 5.13 presents these margin changes for both types of districts, for all races and for only those that were contested. It indicates that while house margins fell by a *larger* amount in nonclean districts (they even rose by 0.4 percent when averaged over both uncontested and contested house races), this difference was not statistically significant. Similarly, although the senate margin reduction was greater in clean districts, it, too, was not significant. Finally, although margin reductions in nonclean districts were larger than those in clean districts in the combined house-senate sample, the difference was insignificant.

Of course, this analysis evaluates the impact of the MCEA only in a crude way because it assumes that other factors which might affect margins are held constant. Thus, it is necessary to elaborate on these results by *actually* holding constant other relevant factors via regression analysis. With regard to margins, there are two ways to accomplish this: regressions examining effects on the margin in 2000, holding constant the 1998 margin and other variables, and regressions examining effects on the change in margins between 1998 and 2000.

These results generally confirm the prior findings from the simple statistical analysis. Consider Table 5.14, which contains the results

Table 5.14
REGRESSION ANALYSIS OF IMPACT OF CLEAN ELECTION LAW
ON MARGINS, 2000 (percent)

Dependent variable: 2000 Margin

Independent Variables	All Races			Contested Races		
	House	Senate	Combined	House	Senate	Combined
1998 margin	0.16***	0.22***	0.16***	0.19***	0.22***	0.19***
Unopposed	75.25***	73.59***	75.18***	—	—	—
Open	-6.88*	-5.38	-6.03*	-7.66*	-5.38	-6.58
Clean	2.08	-0.18	2.76	2.74	-0.18	3.31
Term limits	-1.41	-14.98**	-5.18*	-1.93	-14.98**	-6.19*
House	—	—	-0.62	—	—	-0.83

NOTE: * indicates that the regression coefficient is significant at the 10 percent level; ** indicates that the coefficient is significant at the 5 percent level; *** indicates that the coefficient is significant at the 1 percent level; and — indicates that the variable was not included in the regression.

SOURCE: Authors' calculations.

of the regressions in which the 2000 margin is the dependent variable. These combined results indicate that clean districts had neither higher nor lower margins in 2000 than did nonclean districts, controlling for the 1998 margin, regardless of whether the candidate was unopposed, whether the seat was open, whether the district was covered by a term limits law, or whether the seat was in the house or senate. Seats with higher 1998 margins, and those that were uncontested in 2000, exhibited higher 2000 margins, while those that were open in 2000 displayed lower margins. Districts with term-limits laws had smaller margins in 2000, a result driven by the senate outcomes, where districts with term limits had margins 15 percent below those without such limits. Term-limited house districts exhibited an insignificant effect. Analysis of the subset of elections that were contested yielded similar results.

Related regression analysis, in which the change in margins between 1998 and 2000 was used as the dependent variable, revealed similar results (Table 5.15). Again, clean election districts appeared no different from nonclean ones; the change in margin between 1998 and 2000 was neither smaller nor larger in clean than in nonclean districts. Margins *were* increased, however, in districts that switched from having two candidates in 1998 to a single candidate in 2000.

Table 5.15
REGRESSION ANALYSIS OF IMPACT OF CLEAN ELECTION LAW
ON CHANGE IN MARGIN BETWEEN 1998 AND 2000 (percent)

Dependent variable: Change in margin (2000 margin minus 1998 margin)

Independent Variable	All Races			Contested Races (in 1998 and 2000)		
	House	Senate	Combined	House	Senate	Combined
Unopposed	70.05**	66.68**	69.79**	—	—	—
Open	D	-6.43	-2.73	—	-8.87	-4.32
Clean	3.17	-4.68	4.44	2.08	-1.62	4.78
Term limits	-2.07	-11.51*	-4.17	-2.92	-11.78*	-6.01
House	—	—	1.98	—	—	0.78

NOTE: * indicates that the regression coefficient is significant at the 10 percent level; ** indicates that the regression coefficient is significant at the 1 percent level; D indicates that the variable was dropped because it was perfectly correlated with another independent variable; and — indicates that the variable was not included in the regression.

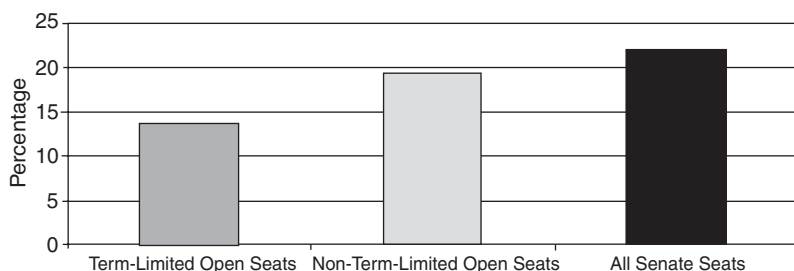
SOURCE: Authors' calculations.

Finally, senate districts with term limits experienced an 11.5 percent reduction in margins between 1998 and 2000. Again, the results were robust to analysis in which only contested races were examined.

Although the MCEA did not narrow margins or enhance competition more generally, the data suggest that, overall, term limits were relatively effective in doing so. For example, in the 2000 election, 7 of 13 open senate seats were the result of term limits. In the house, 15 of 34 open seats were the result of term limits. Further, as shown in Figure 5.2, the average winning margin for the term-limited open senate seats was only 13.5 percent, compared with a statewide average of 22 percent. The average winning margin for the non-term-limited open seats was 19.4 percent, a differential much closer to the statewide average. Thus, term limits seem to have produced more competitive elections in specific senate contests than did taxpayer financing.

For term-limited open house seats the average winning margin was 24.9 percent, compared with a statewide average of 22.4 percent. For the non-term-limited open seats, the average winning margin was 17.3 percent, 5 percent lower than the statewide average.

Figure 5.2
AVERAGE WINNING MARGIN OF TERM-LIMITED AND
NON-TERM-LIMITED SENATE SEATS, 2000



SOURCE: Authors' calculations.

Table 5.16
PERCENTAGE OF SEATS UNOPPOSED IN
CLEAN AND NONCLEAN DISTRICTS, 1998 (percent)

Districts	House	Senate	Combined
Nonclean	22.6	10.0	20.6
Clean	22.4	16.0	21.1
	n = 151	n = 35	n = 186

SOURCE: Authors' calculations.

However, those results may be a function of the particular seats that were open in 2000.

Contestedness

With regard to whether candidates tended to be unopposed, simple statistical comparisons for 1998, akin to those for 2000, reveal no significant difference between clean and nonclean districts (Table 5.16). In the combined house-senate sample, while 21.1 percent of districts with unopposed candidates in 1998 became clean in 2000, the proportion of such districts becoming nonclean in 2000 was only slightly (and insignificantly) smaller at 20.6 percent. Similarly, small and insignificant differences were obtained from the disaggregated house and senate data.

Moreover, there was no significant difference between clean and nonclean districts in terms of a change in the rate of single-candidate

Table 5.17
CHANGE IN CANDIDATES RUNNING UNOPPOSED IN CLEAN AND
NONCLEAN DISTRICTS BETWEEN 1998 AND 2000 (percent)

Districts	House	Senate	Combined
Nonclean	-3.8	-10.0	-4.8
Clean	0.0	-12.0	-2.4
	n = 151	n = 35	n = 186

SOURCE: Authors' calculations.

elections between 1998 and 2000 (Table 5.17). For the house, results were contrary to intuition, with a reduction in unopposed candidates in nonclean districts of 3.8 percent compared with no change in clean districts, although this difference was insignificant. In the senate, while clean districts displayed a slightly larger decrease in single-candidate frequency (12 vs. 10 percent), this difference, too, was insignificant. Finally, for the combined sample, the change in contest-
edness between 1998 and 2000 did not significantly differ for clean and nonclean districts.

Regression results offer further confirmation of the insignificant effect of the taxpayer financing regulations on the frequency with which candidates were unopposed. Table 5.18 reports the results of regressions analyzing the likelihood that a candidate was unopposed in 2000, controlling for the 1998 margin, whether there was an unopposed candidate in 1998, whether the seat was open in 1998, whether clean candidates ran in the district in 2000, and whether term limits were in effect in the district in 2000. For the combined sample, clean districts were neither more nor less likely to feature an unopposed candidate in 2000. (In the senate, the single unopposed candidate was in a clean district; hence, cleanness perfectly predicts the outcome in that case.) Regarding the impact of other independent variables, uncontested races in 2000 were significantly more likely when the 1998 margin was higher and when the race had been contested in 1998.

In addition, when the propensity of a seat to switch from being contested in 1998 to uncontested in 2000 is examined, no significant effect of the MCEA is found (Table 5.19). Specifically, for the combined sample, clean districts were neither significantly more nor less likely to switch from contested in 1998 to uncontested in 2000. As

Table 5.18

REGRESSION ANALYSIS OF IMPACT OF CLEAN ELECTION LAW
ON CONTESTEDNESS, 2000 (percent)

Dependent variable: Dummy variable for contestedness
(1 if single candidate, 0 if two candidates)

	House	Senate	Combined
1998 margin	0.04**	0.002	0.04**
Unopposed in 1998	-2.37*	—	-2.51**
Open in 1998	-1.27	—	-1.19
Clean	1.07	P	1.03
Term limits	-0.33	—	-0.38
House	—	—	2.32**

NOTE: * indicates that the regression coefficient is significant at the 10 percent level; ** indicates that the coefficient is significant at the 5 percent level; P indicates that the variable in question perfectly explains variation in the dependent variable; and — indicates that the variable was not included in the regression.

SOURCE: Authors' calculations.

Table 5.19

REGRESSION ANALYSIS OF IMPACT OF CLEAN ELECTION LAW ON
CHANGE IN CONTESTEDNESS BETWEEN 1998 AND 2000 (percent)

Dependent variable: Dummy variable for change in contestedness
(1 if seat changed from contested in 1998 to single-candidate in 2000, 0 otherwise)

	House	Senate	Combined
1998 margin	0.03**	0.10*	0.04**
Change in openness	—	0.09	-0.35
Clean	0.09	1.49	0.44
Term Limits	0.04	0.31	0.16
House	—	—	0.86

NOTE: * indicates that the regression coefficient is significant at the 5 percent level; ** indicates that the regression coefficient is significant at the 1 percent level; and — indicates that the variable was not included in the regression.

SOURCE: Authors' calculations.

Table 5.20
OPEN SEATS IN CLEAN AND NONCLEAN DISTRICTS, 1998
(percent)

Districts	All Races			Contested Races		
	House	Senate	Combined	House	Senate	Combined
Nonclean	35.8*	13.3	42.9*	31.7*	77.8	40.0*
Clean	100.0*	5.5	98.4*	100.0*	95.2	99.0*
	n = 151	n = 35	n = 186	n = 117	n = 30	n = 147

NOTE: * indicates that the nonclean and clean percentages are significantly different at the 1 percent level.

SOURCE: Authors' calculations.

Table 5.21
CLEAN DISTRICTS BY PRESENCE OF 1998 OPEN SEATS (percent)

Clean Districts	House	Senate	Combined
Not open	0.0*	50	5.3*
Open	83.8*	74.2	81.8*
	n = 151	n = 35	n = 186

NOTE: * indicates that the not open and open percentages are significantly different at the 1 percent level.

SOURCE: Authors' calculations.

for other independent variables, those districts with wider 1998 margins were more likely to switch from two-candidate to single-candidate fields between 1998 and 2000.

Openness

Perhaps the most dramatic results in comparing clean and nonclean districts come from the analysis of seat openness. Recall that, in 2000, clean seats were significantly less likely to be open than nonclean ones. Making this comparison for 1998 yields dramatically opposite results. Specifically, 100 percent of clean seats were open in 1998, significantly *more* than the 35.8 percent of nonclean seats open in that year (Table 5.20). Moreover, this is not an artifact due to the majority of all seats (66 percent) that are in clean districts. Consider a comparison of open and closed seats for 1998. As Table 5.21 shows, for open house seats in 1998, the likelihood of being

Table 5.22
 RACES WITH INCUMBENTS IN 2000 THAT WERE OPEN IN 1998 IN
 CLEAN AND NONCLEAN DISTRICTS (percent)

	All Races			Contested Races (in 1998)		
	House	Senate	Combined	House	Senate	Combined
Nonclean	0.0*	60.0	9.5*	0.0*	55.6	10.0*
Clean	100.0*	76.0	95.1*	100.0*	81.0	95.9*
	n = 151	n = 35	n = 186	n = 117	n = 30	n = 147

NOTE: * indicates that the nonclean and clean percentages are significantly different at the 1 percent level.

SOURCE: Authors' calculations.

clean in 2000 was 83.8 percent, significantly higher than it was in those districts with an incumbent running in 1998 (0 percent). In other words, the vast majority of districts that had no incumbent running in 1998 became clean, while *none* of the districts with an incumbent running in 1998 became clean. Had the MCEA been used to promote electoral competition, one suspects that it, instead, would have been *more* likely to have been employed in those districts where incumbents had run in 1998.

By analyzing the change in openness that occurred between 1998 and 2000, and comparing clean and nonclean districts along that dimension, one can directly examine this conjecture. Specifically, as exhibited in Table 5.22, the tendency of house seats to remain open between 1998 and 2000 differed significantly between clean and nonclean districts, but not in the direction forecast by proponents of clean elections. Of the 98 house districts that became clean in 2000, 100 percent shifted from having an open seat in 1998 to having a nonopen seat in 2000. In other words, while no incumbents ran in *any* clean house district in 1998, an incumbent ran in *every* clean house district in 2000. Conversely, of those incumbents elected in 1998 in nonclean house districts, the proportion running again in 2000 was significantly lower (0 percent).

Similarly, in the senate, while clean districts with no incumbent running in 1998 were more likely to have one running in 2000 than were their nonclean counterparts (76 vs. 60 percent), the difference was not statistically significant. The significant difference in the house led the combined comparison to be significant, with 95.1

Table 5.23
REGRESSION ANALYSIS OF IMPACT OF CLEAN ELECTION LAW
ON SEAT OPENNESS, 2000 (percent)

Dependent variable: Dummy variable for openness (1 if incumbent not running in 2000, 0 if incumbent running in 2000)

	All Races			Contested Races (in 1998)		
	House	Senate	Combined	House	Senate	Combined
1998 margin	—	−0.08	−0.01	—	−0.07	−0.01
Unopposed in 1998	—	6.39	1.47	—	6.12	1.19
Open in 1998	—	0.35	4.79*	—	0.33	4.40*
Clean	P	0.36	−4.52*	P	0.36	−4.18*
Term limits	—	—	—	—	—	—
House	—	—	0.41	—	—	0.38

NOTE: * indicates that the regression coefficient is significant at the 1 percent level; P indicates that the variable perfectly explains variation in the dependent variable; and — indicates that the variable was not included in the regression.

SOURCE: Authors' calculations.

percent of clean districts switching from open to incumbent-held (closed) seats between 1998 and 2000, compared with only 9.5 percent of nonclean districts. The same pattern existed in the districts that had contested races in 1998.

Further confirmation of the significant connection between a district's being clean and its shift away from open elections can be found in a regression analysis in which the dependent variable measures whether the seat was open in 2000. Results of this regression, shown in Table 5.23, indicate that even after taking account of other characteristics of the district such as the 1998 margin, whether the candidate was unopposed in 1998, and whether the seat was open in 1998, elections in clean districts were significantly less likely to be open in 2000. In other words, clean districts were more likely to have incumbents running in 2000 than nonclean ones, even after controlling for other relevant differences among districts. In addition, analogous results were found when the analysis was limited to contested races.

Final evidence of the tendency of clean districts to switch from open in 1998 to incumbent-held in 2000 is provided by a regression in which the dependent variable measures whether a district made

Table 5.24

REGRESSION ANALYSIS OF IMPACT OF CLEAN ELECTION LAW ON
CHANGE IN OPENNESS, BETWEEN 1998 AND 2000 (percent)

Dependent variable: Dummy variable (1 if district switched from open in 1998 to closed in 2000, 0 otherwise)

	All Races			Contested Races (in 1998)		
	House	Senate	Combined	House	Senate	Combined
1998 margin	—	0.13**	0.01	—	0.13**	0.03
Clean	P	0.15	5.91***	P	0.15	5.10***
House	—	—	-1.53*	—	—	-0.68

NOTE: * indicates that the regression coefficient is significant at the 10 percent level; ** indicates that the regression coefficient is significant at the 5 percent level; *** indicates that the regression coefficient is significant at the 1 percent level; P indicates that the variable perfectly explains variation in the dependent variable; and — indicates that the variable was not included in the regression.

SOURCE: Authors' calculations.

Table 5.25

CLEAN MONEY AND INCUMBENCY, 2000

Chamber	Clean Money Incumbent Wins	Clean Money Incumbent Losses	Incumbent Wins As Percentage of All Clean Money Wins
Senate	11	0	64.7
House	24	2	53.3

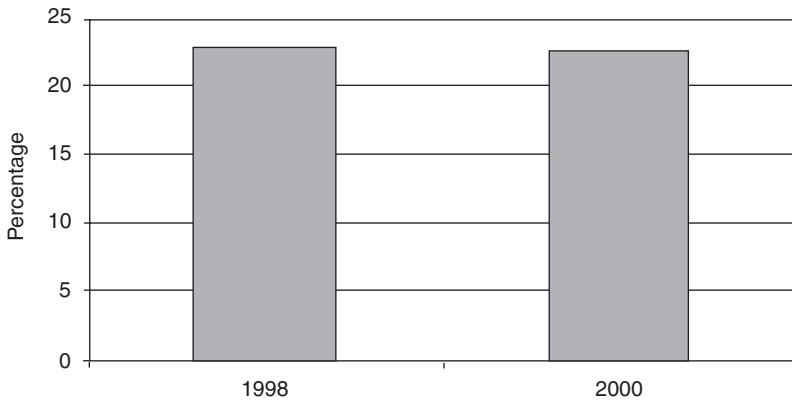
SOURCE: Authors' calculations.

such a switch. The results (Table 5.24) indicate that in the combined sample and in the subsample of house districts, clean districts were significantly more likely to shift from open to closed than were nonclean districts. For the house, the clean variable perfectly predicts changes in openness; 100 percent of house seats open in 1998 became closed in 2000. Again, analysis of contested races provided highly similar results.

Analysis of Incumbency

The 2000 election clearly demonstrates the power of incumbency. Fifty percent of incumbents seeking reelection to the state senate accepted taxpayer financing. Not one of those clean senate incumbents was defeated in 2000 (Table 5.25). Therefore, despite the limited

Figure 5.3
AVERAGE MARGIN OF VICTORY OF CLEAN MONEY HOUSE
INCUMBENTS



SOURCE: Authors' calculations.

campaign spending available to the clean incumbents, the respective advantages of incumbency, such as name recognition, appeared to outweigh more tangible factors.

As is the case for the state senate races, the power of house incumbency can be illustrated (Table 5.25). Only two of the house incumbents who chose to fund their reelection efforts courtesy of Maine taxpayers were defeated in 2000. In fact, the majority of clean-candidate victories belonged to incumbents. Again, one finds evidence that, despite the limitations on campaign spending by tax-funded incumbents, the advantages of entrenched incumbency were almost impossible to overcome.

If one notes the average margin of victory of the clean house incumbents in 2000 and compares that figure with the same incumbents' average margin of victory in 1998 (Figure 5.3), there is no improvement in the competitiveness of the average outcome. Overall, of the 17 comparable clean incumbent house seats, 8 were more competitive in the 1998 election, and 9 were more competitive in the 2000 election.

The Competitiveness of Maine's 2000 Election—Summary

A variety of statistical tests support the notion that the MCEA had significant effects on electoral competitiveness. Unfortunately

for the proponents of the law, those effects, where they exist, tend almost exclusively in the direction of *lessened* rather than heightened competitiveness.

With regard to victory margins, clean districts did not exhibit a larger reduction in the size of margins between 1998 and 2000 than did nonclean districts. Instead, for the combined house-senate sample, the average margin reduction was *larger* in nonclean districts in both contested and uncontested races, although not significantly larger. This overall result was driven by (insignificantly) greater margin reductions in nonclean districts in the house, while clean senate districts did experience greater margin reduction than nonclean districts (again, a statistically insignificant difference). This result was further confirmed by regression analysis in which races in clean districts had neither closer margins in 2000 nor greater margin reductions between 1998 and 2000, holding constant other relevant characteristics of the election.

In fact, when the 2000 margins alone are examined in districts with contested races, clean districts had significantly *higher* margins than did their nonclean counterparts. When this subset of districts is examined further (results not reported), however, there is no significant difference in margin reduction (between 1998 and 2000) for clean and nonclean districts. Thus, one could reasonably conclude that the MCEA had no impact on electoral competitiveness by way of victory-margin reduction.

Similarly insignificant results were discovered regarding the impact of cleanness on a candidate's likelihood of being unopposed. Simple statistical analysis of the frequency with which candidates were unopposed in 2000 found that while clean districts had a higher frequency of such candidates, the difference was not statistically significant. Moreover, regression analysis of contestedness in 2000 and of the change in contestedness between 1998 and 2000 found no significant effect of cleanness, with one minor exception. In the analysis of the senate for 2000, the clean variable perfectly predicts contestedness, in that the only unopposed senate candidate in 2000 was in a clean district.

The real impact of the MCEA is detected in the propensity of incumbents to run for reelection. As noted earlier, Maine experienced a dramatic and significant reduction in openness between 1998 and 2000, with incumbents running in only 20 percent of districts in 1998

but in 87 percent of districts in 2000. This shift was apparently attributable to the clean election “reforms.” Evidence suggestive of this phenomenon comes from simple statistical analysis of openness in 2000. Thirty-three percent of nonclean seats were open in 2000 compared with 3 percent of clean seats, a significant difference. This significant difference is due to the disparity in this outcome in the house, where 36 percent of nonclean seats were open in 2000 compared with 0 percent of clean seats. While the senate also had a smaller proportion of open seats in clean than in nonclean districts in 2000, the difference was insignificant.

Moreover, this difference was amplified after examining the 1998 data. In that year, districts that were to become clean had 98 percent of their seats open, significantly more than did nonclean districts, at 43 percent. Again, the house was responsible for this significant effect; while 100 percent of clean house seats were open, only 36 percent of nonclean ones were. While almost all clean seats (98 percent) were open in 1998, almost none (3 percent) were open in 2000.

These observations regarding 1998 and 2000 were connected by examining the likelihood that a district switched from open to closed between 1998 and 2000. This analysis revealed that while only 10 percent of nonclean seats (6 of 63) shifted from open to closed, 95 percent of clean ones (118 of 123) similarly shifted. Looked at another way, those districts with open seats in 1998 were significantly more likely to become clean (82 percent) than those with an incumbent running in 1998 (5 percent).

Regression analysis further confirmed this finding. When the likelihood of a district’s being open in 2000 is analyzed, clean districts are discovered to have a significantly lower probability of openness than nonclean ones, controlling for the margin in 1998, whether the candidate was unopposed in 1998, and whether the seat was open in 1998. Specifically, in the house, the clean variable perfectly predicts openness; as noted earlier, 100 percent of all clean house districts had an incumbent running in 2000. Finally, regressions estimating the likelihood of a district’s shifting from open in 1998 to closed in 2000 revealed that clean districts were significantly more likely to shift from open to closed than were nonclean ones, controlling for the size of the margin in 1998. Again, this result was driven by the house data, where the clean variable perfectly predicted the

likelihood of shifting; 100 percent of clean seats open in 1998 became closed in 2000.

In general, taxpayer financing seems not to have improved electoral competitiveness in Maine. This conclusion is borne out by a more detailed analysis of the individual senate and house races directly affected by the MCEA. Instead, taxpayer financing may disproportionately, and negatively, affect open seats that are already predisposed to competition. In other words, we have little reason to believe that the MCEA increased electoral competition in Maine's senate races beyond what would have happened in its absence. The alleged causal relationship between taxpayer financing and increased competitiveness appears even more tenuous when one considers the outcomes of the most inherently competitive races—those for open seats—featuring tax-funded candidates. Increases in competition appear instead to arise, in part, from term-limits provisions that also came into effect in the 2000 elections.

Conclusion

The preceding analysis of the results of the 1998 and 2000 Maine state elections shows that the adoption of taxpayer financing for the 2000 election did not result in a substantially more competitive election than occurred under private funding in 1998. Although enhanced electoral competition has been predicted as a result of clean election regulations, the evidence from Maine implies the opposite. Comparison of districts that had clean candidates in 2000 with those that did not indicates that the clean districts displayed no improvement on two of three dimensions of electoral competitiveness and actually performed far worse on a third.

Specifically, clean districts exhibited no difference in victory margins or in contestedness relative to nonclean districts. However, in the case of openness—the tendency of incumbents to run—clean districts were far more likely to have incumbents running in 2000 and far more likely to have switched from an open race in 1998 to one in which an incumbent was running in 2000. Therefore, our empirical analysis of the Maine election supports the following conclusions:

- The overall average margin of victory in both senate and house races declined by a statistically insignificant amount.

- Races for open seats that featured tax-funded candidates did not clearly show that taxpayer financing leads to more competitive elections, and in fact, demonstrated the reverse.
- Despite limits on campaign spending by incumbents, the advantages of holding office were almost impossible to overcome. Most victorious clean candidates were incumbents, and almost all incumbent clean candidates retained their seats. The limits on house incumbents' spending under taxpayer financing did not reduce their margins of victory. A comparison of the average margin of victory of the clean house incumbents in 2000 and those same incumbents' average margin of victory in 1998 found no statistically significant improvement in competitiveness.
- Term limits were relatively effective at opening up the state's electoral process to greater competition. Newly competitive seats benefited more from the introduction of term limits than from the introduction of taxpayer financing.
- Under a system of taxpayer financing, the number of contested primaries rose only marginally from 1998 and remained well below the level of prior, privately funded elections.
- The lure of subsidized campaigning did not attract a substantial number of independent and minor party candidates.

Rather than making incumbents more vulnerable to challenge, the MCEA has helped to entrench incumbents, diminishing electoral competition. This conclusion should not surprise students of American elections. After all, the research of political scientists Michael J. Malbin and Thomas L. Gais on various earlier taxpayer financing efforts in other states found no evidence that taxpayer financing increases electoral competition.²⁸

These findings should lead other states to be extremely skeptical of the clean money alternative. For a scheme largely funded by taxpayers, the Maine experiment offers few public benefits. Maine's lesson for other states and for national politicians is that a government trying to foster more competitive elections through taxpayer financing will be disappointed with the results, and taxpayers will be discomforted by the costs.

Notes

1. Dan Harris, "The Clean Campaign: New Law Allows Maine Candidates to Use Taxpayer Money," *ABC News*, July 9, 2000.

2. See, for example, Marc Breslow, Janet Groat, and Paul Saba, *Revitalizing Democracy: Clean Election Reform Shows the Way Forward* (Boston: Money and Politics Implementation Project, 2002), pp. 21–35.

3. Glenn Cummings and Ed Youngblood, "Favor-Free Politicians: From Maine, Living Proof that Campaign Finance Reform Can Work," *Washington Post*, August 20, 2001, p. A15.

4. Ellen S. Miller, "Clean Elections, How To," *American Prospect* 30 (January–February 1997).

5. Richard M. Neustadt Center for Communications in the Public Interest, "State and Local Overview," Press release, March 27, 2000, available at <http://us.benton.org/neustadt/reporters/me.html>.

6. See "Ready for Some Good News on the Campaign Finance Beat?" June 12, 2000, available at www.publiccampaign.org/press_releases/pr6_12_00.html. Public Campaign, an advocacy organization based in Washington, D.C., is leading the national campaign for clean money regulations. Two-thirds of its multimillion-dollar annual budget is spent directly on state campaigns, including the funding of state-level campaign finance regulation groups, the training of advocates of campaign finance regulation, and the provision of model legislation and ballot initiatives.

7. Nick Nyhart, quoted in Public Campaign, "A New Kind of Legislature—'Clean,'" Press release, December 6, 2000, available at www.publiccampaign.org/press_releases/pr12_6_00.html.

8. Robert Dreyfuss, "Reform beyond the Beltway: States as Laboratories of Clean Money," *American Prospect* 38 (May–June 1998), available at www.prospect.org/archives/38/38dreyfs.html.

9. Cited in Miller, "Clean Elections, How To."

10. Jonathan Cohn, "Campaign Reform that Might Actually Work," *New Republic*, November 29, 1999, available at www.thenewrepublic.com/112999/cohn112999.html.

11. As stated by a leading advocate of campaign finance restructuring, "The real problems are too much money; too much time spent raising money . . . and the reality that good people don't have a fair chance of winning without the money." Quoted in Miller, "Clean Elections, How To."

12. The MCEA ballot initiative was colaunched by the Maine Citizen Leadership Fund and the Dirigo Alliance (the Maine affiliate of the Northeast Citizen Action Resource Center). The Maine coalition also included Northeast Action, Maine Women's Lobby, Natural Resources Council of Maine, chapters of the Reform Party and United We Stand America, and Peace Action Maine. Financial and organizational support from an assortment of liberal national organizations such as Common Cause, Citizen Action, League of Women Voters, AFL-CIO, American Association of Retired Persons, National Association for the Advancement of Colored People, and significant funding from charitable foundations reinforced the local coalition.

13. Dreyfuss, "Reform beyond the Beltway."

14. *Ibid.*

15. Unidentified national campaign finance regulation activist, as quoted in Dreyfuss, "Reform beyond the Beltway."

16. State of Maine Commission on Governmental Ethics and Election Practices, *A Candidate's Guide to the Maine Clean Election Act* (Augusta, ME: Commission on Governmental Ethics and Election Practices, 1999).

17. *Ibid.*

18. *Ibid.*

Does Cleanliness Lead to Competitiveness?

19. Ibid.
20. Ibid.
21. Ibid.
22. State of Maine, "Maine Clean Election Fund: Sources of Funding," *A Candidate's Guide* (Augusta, ME: Commission on Governmental Ethics and Election Practices).
23. Similar legal challenges were filed in Arizona, Massachusetts, and Vermont following clean money successes in those states. In Arizona, the legal challenge was successful.
24. *Buckley v. Valeo*, 424 U.S. 1 (1976).
25. *Daggett v. Webster*, F. Supp. 2d, 1999 WL 1034520, *3 (D. Me. 1999).
26. *Daggett v. Webster*, Civil No. 98-223-B-H, slip op. at 2, 5-8 (D. Me. January 7, 2000).
27. See Public Campaign, "A New Kind of Legislature-Clean," Press release, December 6, 2000, available at www.publiccampaign.org/press_releases/pr12_6_00.html.
28. Michael J. Malbin and Thomas L. Gais, *The Day after Reform: Sobering Campaign Finance Lessons from the American States* (Albany, NY: Rockefeller Institute Press, 1998), pp. 135-37.

6. Our Democracy, Our Airwaves

Paul Taylor

Popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power which knowledge brings.

—James Madison

*Letter to William T. Barry, Aug. 4, 1822, Madison Papers,
Library of Congress.*

In our democracy, speech is free but communication is expensive—and never more so than during the campaign season. This is the paradox that lies at the heart of our problems with money and politics. As the cost of political communication keeps rising, the competitive playing field of campaigns keeps tilting toward candidates who are wealthy or well financed. Not only does the better-funded candidate almost always win in our system, but, increasingly, these victories come at the end of campaigns that are so lopsided that they rob voters of a meaningful choice. In the 435 races for the U.S. Congress in 2002, for example, the typical winner outspent the typical loser by three to one during the campaign and, on Election Day, piled up a victory margin of 70 percent to 30 percent—a landslide. A staggering 98 percent of all incumbents seeking reelection were successful.¹ In our gilded age of politics, if you're a challenger who can't write a big check to your local television station to pay for a nightly bombardment of ads, you'll still have your freedom of speech. You just won't have the ability to be heard, much less elected.

Election campaigns are democracy's crown jewel, the indispensable moment when the *outs* clash with the *ins* over their competing visions for a better society. They allow for disagreements to be

ventilated, fresh starts to be launched, or the status quo to be affirmed. They build mandates and provide for accountability. At their best, they transform a population into a citizenry—and, come Election Day, a citizenry into a sovereign. But when money becomes the arbiter of who gets heard and who gets elected, citizens are denied the contest of ideas and range of choices that are supposed to be what elections are all about. And once the election is over, the public is too often left with elected officials who are more beholden to their contributors than to their constituents. This breeds a cynicism that drives citizens away from politics—pushing the cost of communicating to them even higher.

Our democracy has struggled with this dilemma for a long time and for a good reason: It presents a clash of core democratic values. On the one hand, we resist limits on what candidates can say or how loudly they can say it; it offends our cherished principle of free speech. On the other hand, when some candidates can shout and others only whisper, all depending on the size of their wallets, it offends the values of equal access and fair play we also prize in our democracy.

The Bipartisan Campaign Reform Act of 2002, commonly known as the McCain-Feingold broadcast bill, is the most important effort by Congress in a generation to confront this dilemma. It outlaws the largest and most potentially corrupting campaign contributions, the unlimited “soft money” donations to political parties. It also places restrictions on the financing of electioneering ads by unions, corporations, and interest groups. The law is currently being challenged by a broad array of plaintiffs who contend that it infringes on their rights of free speech and association. As of this writing, it’s not clear how much of it will survive Supreme Court scrutiny. No matter how the high court rules, however, there are other reforms that need to be enacted. The focus of the BCRA is to reduce the supply of big money; it does nothing to reduce the skyrocketing demand. Nor will it ensure that adequate resources are available for candidates, including challengers, to get their messages across to voters in competitive elections around the country.

For that, we need a second round of reform. But in seeking to open up the political marketplace to more candidates and more ideas, we must be mindful of the U.S. Supreme Court’s admonition in its 1976 *Buckley v. Valeo* decision that restricting the speech of

some elements of our society to enhance the relative voice of others is wholly foreign to the First Amendment. Rather than restrict speech, we should expand speech. Rather than build ceilings, we should build floors. The goal isn't to guarantee absolute equality in the volume of speech enjoyed by rival candidates; rather, it is to increase electoral competition. And as the political science research makes clear, the most effective way to make campaigns more competitive is to ensure that less-well-financed candidates at least have the seed resources to get a message out.

The best place to construct this sort of remedy is at the greatest source of the problem—broadcast television. More than any other factor, broadcast television is the engine that has driven up the cost of running for public office. It also happens to be the one medium we have a legitimate claim to regulate, for broadcasters use the public's assets—the electromagnetic spectrum—in order to function. Since the dawn of radio, we've had the following compact with the broadcast industry: we'll give you free and exclusive rights to use assigned frequencies on our public airwaves; we'll protect you from interference from would-be competitors; we'll even (since the advent of cable) require that rival systems of delivering television signals into homes "must carry" all your programming; but, in return, you must agree to serve the public interest.

In theory, it's a good bargain. In practice, it's been an abject failure—and nowhere more so than in the realm of ensuring that citizens acquire the information they need to govern themselves. For the past generation, broadcasters have scaled back on substantive coverage of political campaigns, even as they auction off the right to "free speech" to candidates at ever-higher prices, 30 seconds at a time. They treat election campaigns as a chance to profiteer rather than to inform. In so doing, they serve their bottom lines, not the public interest.

Virtually all other democracies around the world have found a way to open up their broadcast airwaves to free political speech just before elections. We should adopt such a system as well, one that is suited to our particular campaign and media culture. Senators McCain and Feingold have introduced such a bill. It has two principal components. One would require television and radio stations to devote a reasonable amount of airtime during the campaign season to issue-based candidate forums such as debates, interviews, town

hall meetings, and so on. The other would require stations to pay a small spectrum-use fee to create a pool of money that could be used to provide qualifying candidates and parties with vouchers to run a reasonable number of ads in the period before an election. Free airtime is not a panacea; it will not drive money out of politics altogether. But by providing credible candidates access to the broadcast media regardless of their financial circumstances, it would open up the political process to those currently priced out of the market. And by creating forums that allow for a free exchange of ideas among competing candidates, it would reduce the relative importance of monied special interests. These steps would provide citizens with more choice, more information, and more power.

Television, Money, and Politics

Until now, the search for answers to the problems of money and politics hasn't taken most reformers to the doorstep of the local television station. But it's time that it did, because that's where the biggest chunk of money in modern campaigns winds up. "Today's political campaigns function as collection agencies for broadcasters," former Sen. Bill Bradley quipped as he sought his party's presidential nomination in 2000. "You simply transfer money from contributors to television stations," he added. In 2002, television stations took in an estimated \$1 billion of the estimated \$4 billion in overall campaign spending by candidates, parties, and issue groups at all levels of politics—federal, state, and local.²

Television's haul from politics has been rising at breakneck pace. Between 1980 and 2000, the amount of money spent on political ads more than quadrupled, even after adjusting for inflation. One reason is that there are far more political advertisers than ever before—not just candidates, but parties and issue groups as well. Another reason is that stations have grown more aggressive about jacking up the cost of advertising to take advantage of the demand spike that occurs just before elections. In 2000 the Center for the Study of Elections and Democracy at Brigham Young University analyzed the cost of political ads in 17 media markets across the country where there were competitive congressional and senatorial races and found that a typical 30-second political spot tripled in cost from the end of August through the end of October.³ In nonelection years, ad prices

during that same period increased by just 20 percent (reflecting the start of the holiday shopping season).

"The rates are becoming extortionist," James Jordan, director of the Democratic Senatorial Campaign Committee, said during the 2000 campaign. "They can charge the moon and get it," lamented David Keating, executive director of the Club for Growth, a group that ran political spots. Dan O'Connor, general sales manager of WSYT-TV in Syracuse, New York, mused in 1999 about what it was like to sell airtime in the heat of an expensive statewide political campaign: "It's like Santa Claus came."⁴

This gouging by stations occurred despite a law Congress passed in 1971 that was designed to insulate candidates from these classic supply-and-demand pressures. Known as the "lowest unit charge" law, it requires that television stations, as a condition of receiving free licenses to use the public airwaves, must offer candidates the same low rates they give their high-volume, year-round commercial advertisers. But the law was poorly drafted and has never provided candidates with the safeguards that its name promises. That's because candidates have unique needs as advertisers. In the heated thrust-and-parry of a political campaign, they need assurances that their ads will run exactly where and when they place them. If the opponent launches an attack in an ad on the six o'clock news, the candidate wants to be sure his or her response ad will air in the same time and place. Stations charge high premiums for such "non-preemptible" time slots and nothing in the lowest unit charge law prevents them from doing so.

After the 2000 campaign, the U.S. Senate took a step toward closing this loophole. In March 2001 it approved an amendment to the McCain-Feingold campaign finance bill that would have allowed candidates to purchase "non-preemptible" time at the lower "preemptible" rates most product advertisers are content to use. The lopsided vote in favor of this amendment—69 to 31—was a powerful testament to just how fed up members of the Senate have become at stations' gouging.⁵ However, the broadcast industry successfully lobbied to remove that provision when the companion Shays-Meehan campaign finance bill was taken up in February 2002 by the House of Representatives. The new McCain-Feingold broadcast bill will once again include this proposal to close the loopholes in the lowest unit charge provision.

Tuning Out Democracy: The Decline in Substantive Campaign Coverage

The trouble at the intersection of television, money, and politics isn't limited to the rising cost of ads. The other problem is the declining amount of time that broadcast television devotes to substantive coverage of issues, debates, conventions, candidate speeches, and the like. These two problems feed off one another. The less exposure candidates receive from "free media" coverage, the more they must rely on paid ads to reach the broad audience that only television delivers.

To cite one striking example: During the final three months of the 1998 California governor's race, stations in that state's seven largest cities devoted, on average, just *one-half of one percent* of their news coverage to what was arguably the most important political race in the country that year.⁶ The California gubernatorial candidates, in turn, spent most of the campaign season dialing for dollars to pay for the nearly \$100 million worth of political ads they ran on those same stations in hopes of getting their names and ideas out across the state. "The political unit of today's commercial TV station is the sales department, not the news department," Gov. Gray Davis's campaign manager, Garry South, complained after the election was over.

The broadcast industry's retreat from substantive campaign coverage isn't just a California phenomenon. It stretches from coast to coast; it has affected the national networks as well as local stations; and it has been exhaustively documented over the years by scholars as well as watchdog groups. The following is a summary of findings from the 2000 presidential campaign:

- The three national network nightly newscasts devoted 28 percent less time to coverage of the 2000 campaign than they did to the 1988 campaign, the last open-seat contest for the presidency.⁷
- The time devoted by the networks to coverage of the two national party conventions in 2000 was down by two-thirds from 1988.⁸
- Just 12 percent, a record low, of all presidential campaign coverage on the nightly network newscasts was devoted to the candidates' own words. Reporters received 74 percent of election news airtime and the remaining 14 percent was divided among voters, pundits, pollsters, campaign staffers, and others.⁹

- The length of the typical presidential candidate sound bite on the nightly newscasts also set a record for brevity—7.8 seconds. In 1968, it was 43 seconds.¹⁰
- Seventy-one percent of the campaign stories that the national network nightly newscasts did air in 2000 focused on the horse-race rather than on the issues.¹¹
- A total of 22 television debates were held by presidential candidates during the 2000 primary campaign, but of these, just two aired on a national broadcast network, neither in prime time. The other 20 were shown only on cable, public television, or a local broadcast station in the city where the debate was held.¹²
- Two of the four national networks (Fox and NBC) declined, for the first time ever, to carry all of the general election presidential debates—opting instead to counter-program with sports and entertainment.
- The typical local television station in a large or medium-sized city aired just 45 seconds a night of candidate discourse in the month before the 2000 election,¹³ and the national networks aired just 64 seconds a night¹⁴—both far below a five-minute-a-night voluntary standard recommended by a White House advisory panel charged with updating the public interest obligations of broadcasters.

In the early decades of television, the national network newscasts provided substantive political coverage not just out of a commitment to public service, but as a badge of journalistic excellence. Their cameras transformed debates and conventions and election nights into something never before seen—mass spectacles. Their anchor-men served as tour guides, deciphering the speeches and platforms and infighting for the uninitiated. Up until the late 1970s, ABC, CBS, and NBC between them attracted 75 percent of the nightly television audience to their newscasts, and their close attention to campaigns helped to anchor politics on the center stage of our national life. “If it didn’t happen on television,” went a favorite political aphorism of the era, “it didn’t happen.”

Much has changed in the generation since then. Campaigns have lost both their novelty and their lure as television events; today’s audiences find them dull, grating, and synthetic. The broadcasters have lost substantial slices of their audience, first to cable and more

recently to the Internet. And politics has lost its pride of place, struggling to keep its head above water in a popular culture more consumed by money and entertainment.

Rather than resist these dynamics, broadcasters have given in to them—and in the process made them stronger. They have offered up what amounts to a Let'em-Eat-Cable defense for their abandonment of political coverage. Veteran ABC correspondent Sam Donaldson ruefully acknowledged during the midst of the 2000 primaries that his network's nightly newscasts had "simply forfeited the field" of campaign coverage to CNN, MSNBC, and the Fox News Channel. "For us to run long programs in prime time as a public service doesn't make a lot of sense anymore to our bosses," he said.

The New Media: An Uninformed Electorate

One of the paradoxes of this new era of "technological plenty" has been that as more political information has become more readily available on more different kinds of media, fewer people have chosen to avail themselves of it. Polls taken throughout 2000 showed a decline in citizen interest in that presidential campaign compared to previous ones, even though it was apparent from Labor Day forward that the contest between George W. Bush and Al Gore was headed for a tight finish.¹⁵ Because so few people were interested, not many took the time to bone up on the issues. A nationwide survey taken two days before the election found that more than half of those polled could not answer basic questions about Bush's position on taxes, abortion, and gun control, or about Gore's position on Medicare prescription drug plans, Social Security, school vouchers, and affirmative action.¹⁶ These findings came at the end of a campaign in which fewer people than ever in the television era followed the campaign on broadcast television, while more people than ever followed it on cable and the Internet.¹⁷ The lesson seems clear: If politics cannot win the battle for eyeballs in the broadcast world, it cannot recover in the narrowcast world.

A quick look at viewership levels drives the point home. Even after a generation of declining ratings, the ABC, CBS, and NBC nightly network newscasts still draw a combined audience of 30 million. Meantime, CNN and the Fox News Channel each average about 1 million viewers in prime time, but during slow news periods, those numbers drop sharply. Network television may not be the

colossus it once was, but it's still the place that sets the tone for our ongoing conversation of democracy. NBC chief executive officer Robert Wright had it right when he told a gathering at the National Press Club in January 2000: "Only the NBCs, ABCs, and CBSs of the world can provide a shared experience that affects and influences our collective identity as a nation."

And even if one day all the political niches on cable and the Internet were somehow to aggregate a mass audience that rivals the one that broadcast television now delivers, there would still be the troubling issue of cost. Only broadcast television comes into everyone's home for free; that's why it has achieved 99 percent market penetration, and it's one of the reasons it receives such friendly treatment from lawmakers and regulators. Cable and Internet connection fees start at about \$40 a month and range upward. Left unchecked, the broadcasters' Let'-em-Eat-Cable rationale for abandoning political coverage would lead to a "subscription democracy" in which the only citizens who had a front-row seat to their presidential campaign would be those who could pay a monthly fee for the privilege.

Surely that's not progress.

Television isn't the only guilty party here; political campaigns also have had a large hand in shrinking their own audience. The irony is that in their very effort to turn themselves into made-for-television spectacles, modern campaigns have managed to make themselves less rather than more appealing to the general public. Synthetic candidates, scripted conventions, programmed sound bites, and incessant attack ads turn out not to be the way to win loyal viewers—especially not viewers primed by television pundits to be on the lookout for the packaging in politics.¹⁸ On the other hand, these often are the winning tactics in low-turnout campaigns, where the name of the game is to drive down your opponent's vote total rather than to build up your own.

It is not television's job to teach politicians how to run campaigns that make for better television and a more engaged citizenry. But it is the job of journalism, including broadcast journalism, to make what's important interesting. A political campaign is inherently important. It can have a direct impact on those things that most of us hold dear—health, wealth, security, environment, and education. A political campaign also has all the ingredients to be interesting—

character, plot, drama, a suspenseful ending, and an important underlying purpose. Moreover, it is the only story for which the audience chooses the ending—and, by so doing, chooses its own future. Yet somehow when all of these elements are tossed into the broadcast media blender, the whole concoction comes out as “ratings poison.” This is not merely a failure of politics; it is also a failure of journalism.

Many leading broadcast journalists have reached the same conclusion and point an accusatory finger at their industry’s fixation on profits. Network-affiliated local television stations across the country typically run operating profit margins of 30, 40, and even 50 percent annually. Yet these high margins have served mainly to whet the appetite for more of the same in the boardrooms of the corporations that own them.¹⁹ “Ratings are about all that most people in television give a damn about,” CBS anchorman Dan Rather told a symposium at Harvard University in 1998. “[Business pressures] overwhelm journalistic instincts.”²⁰ These sorts of alarm bells have been sounded for years, by critics both in and out of broadcast television, and still the industry continues its retreat.

The best remedy is to enact free airtime legislation that would require broadcasters to air forums that would open up the discourse of campaigns to something more nourishing than attack ads, sound bites, and synthetic spin. Such forums may not transform campaigns overnight, but at least they’d create a healthier set of incentives than now exists. Broadcasters would want to attract viewers, and candidates would want to win votes—so they’d both have a stake in finding ways to make good television. It may seem counterintuitive to try to revive campaign discourse on the very medium that’s contributed so much to its demise. But any real hope for reform will have to start there—for that’s where the most important political conversation still takes place.

A Free Airtime Proposal

Any free airtime system should have six related—but distinct—objectives. First, it should reduce the cost of candidate communication. Second, it should increase the flow of political information on the broadcast media. Third, it should strengthen, not weaken, political parties. Fourth, it should strengthen, not weaken, political competition—it should not be yet another incumbent protection mechanism. Fifth, it should not be “welfare for politicians,” simple grants

of time given to all candidates without any effort in return. Sixth, as important as any other goal, it must be workable—flexible enough to fit in a system where different districts and states have different television markets and costs, and where candidates may have very different communications needs. What works in South Dakota, where there are a few clear media markets and one congressional seat, may not work at all in the New York metropolitan area, covering two or three dozen congressional districts across three states. What follows is an outline of one workable and flexible approach to achieve these goals.

1. A VOUCHER SYSTEM FOR FREE POLITICAL ADS

The free airtime system would provide vouchers for a reasonable amount of free advertising time to candidates and to political parties. The only candidates who would receive direct grants of vouchers would be those running for U.S. House and Senate seats who had first raised a threshold amount of contributions in small donations. In addition, each of the two major political parties would receive in each election cycle large block grants of broadcast vouchers that the parties could use to air their own ads, or pass along for use by any general election candidate the party supported for any local, state, or federal office. Minor parties that met qualifying thresholds would receive smaller blocks of free airtime vouchers.

The voucher system would be financed by a spectrum usage fee amounting to not less than one-half percent, and not more than one percent, per year of the gross annual revenues of the nation's 1,300 local television station licensees and 13,000 local radio station licensees, either as a new form of public interest obligation, or as a portion of a spectrum rental fee instead of those obligations. A fee set in that range would easily fund the system envisioned in the new McCain-Feingold broadcast bill, which calls for \$750 million in broadcast vouchers to be made available to candidates and parties each two-year election cycle.

2. A VOTER'S TIME REQUIREMENT

All television and radio licensees would be required to air a minimum of two hours a week of a candidate's discussion of issues in the four to six weeks preceding every election. At

least half of these segments would have to be aired in prime time or drive time; no segment that aired between midnight and 7 a.m. would count toward meeting this obligation. The formats would consist of debates, interviews, candidate statements, town hall meetings, mini-debates, or any other similar news or public affairs programming of a broadcaster's choosing. Within these broad guidelines, all decisions about when the segments should air, how long they should be, what races they should focus on, and what formats should be used would rest with local stations.

Some Questions and Answers about Free Airtime

There are many important policy questions raised by this free airtime proposal:

Would a free airtime bill be constitutional?

The broadcast industry maintains that such a measure would violate its First Amendment rights to free speech and its Fifth Amendment protections against a "takings" of its property.²¹ But more than 70 years of legislation, regulation, and court rulings argue strongly against its position. In a landmark ruling in the *Red Lion Broadcasting Co. v. FCC* case in 1969, the Supreme Court held that when the government regulates access to the spectrum, it must balance the First Amendment rights of broadcasters against the First Amendment rights of the public, and that when these rights come into conflict, the rights of the public are "paramount." The Court reasoned that "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . rather than to countenance the monopolization of the market," and thus, it is "the right of the viewers and listeners, not the right of the broadcasters, which is paramount."

In the *FCC v. League of Women Voters of California* (1984), the Court reinforced this doctrine, holding that the government has a compelling interest in ensuring that "the public receives through the [broadcast] medium, a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium was left entirely in the hands of those who own and operate broadcasting stations."

In *Buckley v. Valeo* (1976), the Court observed that "efforts to 'enhance the volume and quality of coverage' of public issues

through regulation of broadcasting may be permissible where similar efforts to regulate print media would not be" (*Buckley v. Valeo* 424 U.S. 50–51 n. 55). And in upholding the "reasonable access" provision of existing law against the broadcasters' First Amendment challenge, the Court noted that the provision makes "a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process" (*CBS v. FCC*, (1981) 453 U.S. 396).

Over the years, the broadcast industry has mounted multiple challenges to the "scarcity rationale" for regulation, arguing that in an era of proliferating information technologies, what broadcasters provide is neither scarce nor unique. But the Court has taken the view that scarcity persists because there are still many more people who want to broadcast over the airwaves than there are available frequencies. As for the Fifth Amendment "takings" argument, the Communications Act is clear and the courts have long held that broadcasters have no "property interest" as a result of their licenses to use the airwaves, and thus there could be no takings.²² Other commercial users of the spectrum, such as cell phone companies, have been required to pay billions of dollars to the federal government for spectrum licenses assigned by auction since 1994.

How would the voucher system work?

Candidates could use their vouchers on whatever television or radio station was most advantageous to them, but they would "pay" prevailing market rates. So, for example, it might cost a candidate in New Mexico \$300 worth of vouchers to air a 30-second spot on the local six o'clock news, while a candidate in New York City might have to spend 10 times that many vouchers for a similar spot on the local news there. This creates real-world pricing incentives that will result in the most politically efficient and market friendly use of the vouchers.²³ Moreover, because the vouchers would be financed by a gross revenue tax on broadcasters, all local stations would share an equitable financial burden, regardless of how many candidates redeemed vouchers at their stations.

How Would Congressional Candidates Qualify for Vouchers, and How Many Could They Receive?

Under the new McCain-Feingold broadcast bill, a congressional candidate would have to raise at least \$25,000 in donations of not

more than \$250 apiece. Once the candidate met that qualifying threshold, all donations of \$250 or less would be matched in broadcast vouchers on a three-for-one basis, up to a limit of \$375,000 per House candidate.²⁴ So if a House candidate raised \$125,000 in small donations, he or she would receive the maximum of \$375,000 in broadcast vouchers. The thresholds and limits for Senate candidates would be the House figures multiplied by the number of House districts in the state where the Senate candidate is seeking office. Candidates who earned vouchers but did not wish to use them on television or radio (for example, candidates in urban districts that don't match up well with media markets) could trade in their vouchers to their political party for cash; the party could then use the vouchers on behalf of candidates who would benefit more from them.

Aren't These Vouchers Public Financing of Campaigns by Another Name?

In a sense they are. The difference is that public financing systems are paid for by taxpayers, whereas vouchers represent a return to the taxpayers on a public asset they already own, the broadcast spectrum. At the same time, candidates have to work to receive the vouchers; they come as a reward for expanding the base of political contributors to include more small donors.

Why Distribute Additional Large Blocks of Vouchers to the Political Parties?

Several reasons exist. First, it is a way to get vouchers to thousands of state and local candidates without having the federal government trying to micromanage which races in which states in which years should get what quantity of vouchers. Let the parties make those allocation decisions; it's their business. Second, a political party is the one permanent political institution that has an ongoing interest in electing challengers. If parties distribute their vouchers wisely, more campaigns will become more competitive. One way to think of these large block grants of party vouchers is as a clean replacement for soft money. What is objectionable about soft money is less how it is spent (helping candidates get elected) than how it is raised (in large donations from contributors with special interests).

What about Third-Party Candidates—Should They Get Vouchers for Free Ads?

Any third-party congressional candidate on the general election ballot would qualify for vouchers in the same way the major party

candidates would qualify—by meeting the threshold and raising money in small donations. As for those large block grants of party vouchers, third parties would have to meet qualifying thresholds, just as they do with the system of public funding for presidential candidates.

Notes

1. Center for Voting and Democracy, *Dubious Democracy 2001*, 2001, available at www.fairvote.org/2001/index.html. Money is not the only factor in the dearth of competitive congressional campaigns. The prevalence of safe seats created by incumbent-friendly redistricting procedures plays a major role as well.

2. This one-in-four percentage surprises most people, who assume the ratio is higher because television ads loom so large as the public face of political campaigns. At \$1 billion, the price tag for television ads is easily the biggest single expense item in campaigns. But candidates also spend a great deal of money on fundraising, travel, staff, overhead, and direct mail. Moreover, the vast majority of political races are uncompetitive, meaning the loser can't afford television ads and the winner doesn't need them. If one looks only at competitive races in 2000 (those in which the loser came within 10 percentage points of the winner) for all federal offices and governorships, the amount of overall campaign spending devoted to television ads is more than 50 percent. Similarly, winning U.S. Senate candidates in 2000 spent an average 52 percent of their overall campaign budget on broadcast ads. And, if one considers the amount of money spent only on political advertising per se, television accounts for more than 80 percent of those budgets, with radio and print dividing the rest, according to a 1998 report by Competitive Media Research of New York. See Alliance for Better Campaign, "Television Still Tops as Political Ad Medium" *Political Standard* (July/August 1999).

3. Ken Goldstein, "Campaign Advertising in the 2000 Election," University of Wisconsin-Madison, 2001. Paper presented at a conference on Campaign 2000 at the University of California-Santa Barbara, available at <http://www.polisci.wisc.edu/tvadvertising>, accessed June 10, 2003; Ken Goldstein and Paul Freedman, "Lessons Learned: Campaign Advertising in the 2000 Election," *Political Communication* 19 (2002): 5–28.

4. "People [ad buyers for candidates] call you up and say 'Can you clear \$40,000 next week?' It's like, 'What? Am I dreaming? Of course I can clear that!' And they send you a check in the overnight mail. It's like Santa Claus came. It's a beautiful thing," Dan O'Connor of WSYT-TV, quoted in Paul Taylor, "Too Little Time: How Broadcasters Betray the Public Interest They Are Supposed to Serve," *Washington Monthly Online*, September 2000, available at www.washingtonmonthly.com/features/2000/0009.taylor.html.

5. For excerpts of Senate floor debate, see Alliance for Better Campaigns, "The Case for Free Air Time," Spectrum Series Working Paper no. 4, June 2002, available at www.bettercampaigns.org/freeairtime/monograph.pdf.

6. Martin Kaplan and Matthew Hale, "Television News Coverage of the 1998 California Gubernatorial Election," Institute of Governmental Studies Working Paper no. 2000-6, 1998, available at www.learcenter.org/pdf/1998CA.pdf.

7. Center for Media and Public Affairs, "Campaign 2000 Final: How TV Covered the General Election Campaign," *MediaMonitor* (November/December 2000), available at <http://www.cmpa.com/MediaMonitor/MediaMonitorarchive.htm>.

8. Alliance for Better Campaigns, "Networks, Parties Trade Charges Over Plunge in Convention Coverage," *Political Standard* (August 2000).

9. Center for Media and Public Affairs, "Campaign 2000 Final.

10. Ibid.

11. Ibid.

12. Alliance for Better Campaigns, "Broadcasters: Debates Not Yet Ready for Prime Time," *The Political Standard* (February 2000), available at www.bettercampaigns.org/standard/display.php?StoryID=135.

13. Martin Kaplan and Matthew Hale, *Local TV Coverage of the 2000 General Election*, February 2001, available at www.learcenter.org/pdf/campaignnews.PDF.

14. Erika Falk and Sean Aday, "Are Voluntary Standards Working?: Candidate Discourse on Network Evening News Programs," Report for the Annenberg Public Policy Center, December 20, 2000, available at www.appcpenn.org/political/free-time/2000-general-report-final.htm.

15. Vanishing Voter Project, Joan Shorenstein Center on the Press, Politics and Public Policy, John F. Kennedy School of Government at Harvard University, December 2000, available at www.vanishingvoter.org/graphs/vi-current.shtml.

16. Vanishing Voter Project, Joan Shorenstein Center on the Press, Politics and Public Policy, John F. Kennedy School of Government at Harvard University, November 2000, available at www.vanishingvoter.org/data/cand-knowledge.shtml.

17. Pew Research Center for the People and the Press, "Campaign 2000 Highly Rated," Survey report, November 16, 2000, available at <http://people-press.org/reports/display.php3?ReportID=23>.

18. To be sure, people have been complaining about artifice in politics since long before the advent of radio and television. But the way those media enable a candidate to barge uninvited into a voter's living room takes the phenomenon to a new level.

19. Chicago Tribune media reporter Tim Jones, quoted in Common Cause, "Channeling Influence: The Broadcast Industry and the \$70 Billion Free Ride," April 1997.

20. Paul Taylor, "The Case for Free Airtime," March 2002, available at www.bettercampaign.org.

21. To read the constitutional arguments presented by the National Association of Broadcasters, go to http://gullfoss2.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch_v2.hts.

22. For more on these constitutional issues, see Alliance for Better Campaigns, "The Case for Free Air Time," available at www.bettercampaigns.org.

23. Consider the problems created by a less market-sensitive free airtime system—one in which all candidates were given a fixed number of minutes of free ads. In a large media market such as New York City that encompasses dozens of congressional districts, this system would result in a glut of ads running on a limited number of stations.

24. In 2000, the typical winning candidate for the U.S. House spent \$840,300 and the typical losing candidate spent \$305,600. On the theory that the "first dollars" in politics are more important than the "last dollars," a grant of \$375,000 in broadcast vouchers would go a long way toward enabling underfunded challengers to mount viable campaigns.

7. Why Subsidize the Soapbox? The McCain Free Airtime Proposal and the Future of Broadcasting

John Samples and Adam Thierer

The urge to regulate political speech did not end with the passage of the Bipartisan Campaign Reform Act in 2002. "Reform is a process," Sen. John McCain (R-Ariz.) now says. "It is not a one-time fight."¹ In the 108th Congress, this unending process began again. Senator McCain and cosponsors Sens. Russell Feingold (D-Wisc.) and Richard Durbin (D-Ill.) introduced the "Our Democracy, Our Airwaves Act of 2003." The bill codifies the persistent efforts of many politicians and so-called "public interest" groups to force broadcasters to provide free airtime to political candidates and parties.

This paper examines McCain's proposal in two parts. The first part takes the proposal on its own terms and contends the McCain bill would not advance the common good, largely because it depends upon false assumptions about American elections. Even those who accept the traditional justification for broadcast regulation have good reason to reject McCain's free airtime proposal.

The second part of the paper shows the flaws in the traditional justifications for regulating the broadcast spectrum. The McCain measure rests upon and propagates the long-standing theory that the electromagnetic radio spectrum must be treated as a socialized resource, owned by the public and regulated at the whim of legislators and regulators. This need not be the case although it has been for almost 70 years. Spectrum property rights can allow for the private management of the airwaves, including broadcast television and radio spectrum. Such rights are developing right now in embryonic form. McCain, a long-time critic of the broadcast sector, should re-channel his energies toward forcing the broadcasters to compete

in a free market for spectrum and demand that they return or sell much of the spectrum they have been given free of charge in the past.

The False Assumptions Behind Free Air Time

The McCain Proposal

The McCain bill imposes two major requirements on broadcasters. It requires broadcasters to run 12 hours of “candidate-centered and issue-centered programming” in the six weeks prior to primary and general elections. The bill outlines the required programming:

“Candidate-centered programming” refers to debates, interviews, candidates’ statements and other news or public affairs formats that provide for a discussion of issues by candidates; it does not include paid political advertisements. “Issue-centered programming” refers to debates, interviews and other formats that provide for a discussion of ballot measures in the forthcoming election. It does not include paid political ads.

The bill limits editorial control in two ways. First, broadcasters have no choice about the content of the 12 hours (half of which must be during prime-time hours) in the six weeks prior to an election; broadcasters must use the time for political programming. Second, the bill dictates the formats to be used in the required programming. The bill states that broadcasters will not be paid for the 12 hours. The mandate constitutes a tax whose sum depends on the lost airtime’s monetary value.

The bill would also “establish a voucher system for the purchase of commercial broadcast air time for political advertisements, financed by an annual spectrum use fee on all broadcast license holders.” The tax will be between .5 and 1 percent of gross revenues of broadcasters, and the expected overall cost of the program is \$750 million for the 2004 election cycle with subsequent adjustments for inflation. Most of the money will go to House and Senate candidates although about 13 percent goes to the political parties. The bill also foresees vouchers for presidential candidates in 2008. Candidates and the parties will use the vouchers to purchase political advertising from broadcasters who will then redeem the voucher for cash administered by the Federal Communications Commission. Since the assets of this fund come from the taxes (or “spectrum use fee”) extracted from the broadcasters, the voucher program essentially forces the

owners of television and radio stations to subsidize political advertising.²

The Flawed Assumptions Behind McCain's Proposal

Advocates rarely say how the free airtime might concretely serve the public interest. Paul Taylor, President of the Alliance for Better Campaigns and the leading proponent of the bill, has been an exception. He argues that free airtime will solve problems created by campaign spending and improve public discourse. Both rationales are dubious.

The Spending Arguments

Campaign spending has risen over the past few decades. Taylor argues that this increase is due to the rising cost of campaign ads.³ In his view, this leads to several public problems.

First, raising the money to pay for the cost of campaigning corrupts public officials by making them beholden to their contributors. In turn, this "corruption" makes voters cynical about politics and discourages voting thereby raising the cost of reaching voters. Taylor also believes the increasing cost of campaigning reduces competition and political equality by tilting the electoral field toward wealthy or well-financed candidates: "When some candidates can speak with a megaphone and others only in a whisper, all depending on the size of their wallets, it offends the values of equal access and fair play we also prize in our democracy." According to Taylor, mandating free airtime for candidates would reduce the power of moneyed interests, increase competition and equality, renew citizen trust in politics, and increase the flow of information to voters. Each of these conclusions is empirically wrong.

Ads and Spending. Have increases in the costs of ads caused an increase in overall campaign spending? In a recent study, three political scientists from the Massachusetts Institute of Technology and Yale University compared total campaign spending in very expensive media markets (New York and Los Angeles) with total spending in very cheap markets. They found that total spending in the expensive media markets was "nearly identical" to spending in inexpensive markets. Their statistical analysis shows a very minor effect of rising television costs on overall campaign spending through time; in fact, the authors note, they cannot rule out the

possibility that the effect may be zero. They believe that costly television advertising causes campaigns to opt for cheaper direct-mail advertising instead. Consequently, total spending in expensive media markets is roughly identical to cheap media markets.⁴

This finding also contravenes Taylor's claims about equality and elections. Taylor believes the rising cost of campaigns creates greater electoral inequality since only the wealthy or well financed can afford the higher rates. If the rising cost of television advertising does not explain the increase in spending on campaigns, then it cannot have caused the putative rise in electoral inequality.

Like many proponents of campaign finance restrictions, Taylor believes campaign contributions corrupt policymaking and elections. In his view, TV costs cause corruption by increasing candidates' demand for money. Whatever the relation between spending and corruption, the MIT/Yale study shows that rising television costs are not behind the rise in spending. Beyond that, Taylor is wrong about the influence of money. In a recent study three MIT professors surveyed 40 academic studies of the putative influence of money on legislative voting; they also conducted their own analysis of the factors affecting legislative roll call voting. They conclude

The evidence that campaign contributions lead to a substantial influence on votes is rather thin. Legislators' votes depend almost entirely on their own beliefs and the preferences of their voters and their party. . . . Interest group contributions account for at most a small amount of the variation. In fact, after controlling adequately for legislator ideology, these contributions have *no detectable effects* on legislative behavior.⁵

Spending and Trust. For several decades, survey researchers have asked about public trust in the federal government. Since 1964, public trust has generally declined with the lowest point coming in 1994. However, trust also increased in the early 1980s and the late 1990s. David Primo, a political scientist at the University of Rochester, examined the putative relationship between trust and campaign spending and found a correlation very near zero.⁶ Since 1980, the United States has seen no relationship between average spending in House and Senate races and voting turnout.⁷

Taylor's arguments repeat the conventional and mistaken assumption that voting turnout has been declining steadily for the past four

decades. Measured properly, the turnout of eligible voters dropped significantly in the presidential election of 1972 and the congressional election of 1974 compared to their counterparts in 1968 and 1970 and has never regained the heights reached in the 1950s and 1960s.⁸ Since campaign spending has risen steadily over that period, it would not be strongly associated with the decline in turnout.⁹

Ads and Competition. The United States lacks electoral competition, especially in elections for the House of Representatives. Incumbents in the House have significant advantages and now enjoy a reelection rate of just over 98 percent.¹⁰ Has the rising cost of television ads hurt challengers and increased the advantages of incumbency?

Stephen Ansolabehere and his colleagues looked at the relationship between television costs and various measures of electoral competition. They found “that TV advertising costs have little or no effect on electoral competition over the period 1968 to 1994.” Their analysis also indicated that a rise in television ad costs was associated with a decline in the vote shares of incumbents, contrary to Taylor’s claim.¹¹ Finally, they found no relationship between TV costs and incumbents’ probabilities of reelection.¹²

Quality of Discourse Arguments

Taylor recalls a time when the television networks devoted much quality coverage to national elections. He finds current coverage much worse by comparison; stories are shorter and less prominent and offer viewers “attack ads, sound-bites and synthetic spin.” According to Taylor,

Campaigns have lost both their novelty and lure as television events; today’s audiences find them dull, grating, synthetic. The broadcasters have lost substantial slices of their audience, first to cable and more recently to the Internet. And politics has lost its pride of place, struggling to keep its head above water in a popular culture more consumed by money and entertainment.

As a result, he concludes, even during close presidential elections, voters are not well informed about the issues and the candidates. In the close election of 2000, for example, “because so few people were interested, not many took the time to bone up on the issues. A nationwide survey taken two days before the election found that more than half of those polled could not answer basic questions

about Bush's position on taxes, abortion and gun control, or Gore's position on Medicare prescription drug plans, Social Security, school vouchers and affirmative action."

Not surprisingly, Taylor concludes that free airtime would be the best remedy for our debased public discourse and public ignorance. By requiring broadcasters to provide "candidate-centered and issue-centered" programming, mandated coverage "would open up the discourse of campaigns to something more nourishing than attack ads, sound-bites and synthetic spin."

Of course, it may instead be the case that the free airtime proposal merely subsidizes more of the same sort of political content Taylor laments. Moreover, Taylor's quality-of-discourse argument is very subjective in nature; it could be argued that the electorate always found political campaigns "dull, grating, and synthetic."

Content Constraint Concerns. The First Amendment states "Congress shall make no law . . . abridging the freedom of speech. . . ." It does not state "Congress shall make no law . . . abridging the freedom of speech *unless the law improves the quality of political speech and information available to voters.*" Expecting the government to "improve" political debates through regulation runs against the liberal grain of the American political tradition. In a liberal democracy, the people are free to make, to hear, and to judge arguments about politics and policy. The government should keep its hands off the public debate; it should reflect rather than determine the wishes of the public. For the true liberal, history indicates that governments "improve" political speech by suppressing unpopular views or opinions threatening those who hold power.

McCain might respond that his mandate for "candidate-centered and issue-centered programming" affects only the format and not the content of speech.¹³ This is incorrect. In the 12 hours at issue, broadcasters are required to cover politics and elections as opposed to any other topics they might wish. The bill requires the content of the coverage to be issues and candidates in an election although the formats and timing remain in some measure up to the broadcasters. Of course, the bill does not overtly require favorable coverage for any party or political position. As we shall later see, we should expect the required broadcasting would be biased in favor of incumbents.

Causality problems with public ignorance theory. History belies Taylor's claim that poor television coverage bores voters and leads to public ignorance of issues and candidates. The modern era of television coverage began in the 1950s about the same time as political scientists began analyzing voter choice through public opinion polling based on random sampling of the population. The leading studies of voting behavior in the 1950s concluded that Americans knew little about political candidates and issues and did not possess a coherent political ideology.¹⁴ Not much has changed since then as two scholars of public opinion note:

The good news is that in spite of concerns over the quality of education, the decline in newspaper readership, the rise of sound-bite journalism, the explosion in national political issues, and the waning commitment to civic engagement, citizens appear *no less informed* about politics today than they were half a century ago.¹⁵

At the same time, the authors note, more wealth and spending on public education have not increased citizen knowledge about and involvement in politics.¹⁶ Before television came to dominate American elections, Americans knew and cared little about politics and policy. "Poor" television coverage could not be the cause of their ignorance and lack of interest.¹⁷

Attack Ads Are Valuable for Democracy

The argument for mandated broadcasting draws on distaste among elites for the tone of recent election campaigns. Among intellectuals, television runs a close second to campaign contributions as the pathogen causing public ills in the United States. Critics argue that campaigns defined by negative ads have "turned increasingly hostile and ugly." Attack ads, the argument continues, have "become the norm rather than the exception."¹⁸ Taylor's longing for something "more nourishing" than attack ads fits this line of criticism. Yet almost all social science research shows that negative ads on the whole serve democratic values.

The Case Against Negative Ads

Some scholars believe negative ads reduce electoral turnout by disgusting voters who respond by staying home from the polls. On the basis of an experiment and a statistical analysis of a Senate race, a team of researchers at MIT concluded that negative ads drove

down turnout by 4 to 5 percent.¹⁹ Yet this conclusion has not escaped criticism. The experiment did not use actual campaign advertisements, thereby calling into question its relevance for the larger world. The team's statistical study of the Senate campaigns measured "negativity" by press reports on the tone of a campaign. If the press reported campaigns as more negative than they were, their conclusions would be off target. Finally, their findings have not been replicated by subsequent studies. Indeed, most scholars have found that negative ads improve democracy in theory and practice.

The Case for Negative Ads

A moment's reflection suggests several reasons why negative ads would boost turnout. Negative ads contain relevant information for a voter, and scholars have long known that knowledgeable voters are more likely to participate. Negative information helps voters discriminate between candidates and thereby gives them a reason to go to the polls. Finally, negative messages may stir up voters creating more enthusiasm and involvement in an election and perhaps, a desire to learn more about the candidates.²⁰ As Paul Freedman of the University of Virginia and Kenneth Goldstein of the University of Wisconsin point out, "Criticism of an opponent—particularly strong criticism—sends a message that something of substance is at stake in the election, that its outcome matters, and that this is a choice voters should care about."²¹

So much for theory. What about real life? Does the data support the theory that negative ads stimulate participation? The conjecture that negative ads stimulate turnout at the polls has become the emerging conventional wisdom among scholars studying the question.²² Four high-quality studies of the effects of negative ads have fostered this emerging conventional wisdom.

Fortunately, Richard Lau of Rutgers University and Lee Sigelman of George Washington University considered all studies of negative ads up to 1999 to provide some general conclusions. They performed a meta analysis of 117 findings about negative ads drawn from 52 separate studies. Their work addressed three questions: (1) Do citizens dislike negative ads? (2) Are negative ads more effective than positive ads? (3) Does negative advertising reduce electoral participation? Their statistical analysis of the research literature found

- no reliable statistical basis for concluding that negative ads are liked less than positive ones,

- no evidence that negative political advertisements are any more effective than positive political ads, and
- little evidence that widespread use of negative ads imperils electoral participation.

The authors concluded that “participatory democracy may be on the wane in the United States, but the evidence reviewed here suggests that negative political advertising has relatively little to do with it.”²³

Two earlier studies also concluded such ads drive turnout up, not down.²⁴ The most recent and impressive study of negative ads found that positive ads had no effect on turnout, but “negative ads have a significant and substantial mobilizing effect.”²⁵

Overall, the evidence indicates negative ads make it more likely that people will vote and that their vote will be better informed than in the absence of such advertising. Negative ads are valuable to American democracy, not a justification for government mandates on political discourse.

Anti-choice

Apart from improving political discourse, Taylor’s argument for free airtime assumes Americans should and would be interested in politics if they were not misled by broadcasters and the American system of campaign finance. In fact, Americans in general have little interest in political issues or in participating in politics.²⁶ That is a choice they make, a choice that should be as respected as any other decision by an adult. It is not the job of policymakers to make Americans “better” by drawing them into politics and elections.

Taylor and other supporters of the free airtime measure wrongly assume that spending on television during elections causes numerous social ills that would be cured by subsidized broadcasting. But neither their diagnosis nor their prescription would heal the American body politic. Even if one assumes broadcasting should be government controlled in the public interest, the free airtime measure fails. Yet that fundamental assumption of public interest regulation also fails under scrutiny as we shall see in the next section.

The Rise of Broadcast Regulation

Imagine that McCain’s proposal were applied to newspapers in the United States. Editors would be required to devote a specified

amount of column space to election campaigns, and news reporting on elections would have to assume a particular format and content. The owners of newspapers would be taxed to fund political ads for parties and candidates. Put this way, the “free” newsprint proposal would clearly violate the First Amendment to the Constitution.²⁷ Such a proposal might also be seen as a taking of private property for public use without just compensation in violation of the Fifth Amendment.

Advocates of free airtime defend their proposal against First Amendment challenges by arguing that the broadcast spectrum is a publicly owned, government-managed resource that can and should be utilized to further myriad political objectives. Because private broadcast companies do not technically own their spectrum but instead merely lease it from the federal government, as a condition of their FCC-issued license they must satisfy various public interest requirements, such as offering the public a certain amount of educational and informational programming among other things. And because these other public interest requirements may be legally imposed on broadcasters, the argument goes, broadcasters may also be required to allocate more time or money for political advertising or campaign coverage in general.²⁸

While this public interest or “public trustee” theory of broadcast industry regulation continues to hold great sway with many policymakers and political activists, it has always been based on a fundamental misunderstanding of the way spectrum works and must be governed. Adherents to the public interest school of spectrum management assume that the spectrum’s supposedly unique characteristics—scarcity and interference—mean it must be governed as a publicly owned asset. And once it is classified as a public asset, special requirements can be placed on its use.

Moreover, many public interest proponents—including, ironically, the broadcast industry itself—also claim that the broadcast spectrum is unique among spectrum applications because it has traditionally offered the public free over-the-air (OTA) programming that only required the purchase of receiving hardware (antenna, TV set, radio) to view or hear broadcast programming. Stated differently, because the broadcast spectrum offered a ubiquitous communications medium with the potential to reach so many citizens simultaneously, policymakers came to believe that unique

regulatory requirements should be placed on this industry that would not have passed constitutional muster if applied to other mediums, such as newspapers or cable television.

These twin public interest rationales for centralized broadcast spectrum allocation and management have been repeatedly debunked by economists and legal scholars and even watered-down through the decades by several court and FCC decisions. Nonetheless, in light of the fact that they continue to be used to justify measures such as the McCain free airtime bill, it is worth reiterating why the public interest theory of spectrum ownership and regulation is fatally flawed and on its way to the ash heap of history.

Electromagnetic Spectrum and Its Regulation

The electromagnetic spectrum is sometimes incorrectly referred to as the “airwaves,” but as Lawrence Gasman explains, “[T]he term ‘airwaves’ is a misnomer. Air is not involved. Radio communications use not air, but electromagnetic radiation—oscillating electric and magnetic fields that move through space at the speed of light.”²⁹ While electromagnetic radiation occurs throughout nature (i.e., static electricity, rainbows, thunder, etc.), electromagnetic radio communication requires intentional human design and development. Humans shape and calibrate electromagnetic waves to form distinct communications signals and to transmit information over long distances without the aid of wires. We can collect these waves into a single channel to transmit distinct information (i.e., cellular phone conversations, satellite TV signals, and radio or TV broadcasts).³⁰ This value-added process developed over the course of the late 19th and early 20th centuries through a variety of related scientific discoveries and laid the foundation for the modern broadcast industry.

The early history of the wireless radio spectrum saw unrestricted, unregulated experimentation by amateurs as well as military agencies. As both public and private use of the spectrum grew, however, government officials became concerned about what many labeled “chaos in the spectrum.” In other words, policymakers feared that unregulated use of this new and important resource would degrade signal quality to a point where no one would be able to communicate effectively.

Responding to complaints from the U.S. Navy about interference with their signals, Congress ended the brief period of unrestricted

experimentation in the radio spectrum by passing the Radio Act of 1912, which effectively nationalized the entire electromagnetic spectrum. The Act granted the federal government the power to allocate licenses among users for specific spectrum allocations. The new licensing process assured military users the best parts of the spectrum, leaving private users crowded up in a small space with nearly useless channels. The Navy took control of the entire spectrum during World War I; thereafter, the Department of Commerce retained licensing power, but could not charge for use of the license or restrict its use once granted.

Not surprisingly, spectrum users began applying for as much of the unpriced spectrum as they possibly could. This led to genuine interference, or “chaos,” problems within the spectrum. Economist Jora R. Minasian noted in 1975 that this interference “was not due to any inherently particular technological characteristics of radio emissions, but to the fact that rights to use of the frequency spectrum, rights of radiation, were ill-defined.”³¹ Sixteen years before Minasian, Nobel economist Ronald H. Coase pointed to the same problem in a famous 1959 article on the Federal Communications Commission:

[T]he real cause of trouble was that no property rights were created in these scarce frequencies. A private-enterprise system cannot function properly unless property rights are created in resources, and, when this is done, someone wishing to use a resource has to pay the owner to obtain it. Chaos disappears; and so does the government except that a legal system to define property rights and to arbitrate disputes is, of course, necessary. But there is certainly no need for the kind of regulation which we now find in the American radio and television industry.”³²

Manhattan Institute economist Thomas Hazlett’s pioneering work on the history of spectrum regulation found that the chaos of the 1921–23 period, “was, in essence, an outcome of government control: over 500 broadcasters were . . . bunched up all at the same point on the spectrum to which they had been directed by the Commerce Department, and operations were not always perfectly synchronized.”³³ Minasian agrees: “No attempts were made prior to May, 1923, to assign a separate channel to each station, or to provide geographic separation of the stations operating on the same channels, or to provide mutually exclusive times of operation. The wave

lengths were assigned to all in a group. . . . This policy, coupled with a liberal policy for issuing licenses to amateurs, resulted in interference. . . .”³⁴

To summarize, the Radio Act of 1912 and the administrative decisions that flowed from it had two main effects. First, it encouraged military use of the spectrum at the expense of private broadcasters, leaving them little room to operate effectively. Second, it failed to create a private marketplace in spectrum rights that could have solved the ensuing scarcity and interference problems. That failure led to demands by policy makers and industry officials for more legislative intervention. The regulatory framework for the electromagnetic spectrum grew out of government failure.

The Road Not Taken: Property Rights

Despite these impediments, Hazlett also found that property rights in the spectrum *were* developing at this time.³⁵ While federal regulators, legislators, and industry officials were working to create a regulatory regime, some judges were taking steps to establish property rights. Hazlett points out that in one 1926 Illinois Circuit Court case, *Tribune Co. v. Oak Leaves Broadcasting Station*, “the classic interference problem was encountered, litigated, and overcome, using no more than existing common-law precedent.”³⁶ Judge Francis S. Wilson adjudicated a dispute between two broadcasters who were “homesteading” and who faced an interference dilemma. He argued that once an entity had established a presence within the spectrum to a given allocation, in effect, that user had a *de facto* property right in that allocation. By establishing this common law precedent to protect property rights in the spectrum, the decision effectively rendered the interference problem moot. Not everyone was pleased with this solution, however. Some in the industry and government feared property rights would preclude a comfortable, oligopolistic market setting (that is, a noncompetitive market where both the regulator and the regulated entities were satisfied with control of entry and comfortable market share, respectively).³⁷ In the 1920s, the incumbent broadcasters had worked with Secretary of Commerce Herbert Hoover to establish a public interest paradigm of federal regulation and control of the spectrum to replace the emerging common law, property rights-based paradigm. Despite past legislative failings and the emerging property rights regime,

they argued that only federal regulation of the spectrum could eliminate the chaos that existed within the spectrum during this period.

This coalition eventually convinced Congress to pass the Radio Act of 1927, giving the federal government plenary regulatory authority over the allocation of the spectrum. The law created the Federal Radio Commission with the power to grant three-year licenses in exchange for certain public service requirements. The FRC could grant and revoke licenses “in the public interest, convenience, or necessity.” The law did not specifically define “the public interest” in spectrum allocation.

As Hazlett notes, the FRC and the public interest paradigm pleased broadcasters: “[I]t immediately grandfathered rights for major broadcasters, while eliminating marginal competitors and all new entry.”³⁸ When the law passed, the *Harvard Business Review* concluded: “The point seems clear that the Federal Radio Commission has interpreted the concept of public interest so as to favor in actual practice one particular group. While talking in terms of the ‘public interest, convenience, and necessity’ the commission actually chose to further the ends of the commercial broadcasters.”³⁹

The Return of Property Rights?

Unfortunately, little has changed since the *Harvard Business Review* printed these words in 1935. The FRC and its public interest powers became part of the Federal Communications Commission that was created by the Communications Act of 1934.⁴⁰ In the absence of spectrum markets and property rights, the FCC then developed haphazard, inflexible, and inefficient techniques to manage the spectrum resource in general and broadcast licensees in particular.

As this brief history makes clear, the American broadcast television industry has always been a creature of federal law and regulations. The industry continues to rely heavily upon lawmakers and regulators for special favors and unique treatment. Correspondingly, policymakers continue to believe that this special historic relationship and the supposedly unique attributes or problems associated with the spectrum (scarcity and interference) justify ongoing federal oversight and control. Lawmakers have continued to argue that the broadcast spectrum should be treated as a nationalized public asset and that markets, property rights, contracts, and operational flexibility must be rejected in favor of central planning. “Perhaps the closest

analogy to the U.S.'s current approach is that of GOSPLAN, the central planning agency in the former Soviet Union," argue Gerald R. Faulhaber and David J. Farber, the former chief economist and chief technologist of the FCC, respectively.⁴¹

The FCC may, however, be moving away from collective ownership and central planning. In June 2002, FCC Chairman Michael Powell established a Spectrum Policy Task Force to explore improvements in spectrum management and conduct the first comprehensive review of spectrum policy at the agency. The Task Force's report begins by acknowledging: "The time is ripe for spectrum policy reform. Increasing demand for spectrum-based services and devices is straining longstanding and outmoded spectrum policies."⁴² The report notes that the FCC's traditional "command-and-control approach" to spectrum management is the primary cause of regulatory failure because that approach has imposed significant restrictions on spectrum use and users.⁴³ The Task Force goes on to recommend greater reliance upon an exclusive use model of spectrum allocation and use—one in which spectrum holders would be granted clearly defined rights and have the right to use or sell their spectrum however they wished. This is really just a good old fashioned private property rights regime for spectrum allocation, even though the FCC does not call it that.⁴⁴ Oddly, the report gratuitously exempts the broadcast spectrum from these recommendations.⁴⁵

Nonetheless, the FCC is changing the way it regulates the broadcast marketplace. Legal scholars Howard A. Shelanski and Peter W. Huber have argued that, "although important changes remain to be made, the FCC has strengthened property interests on both the transmission and receiving ends of licensed frequencies and, through the administrative process, has eroded the importance of the statutory distinction between private ownership and public licensing."⁴⁶ That is, the FCC is treating broadcast spectrum licensees as if they have secure ownership and operational property rights in their spectrum. Since almost all broadcast spectrum licenses have traded hands for lavish sums at least once in the secondary marketplace, most companies have come to feel their ownership stake in the license goes beyond the mere sheet of paper on which the license is printed.

Other realities point to an emerging property rights regime. The FCC license renewal process has become little more than a rubber stamp that virtually guarantees incumbents retain their broadcast

license. The FCC is no longer allowed to consider whether another applicant might serve the public interest better than the incumbent because the Telecommunications Act of 1996 eliminated comparative renewal hearings for broadcasters. The government has increasingly recognized the rights incumbents had come to possess in their operating facilities, and by extension, in the spectrum over which they operated.⁴⁷

Flawed Rationales for Spectrum Regulation

The FCC decisions reflect a weakening of the traditional justification for a command and control model of spectrum governance. Government control is supposedly necessary because the spectrum is a scarce resource riddled with the potential for interference at every juncture. But scarcity and interference are not valid reasons to reject property rights; rather, they are reasons property rights should be employed as an allocation mechanism.⁴⁸ Other rationales also fail to convince.

Scarcity

Proponents used spectrum scarcity to justify the broadcast licensing scheme enshrined in the Radio Act of 1927 and Communications Act of 1934. Supreme Court decisions such as *NBC v. United States*⁴⁹ and *Red Lion Broadcasting Co. v. FCC*⁵⁰ then made the scarcity rationale sacrosanct and used it to fashion a two-tiered theory of First Amendment scrutiny for broadcast versus print media. Print media is plentiful and receives strict First Amendment protections while electronic media are scarce and thus have far less protection from government regulation or censorship.

Even if the spectrum is scarce, that hardly makes the case for government control. Every natural resource is inherently scarce in some way and thus, under this rationale, should be subject to extensive government oversight.⁵¹ For example, there is only so much coal, timber, or oil on the planet. While some resources are more abundant or scarce in nature than others, economists have traditionally agreed that property rights, pricing mechanisms, and free markets provide the most effective way to determine who values resources most highly as a way of allocating them to their best use. In fact, Benjamin M. Compaine, executive director of the Program on Information Resources Policy at Harvard University, notes that

the government created a form of artificial scarcity within the spectrum by exempting it from market trading and the pricing system:

[I]t can be argued that the spectrum was scarce because demand exceeded supply. This is almost invariably the case when a good with value is given away for free. If a market price had been assigned to spectrum from the start (which in effect is done when licenses are bought and sold later on), then it would be no more or less scarce than are pencils, VCRs or Lexus automobiles. Moreover, it may have been put to better uses initially if those who obtained it had to pay for it.⁵²

In other words, markets would have likely encouraged the maximum amount of spectrum use and innovation possible thereby diminishing any inherent scarcities within the medium. Ironically, compared to physical resources, electromagnetic spectrum may actually be less scarce since engineers have continued to find new ways to push out the boundaries of the usable spectrum and develop applications for spectrum frequencies that were previously believed to be uninhabitable.⁵³

Government ownership and control exacerbates rather than solves the scarcity problem. Ithiel de Sola Pool explained this best in *Technologies of Freedom*, his classic 1983 study of technology and free speech: "The scheme of granting free licenses for use of a frequency band, though defended on the supposition that scarce channels had to be husbanded for the best social use, was in fact what created a scarcity. Such licensing was the cause not the consequence of scarcity."⁵⁴

And practically speaking, even if scarcity was once a legitimate issue within the broadcast marketplace, it certainly is not today as the number of television and radio stations exceeds the number of daily newspapers in America.⁵⁵ "[T]here simply exists no true scarcity of outlets for mass communication," argues Jonathan W. Emord, author of *Freedom, Technology, and the First Amendment*.⁵⁶ "[I]t is simply not the case that the broadcast media are more scarce than the print media. Indeed, the inverse is true and is exacerbated with each passing moment."⁵⁷ What Emord contended in 1991 is even more true today. "Scarcity is the last word that would come to mind in regard to the vast array of communications outlets available today," concludes *Chicago Tribune* columnist Steve Chapman.⁵⁸ In short,

information and entertainment are commodities that are abundant and cannot be monopolized.

Interference

Interference has also been a recurring rationale for spectrum licensing in federal legislation and judicial decisions, but it is hardly a legitimate reason to reject markets and property rights either.

Interference is not unique to the intangible ether. It may be a more serious problem within the realm of tangible property. Consider the case of two landowners who have adjoining parcels of land and a common stream that runs through their properties. If landowner A disposes of a small amount of waste in the stream and it comes to rest on the property of landowner B downstream, has it “interfered” with or harmed B’s property right? What if A was prone to burn leaves or even garbage in his yard and the wind blew the smoke and smell across B’s property? What if A simply played loud music late at night that B could hear while he tried to sleep? These are hardly hypothetical examples. Property law books are replete with countless case studies of how such interference disputes have been resolved throughout the centuries. Why then has the United States relied instead on central planning instead of common law adjudication for governing the electromagnetic spectrum? The problem of interference simply does not make the case for government control as Thomas Hazlett points out:

Economists, political scientists, and lawyers generally agree that the interference rationale for licensure in “the public interest” is nonsensical. The interference problem is widely recognized as one of defining separate frequency ‘properties’; it is logically unconnected to the issue of who is to harvest those frequencies. To confuse the definition of spectrum rights with the assignment of spectrum rights is to believe that, to keep intruders out of (private) backyards, the government must own (or allocate) all the houses.⁵⁹

Thomas G. Krattenmaker and Lucas A. Powe, authors of *Regulating Broadcast Programming*, concur:

[I]nterference, like scarcity . . . is a bogeyman. All resources are subject to interference in the sense that their value will decline if everyone attempts to use them at once. This is why governments recognize property rights (which include the

right to exclude others from using) in resources exchanged through the marketplace. Interference will . . . destroy the value of any resource, but usually the government does not choose to displace the market to prevent interference. Two people cannot comfortably sit at the same time in the same desk chair. Yet this fact has not led government to parcel out the right to sit in a chair. Rather, ownership of the chair is taken to confer authority to exclude others from sitting in it, no matter how eager they may be to do so.⁶⁰

This leads Krattenmaker and Powe to conclude that, “To prevent chaos (interference) in broadcasting or publishing, then, requires not a commission, but a system of property rights.”⁶¹

Public Service

Congress or the FCC has demanded much of broadcasters through the years using public interest or “public service” rationales for broadcast regulation.⁶² Yet if we look closely, we see that public service most often means political benefits for politicians.

For purposes of this paper, the most important political benefit associated with public interest regulation is the political programming regulations contained in § 312 and § 315 of the Communications Act. Section 312 allows the FCC to revoke a broadcast license “for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.” Section 315 demands that broadcasters afford equal opportunities for all candidates for a particular office to use their stations if they have allowed any other candidates to do so already. More important, § 315(b), the so-called “lowest unit charge rule” demands that the rates broadcasters charge candidates for advertising time prior to elections “shall not exceed the lowest unit charge of the station for the same class and amount of time for the same period.” Candidates for office get, in short, the cheapest price for broadcast advertising whatever the demand.

The existence of regulations such as these helps explain why politicians consistently seek to preserve and even expand the public interest rationale for broadcast industry regulation.

"Pervasiveness" Rationale

Some policymakers have argued that public interest regulation is warranted because of the pervasive or intrusive nature of the broadcast medium into the lives of the citizenry. "[T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans" and "is uniquely accessible to children, even to those too young to read," Justice John Paul Stevens noted in the Supreme Court's famous 5–4 decision in *FCC v. Pacifica Foundation*.⁶³ Justice Stevens' concerns about the pervasiveness of broadcasting and its accessibility by many children have been echoed by many legislators and regulators throughout the decades.

In reality, broadcasting is no more pervasive in our culture than any other medium, even when children are taken into account. Books are available at libraries, newspapers and magazines can be thumbed through at newsstands, and cable and satellite can be turned on with a click of the controller just like broadcast television. Merely because children might read or view something offensive in a magazine or on cable television does not justify unique regulatory treatment of those other communications mediums.

Even if broadcasting were pervasive, that would hardly be a public problem. Newspapers, magazines, books, videotapes, DVDs, cable and satellite television, and the Internet all compete for the eyes and ears of consumers. As former FCC Chairman Mark S. Fowler and Daniel L. Brenner conclude, "There is every reason to believe that the marketplace, speaking through advertisers, critics, and self-selection by viewers, provides an adequate substitute for Commission involvement in protecting children and adults from television's 'captive' quality."⁶⁴ Broadcasters hardly intrude into the homes of Americans when families choose to voluntarily purchase televisions. As Krattenmaker and Powe argue, "Radios and televisions are not forced upon citizens, but in fact are considered to be among the most valued household purchases. Intruders they are not."⁶⁵

"Public Forum" Rationale

Finally, some policymakers or interest groups defend public interest regulation because the broadcast medium might be the equivalent of a "public square" or "public forum," which Congress and the FCC must regulate to ensure equal access by various groups and robust dialog on the important civic issues of the day.⁶⁶

Many different communications media could be considered a “vital town square,” however. Moreover, town squares are generally decentralized and interactive, like the Internet, whereas broadcasting is much more centralized and top-down driven. Should the Internet be regulated as a town square?⁶⁷ Finally, the town square analogy pretends that broadcasting must always be treated as a public asset and governed by a unique set of rules. But as the preceding sections have shown, that should not be the case.⁶⁸

Why Public Interest Regulation Lives On

We have good reasons to reject the conventional wisdom on spectrum management. Yet the command and control methods live on in policy. Why? First, broadcasters have benefited from public interest regulation since they have been able to obtain special favors and economic benefits (or “rents” in economic parlance) from policymakers. Second, many policymakers continue to prop up public interest notions and regulations in the belief that they are directing the content or character of broadcasting toward a more noble end. McCain’s bill continues this ignoble tradition of serving the interests of policymakers.

Broadcast Industry Benefits from Public Interest Regulation

Broadcasters retain substantial benefits from the public interest regulatory regime because they essentially play by their own set of spectrum rules. It could be argued that some of these rules do impose a burden on the industry, such as free speech standards or demands for a certain amount of educational fare,⁶⁹ political programming, or local news to be aired. These requirements are outlined in greater detail later. Yet, most broadcasters likely view such requirements as an acceptable weight to carry in light of the substantial benefits accrued from the public interest paradigm they operate under. “A broadcaster loves to be considered a public interest figure,” argues former FCC General Counsel Henry Geller, since he or she can pretend to be carrying out a great civic duty while receiving generous favors from regulators.⁷⁰

For example, employing public interest arguments, broadcasters have gained the right to require that cable and satellite providers carry their signals on demand without compensation. Such “must carry” mandates essentially give broadcasters a property right in a certain amount of the channel capacity provided by rivals.⁷¹ These

carriage rights impose a substantial cost on cable and satellite operators that broadcasters would otherwise have to cover if not for winning various political, regulatory, and judicial battles to gain free access.⁷²

In a broader sense, the broadcasters have skillfully employed public interest arguments for decades to guarantee costless access to their underlying spectrum. From its origins, the broadcast industry has not been forced to compete for the right to operate its stations but instead has been given free licenses from the FCC on the condition that the broadcaster serve the public interest with forms of programming mentioned earlier. After winning one of the FCC's "beauty contests" for the right to hold such a license, broadcasters are subjected only to a rubber-stamp renewal hearing every few years. Meanwhile, a secondary market in broadcast licenses has developed that witnessed licenses trading hands for exorbitant sums, none of which was remitted to the public that supposedly owned the underlying spectrum. Had the broadcasters that sold those licenses originally purchased those licenses at an FCC auction, this would not have raised much concern. But critics argue that by selling a license, which was originally received at no charge, broadcasters have gained control of an incredibly valuable resource or betrayed the public trust in some loose sense.⁷³

Worse yet, as part of the Telecom Act of 1996, broadcasters employed public interest arguments to convince policymakers to "loan" them additional television licenses for the purposes of deploying digital television (DTV) to the public.⁷⁴ Although each broadcaster in America already has a six megahertz (MHz) spectrum allocation that is used to send over-the-air (OTA) analog television signals, broadcasters argued that each would need an additional 6 MHz of high-quality spectrum to simulcast digital signals alongside analog broadcasts until Americans made the complete transition to DTV sets. Moreover, the broadcasters did not want to pay for this spectrum and claimed it was in the public interest for Congress to loan each station owner an additional 6 MHz to make the conversion. In theory, once the conversion to DTV was complete, each broadcaster would return the old analog license to the FCC, which would rededicate or resell it.

Congress accepted this argument and granted the broadcast industry's wish despite vociferous protests from a diverse array of industry and consumer groups. They objected that the spectrum that the broadcasters were loaned free of charge was quite valuable "beach front quality" spectrum that could have been used for many competing applications and services. Many other spectrum users were salivating at the prospect of bidding billions of dollars to obtain that same spectrum for other uses, but they didn't have the benefit of public interest or public trustee arguments on their side.

More scandalous still, the broadcasters will likely be allowed to keep both 6 MHz licenses for an extended period of time. Under a subtle but important change made by Congress in 1997, broadcasters will be allowed to continue to transmit analog signals on their old 6 MHz analog slice of spectrum until 2006, *or until 85 percent of Americans have made the migration to digital television*, and then return the old spectrum to the FCC for auction. In other words, if the DTV conversion is not 85 percent complete by 2006—and there is almost no chance of success because only a small percentage of Americans have DTV today—then the broadcasters will be able to hold on to both the old analog and the new digital licenses for the indefinite future.

The costs of this misguided industrial policy are enormous. At the time of the initial giveaway, FCC estimates of the value of this spectrum ranged between \$37 to \$70 billion,⁷⁵ and some scholars put the figure over \$100 billion. Senator McCain described this giveaway as "one of the great rip offs in American history. They used to rob trains in the Old West, now we rob spectrum."⁷⁶

But this is merely the cost of the lost auction revenues for the government. We have also lost unquantifiable forgone opportunities for innovation and investment by other potential users of that same spectrum. While Americans wait for the rollout of DTV to occur, countless other service providers are being denied the opportunity to use that same spectrum for alternative uses that the public might actually demand today. They might, for example, use that spectrum to provide next generation cellular telephony and wireless broadband.⁷⁷

Given these costs, should we continue to use so much spectrum to deliver broadcast signals over the air? Considering the fact that over 85 percent of American households now subscribe to cable

or satellite video distribution systems⁷⁸—both of which retransmit traditional broadcast signals to consumers anyway—why should so much valuable spectrum be dedicated to a high-bandwidth application like television broadcasting?

In fact, some spectrum scholars on both the political left and the right have suggested that Congress should consider “pulling the plug” on broadcasters entirely by demanding that they return their licenses to the federal government for redeployment.⁷⁹ Broadcast programming would then be delivered to homes via cable and satellite systems instead. “Even if ad-supported TV is determined to be a vital national interest, it is possible that there are more efficient ways of delivering it,” notes Jim Snider of the New America Foundation:

Let’s assume that every American has a sacred right to continue receiving local ad-supported TV from the current crop of incumbent broadcasters. Currently, these broadcasters use the most valuable airwaves available on earth to distribute their programming. But the programming could also be delivered over the much less valuable spectrum than can be used with satellite TV delivery. Every American could be guaranteed their current free TV fare, just not over the same airwaves. This would appear to be a creative win-win because free TV is preserved while resources are used more efficiently. Yet broadcasters would be sure to oppose it because the current regulatory regime is even more favorable to themselves.⁸⁰

Political and legal obstacles notwithstanding, we should ask how long Americans will be forced to prop up the old system of OTA broadcasting. As noted, 85 percent of Americans subscribe to cable or satellite today. At what point would policymakers be willing to pull the plug on the old OTA broadcasting system? When 90 percent of the public opts for cable and satellite? 95 percent? 99 percent? Stated differently, if only a very small percentage of Americans continued to receive their video programming through OTA broadcasts—say 1 to 5 percent—does that justify the continuation of this 70-year-old industrial policy that grants broadcasters special favors and treatment at the expense of others while foreclosing others from using a portion of this massive chunk of prime spectrum?

Ironically, Norm Ornstein, a Resident Scholar at the American Enterprise Institute and one of the chief architects of the free airtime proposal, makes this point succinctly: "Over-the-air broadcasting is a dinosaur. It's not going to last very long."⁸¹ If that is true, why support additional public interest mandates like the free airtime requirement? Why not completely clear the broadcast band and re-dedicate it to alternative services the public legitimately demands? The quasi-property claims of broadcasters to spectrum will derail any effort by Congress or the FCC to confiscate and rededicate their spectrum to alternative uses. Yet policymakers can encourage broadcasters to vacate their spectrum.⁸²

If it could be sold for alternative uses, the broadcast spectrum would have two important implications. First, the spectrum could be purchased by alternative owners who wish to deploy innovative new services that the public demands. Second, the substantial revenues generated by the sale of the OTA broadcast spectrum could be used to compensate the broadcasters for vacating the spectrum. Broadcasters should be given a substantial portion of the auction revenues—some would argue *all* of the revenues—to encourage them to go along with the plan.

If the government does keep a portion of the auction revenues, they should be used to fund a temporary universal service scheme for the remaining 1 to 5 percent of low-income households who rely on OTA broadcast signals. A small, means-tested, one-time voucher could be given to the neediest households who still rely on traditional analog OTA signals such that they could purchase a converter box to receive signal in the future from alternative sources. While no American is entitled to free television services, the leading argument against ending OTA broadcast television will be that some households cannot afford cable or satellite, and that ending OTA will cut off their primary means of receiving important public information. Using auction proceeds to help fund the consumer transition from OTA to alternative distribution channels would preemptively undercut such arguments.

If it were sold off, the entire OTA broadcast spectrum would likely fetch significant sums at auction. In a speech before the National Association of Broadcasters in March 2001, Tom Wolzien, Senior Media Analyst for Bernstein Research, used recent cellular auction results to estimate the potential value of the roughly 400 MHz of

spectrum occupied by the broadcast sector. Wolzien concluded that “the theoretical value is an astounding \$367 billion dollars—a third of a trillion dollars. To put this number in some sort of context, the entire television station industry is worth about \$100 billion in enterprise value, around a third of the total theoretical value of the bandwidth the stations occupy.”⁸³

The broadcasters might still argue that the spectrum status quo will enable them to compete on even terms in the new video marketplace against the likes of cable and satellite providers of service. In other words, because they will be able to use their spectrum capacity to multicast a broader array of programs and services to the public, forcing broadcasters to return any of it to the FCC would be a mistake. But this argument is also flawed as Glen O. Robinson of the University of Virginia explains:

When it comes to multicasting, conventional broadcasters are and will remain hopelessly out-channelled. The only way that conventional broadcasting can “compete” with true broadband media is with the aid of government mandates that incorporate that broadcasting into these competing systems [via must-carry mandates on cable and satellite]. Unfortunately, Congress, the FCC, and the broadcast industry are still too much in thrall to the ideology of public interest to perceive the reality of public benefits and costs entailed in clinging to this outmoded form of electronic delivery. In the interest of preserving broadcasting—local terrestrial broadcasting—we will have to settle for a distinctly second-best arrangement of property rights for the radio spectrum for some time yet to come.⁸⁴

Robinson concludes, therefore, that, “If one asks why television should be delivered by a broadcast medium, the only apparent answer is that for 70 years Congress and the FCC have believed that some special public interest inheres in this medium. As a result, broadcast spectrum rights will continue to be the premier example of inefficiency from an incompletely specified property right.”⁸⁵

In summary, by skillfully employing public interest rationales, the broadcast industry has been able to coax policymakers into granting them special favors at the expense of consumers and other industries. The high definition television (HDTV) transition gave the broadcast industry a new lease on life and helped it secure the rights to a

significant swath of spectrum that could have been put to competing uses by other industries.⁸⁶

Yet, as we have seen, the public interest rationale is weak. The costs of continuing OTA broadcasting are substantial, and broadcasters face competition from video providers. The broadcasters should be required to compete in a free spectrum marketplace if they want to remain players in this industry. Such a liberalization would also prevent policymakers from using the DTV transition as another opportunity to exact special favors or requirements of their own from broadcasters, including free airtime for candidates.

Policymakers Benefit from Public Interest Regulation

Many policymakers continue to prop up public interest notions and regulations in the belief that they are directing the content or character of broadcasting toward a nobler end; a sort of *noblesse oblige* for the communications age. At times, their rhetoric takes on a fairy-tale quality as lawmakers and regulators speak of the public interest in reverential and fantastic terms, all the while deftly evading any attempt to define the term. For example, while recently testifying before the Senate Commerce Committee, FCC Commissioner Michael Copps paid homage to the public interest standard:

At all times, I strive to maintain my commitment to the public interest. As public servants, we must put the public interest front and center. It is at the core of my own philosophy of government. More germanely, it permeates the statutes which the Commission implements. Indeed, the term “public interest” appears over 110 times in the Communications Act. The public interest is the prism through which we should always look as we make our decisions. My question to visitors to my office who are advocating for specific policy changes is always: how does what you want the Commission to do serve the public interest? It is my lodestar.⁸⁷

Copps’ public interest “lodestar” is rhetorically pleasing but ultimately provides little practical guidance. Public interest proponents assume that their values or objectives—which, in their opinion, are consistent with the needs and desires of the public—will ultimately triumph within the public policy arena. History shows the contrary: broadcasters have been able to extract and retain substantial ongoing rents from the regulatory process. The public interest rationale has

merely cloaked striving for private gain, at the beginning and throughout the history of broadcast regulation.⁸⁸

If solid analysis of the origins of broadcast regulation suggest skepticism about claims that regulation is in the public interest, we might also wonder whether current proposals for mandated political broadcasts serve private agendas. They do. As we have seen, broadcasting regulation was a compromise that served the interests of its two major supporters, the commercial broadcasters and members of Congress. The broadcasters received for free the right to use part of the spectrum and were protected from competition through the licensing process. Politicians had limited though real power over the content on the airwaves.

The coalition underlying broadcast regulation has come under strain in recent years. Labor unions, businesses, and interest groups began running hard-hitting television ads attacking incumbent members of Congress. These ads were lucrative for the broadcasters; taken together, campaigns spent at least \$509 million on advertising in the 2000 election cycle.⁸⁹ Things looked different from Capitol Hill. The pain inflicted by the ads led to promises from powerful members like Rep. Clay Shaw (R-Fla.) to address the “problem” of soft money ads in the 107th Congress.⁹⁰ After some delay, Congress enacted the Bipartisan Campaign Reform Act of 2002 that included a ban on soft money contributions to the political parties and restrictions on the funding of the issue ads that so chagrined Shaw.⁹¹ By presumably depriving the broadcasters of advertising revenue (as well as ridding themselves of troubling ads), Congress took the first step in sanctioning its erstwhile coalition partners for reneging on the implicit deal underlying broadcast regulation.

The next step in “reform” is “free” airtime for airtime. It is a much more radical step than the Bipartisan Campaign Reform Act because free airtime constitutes simple expropriation of property the broadcasters have controlled for some years. McCain’s bill is a threat aimed at returning control over broadcasting to incumbent politicians.

If the bill passes, broadcasters will be required to devote 12 hours every election cycle to election coverage. We should expect that coverage to favor those in power (i.e., members of Congress who passed the mandatory broadcast bill). After all, every broadcaster will be aware that incumbents will be watching the tone and content

of the mandatory broadcast hours. Any negative coverage of a member of Congress will invite retribution.

A close look at the qualifications set to receive free airtime indicates how vouchers favor incumbents. In the House, a candidate must meet the following conditions to receive the advertising subsidy:

- (1) Raise at least \$25,000 in contributions from individuals, not counting any amount in excess of \$250 received from any individual;
- (2) Agree not to spend more than \$125,000 in personal or immediate family funds on the House campaign; and
- (3) Face at least one opponent who has raised or spent at least \$25,000 on the campaign.

The conditions for Senatorial candidates are similar though the thresholds are higher, reflecting the larger “districts” they represent.

Once they have qualified, House candidates will receive \$3 in broadcast vouchers for every \$1 they could receive in individual contributions during the election cycle, not counting any amount in excess of \$250 received from any individual. The ceiling on the subsidy is \$375,000. Once again, the rules for Senate candidates are similar though the subsidy is proportional to the size of the state.⁹²

The first condition means a House candidate must raise \$25,000 in small donations to qualify; for example, a Senate candidate in a large state like California must raise over \$1.25 million in small donations to qualify. Once qualified, the subsidy itself depends on raising small donations. The ability to raise money in small donations depends on experience and political organization. Incumbents have both, challengers generally have no existing fundraising mechanism. Although the free airtime seems favorable to the small donor, in practice it will favor incumbents who have the organizational ability to raise small donations.⁹³

The second condition improves the chances of incumbents faced with self-financing challengers. Self-financiers must pay for their own advertising while the incumbents force the broadcasters to pay for their ads. Improving the position of incumbents relative to self-financing challengers was also a goal of the Bipartisan Campaign Reform Act.⁹⁴

Note also that 87 percent of the voucher fund goes to individual candidates with the balance going to political parties. This bias

against the parties is not surprising: political parties often support challengers to incumbents.⁹⁵ Overwhelmingly the candidates receiving free airtime will be incumbent officeholders.

If this bill is so favorable to incumbents, why has Rep. Billy Tauzin (R-La.), the chairman of the House Energy and Commerce Committee, judged it “dead on arrival” at Capitol Hill?⁹⁶ Tauzin’s judgment may be prediction about the lobbying influence of the broadcasting industry, or he may be indicating that the bill is not yet sweet enough for the taste of incumbents. The bill does hold some small possibility that rare challengers with sufficient organizational resources will receive some vouchers. The bill might find a congressional majority if the qualifications for receiving subsidies were made more stringent and thus more favorable to incumbents. That change might well happen during the legislative process. After all, McCain’s proposal is the opening bid, not the final word, on free airtime.

McCain’s bill may not need to pass to accomplish its aims. The purpose of the free airtime bill may be to threaten the broadcasters with spectrum expropriation as a way to get them to “voluntarily” refuse to run the attack ads that have so troubled members of Congress. In the 2002 election, several television stations refused to run certain ads citing the risk of lawsuits.⁹⁷ It might well occur to more than a few broadcasters that refusing such ads, or forcing the ads to be “more civil,” would be a good way to avoid McCain’s attempt to expropriate their property.

Finally, we should keep in mind that McCain’s bill is a hidden form of taxpayer financing of political campaigns. Americans do not favor funding political campaigns, and Congress would be unlikely to use general tax revenues to purchase ads for candidates and parties.⁹⁸ One way around that constraint might be forcing an unpopular group to fund the ads. The voucher system in the bill apparently seeks to force the owners of broadcasting companies to pay for election advertising. The broadcasters in turn might raise the cost of all advertising to make up for the lost revenues mandated by the bill. When the price of ads rise, however, candidates tend instead to use direct mail.⁹⁹ This “substitution effect” may mean the cost of the mandate may be partially absorbed by the broadcasters. Some of part of that cost, however, will be passed along in higher ad rates and in turn to consumers. Consumers, shareholders, and advertisers—the public—will indeed fund the mandates. For that

reason, the ironically named “free” airtime should be seen as public financing of campaign ads.

Conclusion: Who Should Define “The Public Interest” Anyway?

While the broadcast industry and politicians have their own self-interested motivations for propping up a public interest regulatory regime, upon closer inspection it remains clear that consumers or the viewing public have very little to say about that regime and have not benefited from Washington-led, top-down interpretations of what supposedly lies in “the public interest.”

Paul Taylor and Norman Ornstein argue that, “If [the public] did decide to examine the relationship between broadcasters and the public interest, they would find a fascinating history with at best a mixed record when matching the *intent of policymakers* and the reality of broadcasting.”¹⁰⁰ This is a telling statement because Taylor and Ornstein are essentially making the best argument against their own proposal by noting that the public interest has been primarily based on what policymakers—legislators in Congress and regulators at the FCC—believed was truly in the public’s best interest. Taylor and Ornstein, like so many before them, imagine that a politically defined public interest standard represents a suitable proxy for what the public really desires. But is that really the case?

“In democracies, there is no universal ‘public interest.’ Rather there are numerous and changing ‘interested publics,’ ” argues Benjamin Compaine of the Massachusetts Institute of Technology Program on Internet & Telecoms Convergence.¹⁰¹ The viewing public is likely to have a broad array of interests and desires that cannot be adequately gauged by what five FCC commissioners believe to be in the public interest. Ronald Coase argued 40 years ago, “The phrase [public interest] . . . lacks any definite meaning. Furthermore, the many inconsistencies in commission decisions have made it impossible for the phrase to acquire a definite meaning in the process of regulation.”¹⁰² And that is still true today. The public interest standard is not really a “standard” at all because it has no fixed meaning; the definition of the phrase has shifted with the political winds to suit the whims of those in power at any given time.¹⁰³

While the public has very little say in what lies in the politically defined public interest standard, they have made it clear what they

demand in the actual video programming marketplace. Broadcast commercial television in America *does* reflect what the public really wants to see and hear. Broadcasters know their audience, even though some cultural elitists might not want to acknowledge that fact. Television is probably the most thoroughly surveyed and studied communications and entertainment medium that has ever existed. Viewers are being offered the programming they genuinely desire.

What public interest supporters are perhaps afraid to answer is: Does the public really want to watch more campaign commercials and politically oriented programming and debates, or would they rather tune into a rerun of "American Idol," "Fear Factor," or "Survivor"? Given the choice, many if not most viewers will opt for what many public interest supporters would consider to be low-brow entertainment offerings over the supposedly culturally-enriching programming that policymakers seek to mandate. Supporters of public interest broadcasting will bemoan the lack of civic spirit and claim that this represents the end of democracy as we know it. Yet this choice may be a rational reaction by a citizenry that is simply tired of cliché-ridden political advertising or campaign debates that feature a tiresome series of prepackaged one-liners and sound bites. "The notion that Americans are starving for more exposure to politics is cockeyed," argues *Boston Globe* columnist Jeff Jacoby. "Americans have never been less interested in campaigns and elections. The more they see and hear of political candidates, the more their interest wanes. And yet some people are convinced Americans would be better off if only there were more politics on TV."¹⁰⁴

Three public opinion polls recently asked voters: "How do you feel about the amount of time broadcast TV and radio stations spend reporting on political campaigns, debates and the issues? Is it too little time, too much time or about the right time?" As Table 7.1 reveals, voters overwhelmingly responded that broadcasters provided "about the right amount" or "too much" campaign coverage during both election cycles. On average, 42 percent of voters thought broadcasters provided "too much" campaign coverage; only 5 percent thought there was "too little" coverage. Given such results, it would be difficult for supporters of free air time to claim that the public was clamoring for more political advertising of election coverage such that free airtime subsidies for candidates were warranted.

Table 7.1
PUBLIC OPINION POLLS OF DEGREE OF TELEVISION AND RADIO
COVERAGE OF ELECTION POLITICS (percent)

Response	February 2000 (New Hampshire Primary)	March 2000 (Super Tuesday Primaries)	October 2002 (General Primary)
About the right amount of time	50	39	40
Too much time	37	46	43
Too little time	6	7	15
No answer	7	7	2

SOURCE: Wirthlin Worldwide polls on behalf of the National Association of Broadcasters and the Radio-Television News Directors Association.

In conclusion, given the clear preferences of the public, the case for mandated airtime for political campaigns makes even less sense. Moreover, spectrum is no scarcer than any other resource on Earth—and broadcast spectrum is only scarce in that the government has artificially limited market opportunities through rigid regulatory policies. In an age of abundant information choices and a growing variety of communications media, special treatment of the broadcasting industry is no longer warranted. Finally, the so-called public interest obligations imposed on broadcasters in return for their zero-cost access to the spectrum resource have been an elegant fairy tale; the obligations have done little to benefit the public but have offered broadcasters and politicians significant benefits.

Notes

1. Quoted in "McCain-Feingold, RIP," *The Wall Street Journal*, December 4, 2002, p. A18.
2. See Our Democracy, Our Airwaves Act of 2003, S. 1497.
3. These arguments have been advanced for some time. See the survey of such arguments in Frank Sorauf, *Money in American Elections* (Glenview, IL: Scott, Foresman, 1988), pp. 341–44.
4. Stephen Ansolabehere, Alan S. Gerber, and James M. Snyder Jr., "Does TV Advertising Explain the Rise of Campaign Spending?: A Study of Campaign Spending and Broadcast Advertising Price in U.S. House Elections in the 1990s and the 1970s," Working paper, October 2001, pp. 13–21. This paper is available at <http://econ-www.mit.edu/faculty/snyder/papers.htm>.

5. Stephen Ansolabehere, John de Figueiredo, and James M. Snyder Jr., "Why Is There So Little Money in U.S. Politics?" *Journal of Economic Perspectives* 17 (Winter 2003): 115–17. (Emphasis added.)

6. David Primo, "Public Opinion and Campaign Finance: A Skeptical Look at Senator McCain's Claims," Cato Institute Briefing Paper no. 60, January 31, 2001.

7. The correlation coefficient is .0072. Data on average House and Senate spending taken from Vital Statistics on Congress is now available on the Internet at www.cfinst.org/studies/vital/3-5.htm (for the Senate) and www.cfinst.org/studies/vital/3-2.htm (for the House). The source for turnout data is Michael McDonald of George Mason University. His data are available at http://elections.gmu.edu/voter_turnout.htm.

8. See Michael P. MacDonald and Samuel Popkin, "The Myth of the Vanishing Voter," *American Political Science Review* 95, no. 4: 963–74.

9. Paul Taylor points out that Congress did successfully impose limits on campaign spending on "communications media," which were in effect only for the 1972 election (they were later struck down in *Buckley v. Valeo*). The 1972 election saw a 5 percent drop in eligible voter turnout compared to 1968. See Taylor, "The Case for Free Airtime," March 2002, p. 26, available at www.bettercampaign.org.

10. In the 2002 mid-term elections, 98.4 percent of House incumbents who ran were reelected. In the 48 open seats at stake, 14 losing candidates received more than 45 percent of the total vote. Another 11 losers received between 40 and 45 percent of the total vote. Even in open seats only about half of the races were called mildly competitive. (Author's calculations based on data drawn from election results posted on www.CNN.com and www.MSNBC.com.)

11. This finding, however, was statistically indistinguishable from zero. Ansolabehere, Gerber, and Snyder, "Does TV Advertising Explain the Rise of Campaign Spending?" p. 22.

12. *Ibid.*

13. Supporters of the proposal summarize "candidate and issue-centered programming" in the following way: "Within these guidelines, stations will retain complete editorial control over the segments that make up the two hours per week of programming. Stations will decide, for example, the placement and duration of each segment, the number of segments, and the mix of local, state and federal races covered in the segments." See <http://bettercampaigns.org/docs/index.php?DocID=36>.

14. Two classic studies are Angus Campbell, Philip E. Converse, Warren E. Miller, and Donald E. Stokes, *The American Voter* (New York: Wiley and Sons, 1960), and Philip E. Converse, "The Nature of Belief Systems in Mass Publics" in *Ideology and Discontent*, ed. David Apter (New York: Free Press, 1964).

15. Michael X. Delli Carpini and Scott Keeter, *What Americans Know about Politics and Why It Matters* (New Haven, CN: Yale University Press, 1996), p. 133. (Emphasis added.)

16. *Ibid.*

17. Political scientists have long known that it is rational to be both ignorant and apathetic about elections. The costs of voting (gaining information, going to polls) vastly outweigh the benefits (which are dependent on one's vote making a difference—which almost never happens). See Anthony Downs, *An Economic Theory of Democracy* (New York: Harper and Row, 1957), ch. 13.

18. Stephen Ansolabehere, Shanto Iyengar, Adam Simon, and Nicholas Valentino, "Does Attack Advertising Demobilize the Electorate?" *American Political Science Review* 88 (December 1994): 829.

19. Ibid., p. 833. See also Stephen Ansolabehere and Shanto Iyengar, *Going Negative: How Political Advertisements Shrink and Polarize the Electorate* (New York: Free Press, 1995), p. 111; and Stephen D. Ansolabehere, Shanto Iyengar, and Adam Simon, "Replicating Experiments Using Aggregate and Survey Data: the Case of Negative Advertising and Turnout," *American Political Science Review* 93 (December 1999): 901–09.

20. Steven E. Finkel and John G. Geer, "A Spot Check: Casting Doubt on the Demobilizing Effect of Attack Advertising," *American Journal of Political Science* 42 (April 1998): 577.

21. Paul Freedman and Ken Goldstein, "Measuring Media Exposure and the Effects of Negative Campaign Ads," *American Journal of Political Science* 43 (October 1999): 1190.

22. Ken Goldstein and Paul Freedman, "Campaign Advertising and Voter Turnout: New Evidence for a Stimulation Effect," *Journal of Politics* 64 (August 2002): 722.

23. Richard Lau, Lee Sigelman, Caroline Heldman, and Paul Babbitt, "The Effects of Negative Political Advertisements: A Meta-Analytic Assessment," *American Political Science Review* 93 (December 1999): 856–58. "Meta-analysis refers to the analysis of analyses . . . the statistical analysis of a large collection of analysis results from individual studies for the purpose of integrating the findings." Also, Gene V. Glass, "Primary, Secondary, and Meta-analysis of Research," *Educational Researcher* 5 (1976): 3.

24. See Freedman and Goldstein, "Measuring Media Exposure and the Effects of Negative Campaign Ads," pp. 1198–2000; and Finkel and Geer, "A Spot Check," p. 587.

25. Goldstein and Freedman, "Campaign Advertising and Voter Turnout," pp. 733–34.

26. John R. Hibbing and Elizabeth Theiss-Morse, *Stealth Democracy: Americans' Beliefs about How Government Should Work* (New York: Cambridge University Press, 2002), parts I and II.

27. This proposal has been recognized for many years. A proposal to regulate newspapers in the way broadcasters have been regulated "would, of course, be rejected out of hand as inconsistent with the doctrine of freedom of the press." See Ronald H. Coase, "The Federal Communications Commission," *Journal of Law and Economics* 2 (October 1959): 7.

28. See Paul Taylor and Norman Ornstein, "The Case for Free Air Time," New America Foundation Working paper, June 1, 2002, Appendix 1 available at <http://freeairtime.org/reports/display.php?PageID=82>.

29. Lawrence Gasman, *Telecompetition: The Free Market Road to the Information Highway* (Washington, DC: Cato Institute, 1994), p. 67. Likewise, legal scholars Howard A. Shelanski and Peter W. Huber argue that "there is no such thing as 'spectrum' out there, any more than there was 'ether' to be bottled up by the Commission or anyone else. 'Spectrum' is composed entirely of the engineering characteristics of transmitters and receivers. Those characteristics are defined, in turn, by power, sensitivity, and modulation parameters in a fuzzy and permeable zone of space." See Howard A. Shelanski and Peter W. Huber, "Administrative Creation of Property Rights to Radio Spectrum," *Journal of Law and Economics* 41 (October 1998): 584.

30. For an excellent introduction to radio spectrum engineering basics see Marshall Brain, "How the Radio Spectrum Works," available at www.howstuffworks.com/radio-spectrum.htm, and Marshall Brain, "How Television Works," available at www.howstuffworks.com/tv.htm.

31. Jora R. Minasian, "Property Rights in Radiation: An Alternative Approach to Radio Frequency Allocation," *Journal of Law and Economics* 18, no. 1 (April 1975): 221.
32. Ronald H. Coase, "The Federal Communications Commission," *Journal of Law and Economics* 2 (October 1959): 14.
33. Thomas W. Hazlett, "The Rationality of U.S. Regulation of the Broadcast Spectrum," *Journal of Law and Economics* 33 (April 1990): 145.
34. Jora R. Minasian, "The Political Economy of Broadcasting in the 1920s," *Journal of Law and Economics* 12, no. 2 (October 1969): 394.
35. Hazlett, "The Rationality of U.S. Regulation of the Broadcast Spectrum," pp. 133–75.
36. *Ibid.*, p. 149.
37. This fear should not be surprising, as noted regulatory economist Alfred E. Kahn concludes, "Responsible for the continued provision and improvement of service, [the regulatory commission] comes increasingly and understandably to identify the interest of the public with that of the existing companies on whom it must rely to deliver goods." Therefore, Kahn goes on to note, "When a commission is responsible for the performance of an industry, it is under never completely escapable pressure to protect the health of the companies it regulates, to assure a desirable performance by relying on those monopolistic chosen instruments and its own controls rather than on the unplanned and unplannable forces of competition." See Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* (Cambridge, MA: MIT Press, 1971), p. 46.
38. Hazlett, "The Rationality of U.S. Regulation of the Broadcast Spectrum," p. 154.
39. Quoted *ibid.*, pp. 157–58.
40. Many decades later the National Telecommunications and Information Administration assumed responsibility for the management and allocation of all spectrum used by the federal government.
41. Gerald R. Faulhaber and David J. Farber, "Spectrum Management: Property Rights, Markets, and the Commons," AEI-Brookings Joint Center for Regulatory Studies Working Paper no. 02-12, December 2002, p. 6. Similarly, Lawrence J. White of the New York University Stern School of Business argues, "Unfortunately, spectrum use is mired in layers of federal regulation, whose consequences sometimes make the former Soviet Union's Ministry of Agriculture and Pencil Erasers look like a paragon of efficiency and good sense." Lawrence J. White, "Spectrum for Sale," *Milken Institute Review* (2nd Quarter, 2001): 31.
42. Federal Communications Commission, "Spectrum Policy Task Force Report," ET Docket no. 02-135, November 2002, p. 11, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.pdf.
43. *Ibid.*, p. 3.
44. See Adam D. Thierer, "Three Cheers for the FCC Spectrum Task Force Report," Cato Institute Tech Knowledge no. 44, November 21, 2002, available at www.cato.org/tech/tk/021121-tk.html.
45. In all likelihood, the Task Force probably felt that such a recommendation was too politically impractical at this juncture given the public interest ethos that still surrounds discussion of broadcast industry regulation.
46. Howard A. Shelanski and Peter W. Huber, "Administrative Creation of Property Rights to Radio Spectrum," *Journal of Law and Economics* 4 (October 1998): 581.

47. Moreover, Congress and the FCC came to realize that there were sound public interest reasons to rubber stamp license renewal for incumbents. As T. Barton Carter, Juliet Lushbough Dee, and Harvey L. Zuckman note, "There is a significant public interest component in stability because unless licensees can be reasonably assured that their heavy investment will not be rendered valueless at the end of the license term, they might not make a long-term investment in public service programming. Rather, they will operate the station solely to maximize short-term profit." T. Barton Carter, Juliet Lushbough Dee, and Harvey L. Zuckman, *Mass Communications Law* (St. Paul, MN: West Group, 2000), p. 450.

48. As Ayn Rand argued, "[I]f you want to make a 'limited' resource available to the whole people, make it private property and throw it on a free, open market." Ayn Rand, "The Property Status of the Airwaves," *Capitalism: The Unknown Ideal* (New York: Signet, 1964), p. 124.

49. *NBC v. United States*, 319 U.S. 190 (1943).

50. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

51. See *Telecommunication Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986). In overturning the FCC's "Fairness Doctrine" then-Judge Robert Bork argued, "All economic goods are scarce. . . . Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing characteristic leads to analytical confusion."

52. Benjamin M. Compaine, "Distinguishing Between Concentration and Competition," in *Who Owns the Media? Competition and Concentration in the Mass Media Industry*, ed. Benjamin M. Compaine and Douglas Gomery (Mahwah, NJ: Lawrence Erlbaum, 2000), p. 557.

53. "[F]requencies are divisible (or expandable) in ways that [physical goods] are not. The spectrum can be mined more intensively, using less separation between frequencies with more (or higher quality) broadcast transmitters and better receivers, or more extensively, deploying more sophisticated sending and receiving equipment so as to exploit progressively higher and lower wavelengths." Thomas W. Hazlett, "Physical Scarcity, Rent Seeking, and the First Amendment," *Columbia Law Review* 97, no. 4 (May 1997): 926, available at www.aei.org/ra/rahazl7.pdf.

54. Ithiel de Sola Pool, *Technologies of Freedom* (Cambridge, MA: Harvard University Press, 1983), p. 141. "Clearly it was policy, not physics, that led to the scarcity of frequencies. Those who believed otherwise fell into a simple error in economics," Pool concluded.

55. See William T. Mayton, "The Illegitimacy of the Public Interest Standard at the FCC," *Emory Law Journal* 38 (1989): 719.

56. Jonathan W. Emord, *Freedom, Technology, and the First Amendment* (San Francisco: Pacific Research Institute for Public Policy, 1991) p. 282.

57. *Ibid.*, p. 284.

58. Steve Chapman, "You Will Watch the Debates," *Chicago Tribune*, October 15, 2000, p. 19.

59. Hazlett, "The Rationality of U.S. Regulation of the Broadcast Spectrum," pp. 137-38.

60. Thomas G. Krattenmaker and Lucas A. Powe, *Regulating Broadcast Programming* (London: MIT Press, 1994), p. 54.

61. *Ibid.*, p. 207.

62. An excellent summary of these public interest requirements can be found in Matthew L. Spitzer, "The Constitutionality of Licensing Broadcasters," *New York*

University Law Review 64 (November 1989): 997–1006. The major public interest regulations included:

(1) The “Fairness Doctrine”: The Doctrine which demanded that broadcasters cover controversial issues of public importance in a “fair” manner and provide reasonable opportunities for conflicting opinions to be presented. Although repealed by the FCC in 1987 after coming under attack by the Courts, several attempts were made by members of Congress to re-institute the rule. The Doctrine was repealed after the FCC came to agree with the Court’s logic that the rule stifled legitimate free speech and exchange.

(2) Indecency rules: The FCC, egged on by Congress, has regulated speech on television and radio that is supposedly “indecent” even though it is doubtful comparable regulations could pass Constitutional muster if imposed on print media.

(3) Children’s television requirements: Through various FCC regulations and, more importantly, the Children’s Television Act of 1990, policymakers have required that broadcasters take the “educational and informational needs of children” into account. Although the rules are quite vague and open to creative interpretation by regulators, they do specifically mandate that broadcasters air at least three hours of children’s programming per week and also limit the amount of advertising that broadcasters air during children’s programming. A broadcaster’s license may be revoked for failure to live up to these rules, however they are interpreted by the FCC.

(4) Personal attack and political editorializing rules: Comparable to the Fairness Doctrine, the personal attack and political editorializing rules were codified by the FCC in the late 1960s. They required: broadcasters to notify candidates and even individual citizens whose honesty, integrity or character have been attacked; to provide them with a script or tape of the attack; and to offer them a chance to respond over the station’s facilities. After coming under attack in the courts, the FCC finally repealed the rules in October of 2000. As was the case with the Fairness Doctrine, the courts had found that the rules have had a “chilling effect” on programming and editorializing.

63. *FCC v. Pacifica Foundation*, 438 U.S. 726, 748–49.

64. Mark S. Fowler and Daniel L. Brenner, “A Marketplace Approach to Broadcast Regulation,” *Texas Law Review* 60, no. 2 (February 1982): 229.

65. Krattenmaker and Powe, *Regulating Broadcast Programming*, p. 220.

66. As Taylor and Ornstein argue, “In the land of free speech, we have permitted a system of ‘paid speech’ to take hold during political campaigns on the closest thing we have to a public square—our broadcast airwaves.” Paul Taylor and Norman Ornstein, “A Broadcast Spectrum Fee for Campaign Finance Reform,” New America Foundation Spectrum Series Working Paper no. 4, June 2002, p. 2.

67. Ironically, some scholars have recently suggested that the Internet should be regulated as a public forum or a commons. See Cass Sunstein, *Republic.com* (Princeton, NJ: Princeton University Press, 2001).

68. Robert M. O’Neil, director of the Thomas Jefferson Center for the Protection of Free Expression, has noted, “It seems obvious that a radio or television station, or a cable system or computer bulletin board, bears little resemblance to a park or a street or a civic auditorium. Yet the very fact that broadcast facilities provide vital channels of communications has served to keep the public forum analogy alive in

the minds of some observers." Robert M. O'Neil, "Broadcasting as a Public Forum," in *Rationales and Rationalizations*, ed. Robert Corn-Revere (Washington, DC: The Media Institute, 1997), p. 125.

69. See Adam D. Thierer, "Who Will Mind the Children? The Regulation of Children's Programming in the Information Age," in *Speaking Freely: The Public Interest in Unfettered Speech* (Washington, DC: Media Institute, 1995), pp. 47–66.

70. Henry Geller, "Broadcasting and the Public Trustee Notion: A Failed Promise," *Harvard Journal of Law and Public Policy* 10, no. 1 (Winter 1987): 90.

71. See Roger Pilon, "A Modest Proposal on 'Must-Carry,' the 1992 Cable Act, and Regulation Generally: Go Back to Basics," *Hastings Communications and Entertainment Law Journal* 17, no. 1 (Fall 1994): 59.

72. See Thomas W. Hazlett, "Digitizing 'Must-Carry' Under *Turner Broadcasting v. FCC*," *Supreme Court Economic Review* 8 (2000): 154, available at www.manhattan-institute.org/hazlett/rahazl1.pdf.

73. See, for example, Michael Calabrese, "Battle Over the Airwaves: Principles for Spectrum Policy Reform," New America Foundation Working Paper, October 2001, pp. 4–7.

74. For additional background see Adam Thierer, "The Digital TV Transition: The Fairy Tale Continues," Cato Institute Tech Knowledge no. 26, November 9, 2001, available at www.cato.org/tech/tk/011109-tk.html.

75. Letter from Robert M. Pepper, Chief, Federal Communications Commission Office of Plans and Policy, to Senator Joseph Lieberman, September 6, 1995.

76. Quoted in Christopher Stern, "Broadcasters' Promise of a Digital TV Age Has Not Been Met," *Washington Post*, December 17, 2000, p. H1.

77. Adam Thierer, "The HDTV Fiasco Gets Worse: TV Set and Cable Mandates on the Way," Cato Institute Tech Knowledge no. 39, August 5, 2002, available at www.cato.org/tech/tk/020805-tk.html. Nonetheless, policymakers, egged on by the broadcast lobby, continue to go to great extremes to try to make the transition work. For example, in August 2002, the FCC mandated that television set manufacturers include digital tuners in all their new sets by 2006 to help speed the transition even though it will add more than \$200 to the cost of each new television. Likewise, Congress was rumored to be considering legislation mandating that cable companies carry all local digital television broadcast signals on their systems in addition to older analog channels. Under such "dual must carry" rules, cable operators would be forced to dedicate even more of their capacity to the retransmission of OTA broadcast signals, meaning less room for other cable channels or even Internet access.

78. See Federal Communications Commission, "Ninth Annual Report on Competition in Video Markets," MB Docket no. 02-145, December 31, 2002, p. 75, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-338A1.pdf.

79. See, for example, Thomas W. Hazlett, "The U.S. Digital T.V. Transition: Time to Toss the Negroponte Switch," AEI-Brookings Joint Center for Regulatory Studies Working Paper no. 01-15, November 2001; and J. H. Snider, "The Myth of 'Free' TV," New America Foundation Spectrum Series Working Paper no. 5, June 2002.

80. J. H. Snider, "The Myth of 'Free' TV," p. 26.

81. Quoted in Neil Hickey, "TV's Big Stick," *Columbia Journalism Review* (September/October 2002): 53.

82. An interesting incentive plan in this regard was recently revealed by two spectrum experts at the FCC. In a new working paper entitled, "A Proposal for a Rapid Transition to Market Allocation of Spectrum," an ingenious scheme to expedite

the transition to a spectrum free market was outlined by Evan Kwerel and John Williams of the FCC's Office of Plans and Policy. Kwerel and Williams, who have done pioneering work on spectrum policy at the FCC, propose to exhaustively auction off not only untapped or underutilized spectrum, but also the large swaths of spectrum currently controlled by incumbent licensees. Incumbent holders of spectrum would be given the right to accept the bid price for their spectrum at auction or retain that spectrum and gain full flexibility to use it however they wanted in the future. If incumbent spectrum holders were able to see how much their spectrum could fetch on the open market, many of them might opt to sell off their bandwidth to others who value it more highly. Although the OPP report specifically exempted the broadcasters from its recommendations, that judgment was probably based more on practical political concerns rather than sound economic or engineering considerations. There is no reason that this plan could not apply to the broadcasters as well.

83. Thomas Wolzien, "Whose Broadband Is It Anyway?" speech for the National Association of Broadcasters Futures Summit, Bernstein Research, March 25, 2001.

84. Glen O. Robinson, "Spectrum Property Law 191," *Journal of Law and Economics* 41 (October 1998): 623–24.

85. *Ibid.*, p. 623.

86. See Joel Brinkley, *Defining Vision: How Broadcasters Lured the Government into Inciting a Revolution in Television* (San Diego, CA: Harcourt Brace & Company, 1997).

87. Statement of Michael J. Copps Before the Senate Committee on Commerce, Science, and Transportation, January 14, 2003, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-230241A4.doc.

88. Thomas W. Hazlett, "Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?" *Journal of Law and Economics* 41 (October 1998): 540–41. "As a factual matter, empirical research long ago established that the public interest outputs that regulators claimed to be the objective of the licensing system were not, in reality, produced by the comparative hearing process. Harvey Levin found that 'FCC licensing policies appear to bolster industry rents and profits rather than channel them into diversity and merit service generally.' "

89. Candice J. Nelson, "Spending in the 2000 Elections," in *Financing the 2000 Election*, ed. David B. Magleby (Washington, DC: Brookings Institution Press, 2002), p. 33. The study cited suggests that the \$509 million estimate is low.

90. Juliet Eilperin, "Feeling the Sting of 'Soft Money,' Some in House GOP Rethink Position on Campaign Reform," *Washington Post*, October 14, 2000, p. A11. "Throughout nearly 20 years in Congress, Rep. E. Clay Shaw Jr. (R-Fla.) had never been a huge fan of overhauling the campaign finance system. But after being pummeled this fall with ads financed by unlimited contributions to labor unions and the Democratic Party, Shaw is having second thoughts. 'After you've been a victim of soft money, you realize the magnitude of the problem,' Shaw said recently. 'I'm determined to address this problem when we come back. It's really ripping at the fabric of our nation's political structure.' "

91. Bipartisan Campaign Reform Act of 2002, 2 USC 431, Titles I and II.

92. "Summary of Bill" cited earlier.

93. Thomas Gais, *Improper Influence: Campaign Finance Law, Political Interest Groups and the Problem of Equality* (Ann Arbor, MI: University of Michigan Press, 1996), *passim*.

94. Bipartisan Campaign Reform Act of 2002, 2 USC 431, Title III, § 304 which loosens contribution limits for candidates facing a self-funded opponent.

95. "For congressional elections, the national parties invest their resources in the most competitive races to maximize their chances of holding on to the seats they already control and to win more seats." See Diana Dwyer and Robin Kolodny, "National Political Parties after BCRA," in *Life after Reform: When the Bipartisan Campaign Reform Act Meets Politics*, ed. Michael Malbin (Lanham, MD: Rowman and Littlefield, 2003).

96. Paige Albiniak, "Free Ads for Pols?; Chances Appear Slim for Planned McCain-Feingold TV Bill," *Broadcasting and Cable*, June 17, 2002, p. 16.

97. Amy Gardner, "TV Stations Referee Campaign Ad," *Charlotte News Observer*, October 10, 2002.

98. William Mayer, "Public Attitudes on Campaign Finance," in *A User's Guide to Campaign Finance Reform*, ed. Gerald C. Lubenow (Lanham, MD: Rowman and Littlefield, 2001), pp. 59–61.

99. Stephen Ansolabehere, Alan S. Gerber, and James M. Snyder Jr., "Does TV Advertising Explain the Rise of Campaign Spending?: A Study of Campaign Spending and Broadcast Advertising Price in U.S. House Elections in the 1990s and the 1970s," October 2001, pp. 13–21. This paper is available at <http://econ-www.mit.edu/faculty/snyder/papers.html>.

100. Taylor and Ornstein, "A Broadcast Spectrum Fee for Campaign Finance Reform," p. 4 [emphasis added].

101. Benjamin M. Compaine, "The Myths of Encroaching Global Media Ownership," Paper presented at the Association for Education in Journalism & Mass Communication Convention, August 2001, available at www1.primushost.com/~bcompain/WOTM/media_myths.htm.

102. Ronald H. Coase, "The Federal Communications Commission," *Journal of Law and Economics* 2 (October 1959): 8–9. Even Taylor and Ornstein admit, "[N]either in the 1927 [Radio] Act nor in the 1934 [Communications] Act, nor subsequently, did Congress define clearly what actions by broadcasters would represent managing their stations in the public interest." Taylor and Ornstein, "A Broadcast Spectrum Fee for Campaign Finance Reform," p. 6.

103. Adam D. Thierer, "Is the Public Served by the Public Interest Standard?" *Freeman* 46, no. 9 (September 1996): 618–20. Likewise, Lawrence J. White has noted, "The 'public interest' is a vague, ill-defined concept. Under the 'public interest' banner the Congress and the FCC have established far too many protectionist, anticompetitive, anti-innovative, inflexible, output-limiting regulatory regimes and unnecessarily infringed on the First Amendment rights of broadcasters." White, "Spectrum for Sale," p. 31.

104. Jeff Jacoby, "More Politics on TV? No Thanks," *Boston Globe*, January 31, 2000, p. A17. Also see Steve Chapman, "You Will Watch the Debates," p. 19.

8. The Constitutional Case against “Free” Airtime

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The other shoe of campaign finance reform is dropping.¹ Senator John McCain (R-Ariz.) is again taking the lead by sponsoring legislation requiring radio and television broadcasters to provide free airtime to political candidates in furtherance of their campaigns.² In fact, such airtime would not be free; we would pay a high price in one of our most precious currencies, freedom of the press.

Proponents of campaign finance reform have long sought to mandate some form of free airtime for candidates.³ Eight years ago President Clinton established the President’s Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (popularly known as the Gore Commission) to deal in particular with the burgeoning costs of television advertising time for political candidates.⁴ The president expected this body to recommend, and the Federal Communications Commission then to implement, a program for government-mandated free television airtime for candidates for political office.⁵ The Gore Commission, a “Noah’s Ark” of representatives of special interests,⁶ was not able to agree on any mandate, and some of its members had to settle for a statement urging broadcasters to do a better job of covering political campaigns.⁷

Yet the initiative behind the Gore Commission lives on. In June 2002 McCain publicly thanked political scientist Norman Ornstein, the cochair of the Gore Commission, and journalist Paul Taylor, head of the Alliance for Better Campaigns, for developing the core of the senator’s current proposal.⁸ The following October McCain introduced S. 3124, the Political Campaign Broadcast Activity Improvements Act, to implement the proposal. He has reintroduced such legislation in the 108th Congress where he chairs the Senate Committee on Commerce, Science and Transportation.⁹

Senator McCain's bill has three main components. First, it explicitly regulates program content by requiring broadcasters to devote at least two hours per week in the period just before federal elections to "candidate-centered" or "issue-centered" programming, defined to exclude paid political advertising. At least one of those hours must be in an expanded prime time, and none can be "night owl" broadcasts between midnight and 6:00 A.M.¹⁰ Second, the act establishes a complicated voucher program, in the aggregate initial amount of \$750 million for each two-year election cycle, under which federal candidates and national committees of qualifying political parties (on behalf of federal, state, or local candidates) would be given vouchers to purchase broadcast time for political ads.¹¹ Broadcasters would have to accept those vouchers as payment; they could then redeem them at face value. Commercial broadcasters would have to finance the voucher system through an annually assessed "spectrum use fee" of between one-half and 1 percent of a station's gross revenues.¹² Finally, the proposed legislation would tighten the requirements of the current 47 U.S.C. § 315(b) to widen the circumstances under which broadcasters must charge political candidates only the lowest unit rate for advertising time.¹³

Overall, McCain's bill proposes to shift much of the cost of political campaigning, especially on television, from candidates and their supporters to broadcasters simply because the latter own and control an effective medium of mass communication. The details could vary and are not as important as the principles at stake. Put simply, requiring broadcasters to carry campaign-related content and speaker-specific airtime cannot survive modern First Amendment scrutiny. Such a scheme also well may constitute a "taking" requiring just compensation under the Fifth Amendment.

Practical Issues

Broadcasters are not necessarily doing a good job of covering political campaigns, and their shortcomings attract appropriate criticism. Paul Taylor and the Alliance for Better Campaigns contribute positively to the public discourse by cataloguing the deficiencies of broadcasters and demanding better performance.¹⁴ When citizens expose, embarrass, and entreat, we may all applaud their efforts.

When interest groups and senators seek to use the heavy hand of government regulation of the press, however, they enter constitutionally forbidden territory. In the long run government regulation

can hardly outperform the marketplace and institutional forces in improving how the press operates. As the Supreme Court once sagely observed, "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."¹⁵

The proposals for free airtime raise many practical questions that relate directly to the government's heavy burden to sustain the constitutionality of free airtime.¹⁶ First, why focus on broadcast coverage of political campaigns? Proponents say the broadcast media are the major source of news and information, including information about political campaigns, for most of the American people.¹⁷ They also argue that campaign ads on television drive up the cost of campaigns, causing a host of allegedly deleterious side effects. Technological changes, however, are undermining both arguments. The proposals for free airtime are peaking just as the influence of broadcast television on political campaigns is rapidly declining because of the advent of new, proliferating electronic media and digital devices.¹⁸

But additional questions remain. What is the great value of television campaign ads that we should want to encourage them? Do they really inform and educate voters and foster deliberative democracy? Do we need more 30- and 60-second political ads that candidates might choose to run if such ads were available free of charge and that, with increasing frequency, may be zapped along with other commercials by proliferating technological devices?¹⁹ Just what is the candidate- and issue-centered discourse the proposals call for? Assuming, as is unlikely, that those can be adequately defined, why is this the favored form of campaign speech? And who will monitor compliance with such amorphous requirements, and how? Why not instead have taxpayers subsidize the mailing to all registered voters of candidates' position papers on the major issues in their campaigns? Alternatively, we could subsidize such position papers carried as paid inserts in major daily newspapers. Such written statements would have far greater potential for conveying meaningful information, especially if supplemented by "dueling" position statements continuously released during a campaign on opposing candidates' websites. Indeed, those websites are perhaps the best source for educating oneself about, and even interacting with, a candidate.²⁰

If the complaint is that most people will ignore such messages in other media, that's most unfortunate. The ultimate answer might

be a better-educated populace. But people have a right to ignore speech no matter how valuable others deem it to be.²¹ Why force broadcasters to subsidize candidates bombarding listeners and viewers with images and slogans they would rather avoid, and often do avoid?

Finally, why should we give preference to major political parties with grants of vouchers?²² If anything, it seems that fringe candidates and parties most need and deserve assistance in getting their messages to the voters, at least from the standpoint of the First Amendment interest in diversity of political thought and ideas. Broader subsidies, however, might mandate support for some rather unpopular or objectionable ideas.²³ But why is that any different from requiring support for the Republican or Democratic Party? There may be some political science theory behind the effort to strengthen the major political parties at the federal and state levels through vouchers, but broadcasters should not be made unwilling participants in this social science experiment.

Constitutional Issues

The First Amendment

Those practical problems are less important than the constitutional questions raised by the "free airtime" proposal. Under the Constitution, "We the People," not just broadcasters or other media players, are guaranteed the benefits of a *free* press, not a press regulated by the government to achieve some currently fashionable view of the good. So I begin with a premise that should be largely uncontested: if mandates for free coverage of political campaigns were proposed for the print media (newspapers), they would be stillborn as a flagrant violation of the First Amendment. The U.S. Supreme Court's *Miami Herald Publishing Co. v. Tornillo* decision in essence so holds, and is good law in both senses of that term.²⁴ As the Court has phrased it recently, the law "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."²⁵ If free time, or space, for political candidates would be a total nonstarter applied to newspapers, why should the situation be any different for broadcasting?

The superficial answer is that broadcasting is different and that this difference is of significant constitutional moment. There is much

truth to that, at least as a historical matter. The Radio Act of 1927 started us down an ultimately misguided path of government licensing of the broadcast media coupled with comprehensive regulation of the new media—a system anathema in this country for newspapers but generally upheld for broadcasting by the Supreme Court decades ago.²⁶ And this is where many people, including those favoring free time for candidates, would like to leave matters. But the world has changed. The world of the mass media marketplace has been revolutionized by technological developments and the digital/computer age; the world of First Amendment jurisprudence has similarly progressed.

The Death of Scarcity and the Need for Strict Scrutiny

What standard of judicial review should be applied to the free airtime proposals? They clearly are content-based regulations of speech as they explicitly favor a very particular category of speech and of speakers.²⁷ The proposals try to foster speech by political candidates, or programming about political candidates, focusing directly on their political campaigns.²⁸ As content-based regulations, the proposals should be subject to the demanding requirements of strict scrutiny, with the government bearing the significant burden of demonstrating that they serve a compelling state interest and are narrowly tailored using the least speech-restrictive means to achieve that interest.²⁹

But, the argument goes, while the proposals favor candidate speech they burden only the speech interests of broadcasters, infringing on their editorial discretion, and broadcasters, we all know, enjoy substantially reduced First Amendment protection. That is the teaching of *Red Lion Broadcasting Co. v. FCC* and the scarcity rationale for government regulation of broadcasting the Supreme Court sanctioned in that 1969 case when broadcasting was the only electronic medium of mass communication.³⁰ The Court asserted that physical scarcity was the unique, distinguishing characteristic of broadcasting that allowed it to be regulated in ways that could not be tolerated under the First Amendment for other media. But the scarcity rationale always has been a highly dubious notion both empirically and in theory.³¹ In particular, critics have raised three fundamental objections concerning

- whether such scarcity exists empirically;
- why the asserted scarcity, even if actual and physical in nature, should be a predicate for regulation since scarcity in some form is *the* basic economic fact of life affecting all media and as such cannot justify selective regulation; and
- how a specific form of scarcity that broadcasters may suffer justifies each particular aspect of regulation, especially those aspects that are content based.

Scarcity now can have no further talismanic significance given the ongoing explosion of new forms of electronic media and new sources of information. The new reality has been acknowledged by courts, commentators, and even some FCC commissioners.³² Whatever legitimacy the concept once may have had, and whatever some people might wish to imagine about its continued vitality, spectrum scarcity as a justifying rationale is now dead, if not quite yet buried. The mere mention of “scarcity” seems anachronistic in a digital age offering a plethora of electronic media from broadcast to cable to satellite to microwave to the Internet.

People who would continue to rely on a concept of scarcity first must carefully define the concept they would invoke—for example, is it allocational scarcity (the demand for broadcast frequencies exceeds supply), numerical scarcity (without government intervention the public would be deprived of diverse viewpoints),³³ or some other kind of scarcity? Next they must demonstrate that such scarcity exists to a significant and unique degree in the media they would regulate. Then they must establish a close nexus between the condition and the regulation it supposedly supports.³⁴ No plausible argument can be fashioned along those lines; only people desperate to maintain government regulation of broadcasting hang on to the discredited anachronism of scarcity out of the justifiable fear that there is nothing to replace it to achieve the desired regulatory end. That approach just demonstrates the bankruptcy of such an enterprise.³⁵

We need not replay the death of scarcity here. Clearly the government must look to the digital, electronic future that already includes broadcasting, cable, satellite, microwave, VCRs, new telephone technologies, and the Internet—not to mention the next revolutions sure to emerge from the laboratory—and cannot be wedded to the past.³⁶

So, if the shibboleth of scarcity can no longer be relied on, the central question becomes whether the government can develop and support any other rationale that adequately justifies regulation of broadcasters—especially content-based programming regulation such as free airtime proposals—under the amorphous notion of the “public interest.” The heavy burden to do so clearly lies on the state;³⁷ the strong presumption must be that broadcasters, like all other members of the press, are protected by the First Amendment from such government regulation.

Moreover, whatever rationale or rationales the government now advances to support the free airtime proposals ultimately will have to survive strict judicial scrutiny and not merely the “peculiarly relaxed”³⁸ First Amendment review that usually has sufficed up to now. The Supreme Court expressed doubts about continued reliance on scarcity and applied heightened review in *FCC v. League of Women Voters*.³⁹ In *Turner Broadcasting System, Inc. v. FCC*, the Court further acknowledged its doubts about scarcity and emphasized the “limited” and “minimal” control the government can exercise over broadcast programming.⁴⁰ In particular, and directly relevant to free airtime proposals, the Court emphatically noted that “the FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations.”⁴¹

As the constitutional guarantee of free speech has its “fullest and most urgent application” in political campaigns,⁴² the government would bear a “well-nigh insurmountable” burden⁴³ to justify further interfering with how broadcasters cover campaigns or provide candidates with airtime. The FCC would have to satisfy exacting scrutiny by demonstrating a compelling interest that is both narrowly tailored and necessary to serve that interest.⁴⁴ The government would have to “demonstrate that the recited harms are real, not merely conjectural, and the regulations will in fact alleviate those harms in a direct and material way.”⁴⁵ Mere assertions to this effect are not enough; the government must actually demonstrate that these conditions are met.⁴⁶ The only way to do that is to concretely establish, with clear and convincing evidence, the logical and empirical link between each specific proposal and the compelling interest it allegedly serves while, at the same time, showing that alternatives to the restriction of speech are not reasonably available.⁴⁷ With the plethora

of alternatives available in the modern communications age, the many practical difficulties with the free airtime proposals discussed earlier, and the declining importance of broadcasting in political campaigns,⁴⁸ the case cannot be made.

The Quid-Pro-Quo Argument

Proponents of free airtime proposals largely recognize the precariousness of continued reliance on a scarcity rationale and the *Red Lion* doctrine, as well as the difficulty of making the practical case at a heightened level of scrutiny. Their argument therefore shifts in an attempt to avoid those difficulties. The new approach—actually a reversion to emphasizing an old concept—is even more distressing as it perpetuates the outdated and pernicious view of broadcasting as a regulated, quasi-public utility and not as an important segment of the free press and one of the great engines of our freedom and liberty.⁴⁹

The current argument thus focuses on the central premise of the 1927 Radio Act, namely government ownership of the electromagnetic spectrum, or “ether” as it was then inaccurately called. Advocates of free airtime note that broadcasters are given a license for free and exclusive use of a portion of the publicly owned spectrum and are legally protected from interference in its use. That grant is a tremendously valuable resource for which broadcasters are not charged. Instead, they hold the license in trust to serve the public interest. So, the argument goes, broadcasters can and should be required to pay a quid pro quo back to the public in the form of in-kind public interest obligations, now including the “modest” proposals for free airtime for political candidates.

This quid-pro-quo analysis, that even predates the 1927 Radio Act,⁵⁰ is being reinvigorated by the ongoing transition from analog to digital television broadcasting. To achieve this transition, as originally proposed by the FCC,⁵¹ Congress gave each current television broadcaster an additional six megahertz (MHz) of spectrum to establish a digital channel, conditioned on the future surrender of each station’s analog license.⁵² The government then plans to auction off this returned analog spectrum and use the receipts to reduce the national deficit.⁵³ The eventual recovery of spectrum will leave each current broadcaster with the same slice of the spectrum—six MHz—

it now enjoys. Nonetheless, this approach gave rise to cries of "give-away" and huge corporate welfare—the "Great American Rip-off"⁵⁴—with extravagant claims that the government simply gave away \$70 billion of spectrum to current broadcasters who are a potent lobbying force in Washington.⁵⁵ Politicians such as Senator McCain now demand that broadcasters pay this putative debt to the public by, perhaps among many other obligations, providing free airtime to candidates. This rhetorical appeal makes for resounding political bombast⁵⁶ but does not justify quid-pro-quo public interest regulation.

First consider the notion of government ownership of the spectrum. Electromagnetism, like gravity, is simply one of the four fundamental forces of nature. The very concept of public ownership of the electromagnetic spectrum is meaningless and cannot by itself justify anything. The government cannot own the spectrum any more than it can own gravity (or, for that matter, cyberspace, which the government did have a substantial role in creating). Public ownership here is simply a trope,⁵⁷ a way of stating the predetermined conclusion in favor of government regulation, a conclusion that needs other independent support. No one would assert government ownership of gravity as a justification for regulation—say, to support a federal excise tax on automobiles for the privilege of keeping a car "on" the road. Such an excise tax regulation might be justified in other ways, but the mere invocation of public ownership of the airwaves—with the corollary notion of broadcasters as public trustees of the frequencies they are allowed to use—adds nothing to the debate, which must proceed on other bases.

Newspapers, as well as cable operators, use public rights-of-way—the streets and sidewalks—to distribute their messages. Newspapers also use the spectrum through satellite transmissions to gather the news and sometimes to convey page layouts to distant printing plants. News trucks burden the streets, news racks and kiosks burden the sidewalks, and newsprint and newspapers litter the environment. Yet none of this justifies regulating the content of newspapers, even though in some sense such regulation might "improve" the papers and render a public service. Why should broadcasters, or other electronic media, be subject to content regulation any more than newspapers? The quid-pro-quo argument adds nothing to the misplaced assertion of government ownership.

Until recently, successful licensees did not pay anything for the frequency license *per se*.⁵⁸ But the original licensees from the early days of radio and television did not necessarily get anything then of great present value. Rather, what they received was exclusive use of a previously idle and only potentially valuable resource that needed their investment, imagination, and entrepreneurship to develop into a productive asset. Those broadcasting pioneers, allowed to air advertising to support themselves, took all the risks of substantial, long-term investment in developing facilities, programming, and audiences, and then provided a free, universal public good to anyone who purchased a receiver. Some garnered the rewards of their efforts. But not all did; any number of initial licensees faltered in favor of more skilled successors.⁵⁹

Those who did succeed satisfied the public interest as best measured by the marketplace, not by a Washington bureaucracy. Along the way they returned huge benefits to the public. They developed an extraordinarily important and vibrant communications industry that enriched both the culture and the economy of the country, helping to define the American identity and the American community during the 20th century.⁶⁰ They created jobs and paid taxes on the wealth they created from this previously wholly nonproductive resource. Over the years many broadcasters sold their licenses through FCC-approved transfers, and their successors presumably paid fair market value for the licenses they acquired. Indeed, not surprisingly, the vast majority of current broadcast licensees are market transferees from original licensees,⁶¹ so this quid-pro-quo argument does not apply to them, any more than it can apply today to the successful bidder for a new license.

The transition to digital television adds nothing to the analytically unsound quid-pro-quo argument for public interest regulation or obligations. Congress decided to give existing analog broadcasters the first and exclusive opportunity to develop digital television to substitute for their analog spectrum. On the one hand, Congress perhaps should have auctioned off the new digital licenses whose recipients, having conspicuously paid up front through competitive bids, might not be subject to the demand for providing any public interest obligations such as free airtime. On the other hand, it could be argued that Congress may have known exactly what it was doing in adopting an approach that it thought would best “preserve and

promote the competitiveness of over-the-air broadcast stations."⁶² Conversion to digital is a very expensive proposition for broadcasters, and there is no guarantee they will be able adequately to recover this expense in the new, highly competitive television marketplace. There may be no more dynamic or harder-to-predict market than that involving telecommunications and electronic media. Not surprisingly, the transition to digital is not going well, prompting FCC efforts to aid the process.⁶³

Some members of Congress also have been concerned about the long-term economic viability of free, over-the-air television in an increasingly competitive video marketplace in which 85 percent of television households now receive their signals from a multichannel video program distributor other than over-the-air broadcasting, and broadcasting's market share of the television audience is declining precipitously.⁶⁴ Indeed, concern for preserving free, over-the-air television was a crucial component of the congressional rationale for the cable must-carry rules. The Supreme Court heavily relied on this rationale to barely sustain the constitutionality of those rules.⁶⁵ Thus, it could be argued that broadcasters, both currently in analog format and soon in digital format, already provide the American public with a substantial "quid" in return for their licenses in the form of their contributions to the economic marketplace and the marketplace of ideas. Broadcasters created a remarkably successful system of free, universal over-the-air television service with programming highly valued by large segments of the public. In many countries this service is not free, and Congress, wishing to preserve our long-standing and highly successful system, may have "given" broadcasters additional spectrum to induce them to undertake the expensive digital conversion without further jeopardizing their ability to compete and survive in the new, fiercely competitive media marketplace. The "payback" to the public already exists in the form of free, universally available channels that exist because they serve the public interest as best and most appropriately measured in the media marketplace.⁶⁶

Still, critics persist in arguing that current broadcasters have been given free of charge a hugely valuable public asset and now should be made to pay for it in kind with public interest obligations such as free airtime for political candidates. This is because those critics claim that, even though broadcasters have amply paid and repaid

for their licenses in the secondary market, broadcasters still haven't paid full value for them. That is, the licenses they acquired came at a discounted price because they were impressed with well-known public interest obligations.⁶⁷ That discount now is to be paid back in kind in the form of free airtime, in addition to other, existing public interest obligations.

The ambiguity of this argument reveals its first flaw. What is the amount of the discount and how does it compare with the value of public interest obligations? The panoply of regulations of broadcasting has waxed and waned over the years. At any time, how could a prospective broadcaster know what additional obligations might be imposed in the future to rationally calculate an appropriate "discounted" price to acquire a license? A vague obligation to offer some programming generally appropriate for children, for example, is very different from a later-imposed guideline quantifying a minimum number of hours per week of specifically defined children's programming.⁶⁸ Today's broadcasters already operate under reasonably narrow and well-defined requirements about selling ad time to candidates for political office and offering equal opportunities for reply time.⁶⁹ Now they are told they should bear additional, substantial obligations regarding political campaigns.

In the future what further, amorphous requirements will be imposed in the name of even more payback for the alleged license discount? The payback for the discounted license is neither specified by contract nor determined in a free market. No rational buyer would agree to an open-ended contract under which a seller has the exclusive right to determine at any future time how much more a good will cost. In fact, the language of contract and markets is not apt here. The "seller," Congress, determines the value of the payback whenever it wishes at its collective whim. Thus the language of payback is really just a pretext for Congress's imposing of costly obligations on broadcasters.

Unconstitutional Conditions

The in-kind quid-pro-quo argument runs into an even more substantial constitutional objection: Congress may not impose unconstitutional conditions on the exercise of freedom of expression. The doctrine of unconstitutional conditions is admittedly a somewhat uncertain realm.⁷⁰ But as Dean Kathleen Sullivan of Stanford University Law School has summarized the doctrine, "[G]overnment may

not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."⁷¹ In application this almost surely means a newspaper could not be offered a tax credit based on a promise not to run any editorial critical of the president, or based on an agreement to run a certain amount of free political ads. It suggests that a magazine's favorable postal rates could not be conditioned on matters affecting content. The federal government may appropriate funds from general tax revenues and provide money to candidates to purchase political ads in accord with the editorial discretion of the media. This does not mean, however, that the government may achieve results with similar economic consequences through other means that displace, or even appear to displace, the press's free exercise of editorial discretion.

While the government may license broadcasters, that does not mean it can impose any conditions it wishes upon them in the name of the public interest. Land may be conveyed subject to a public easement, but a basic First Amendment freedom, the ability to exercise editorial discretion, cannot be granted subject to governmentally imposed conditions.⁷² As one court recently phrased it, "Congress cannot make the receipt of a valuable government license contingent upon the recipient's surrender of its First Amendment Rights."⁷³ In short, the government may not put a price on broadcasters' free exercise of editorial discretion. Thus the notion of quid pro quo—a conditional grant of a broadcast license—adds nothing to the argument for free airtime, which has to find independent justification elsewhere if at all.

The important principle at stake here can be illustrated by any number of examples, but consider the notable silence of two Supreme Court cases decided just last year. *Thompson v. Western States Medical Center*⁷⁴ involved a statutory exemption from the Food and Drug Administration's standard drug approval requirements for compounded drugs, that is, drugs that a pharmacist or doctor creates from combinations or mixes of ingredients to tailor a medication for an individual patient. The exemption, however, was conditioned upon a number of restrictions, including one that raised First Amendment concerns, namely that the providers of such drugs refrain from advertising or promoting particular compounded drugs. The exemption from the drug approval process conferred a

substantial benefit on the pharmacies that challenged the restriction. Yet the Court held that the ban on advertising and promotion was an unconstitutional restriction. There was no argument in the case that the speech ban, like the other non-speech-related statutory restrictions, was valid simply because it was a condition the government imposed in the context of granting a substantial benefit and, indeed, a condition arguably directly related to the benefit.⁷⁵ Rather, the government had to carry the burden of independently justifying the restriction, which it could not do even under the relaxed First Amendment protection that applies to commercial speech.

*Republican Party of Minnesota v. White*⁷⁶ dealt directly with campaign speech. The Minnesota Supreme Court's Code of Judicial Conduct prohibited any candidate for election to the state judiciary from "announc[ing] his or her views on disputed legal or political issues."⁷⁷ The code placed many restrictions on the privilege of seeking or holding judicial office. But again, the state was not allowed to impose the ban on speech contained in the "announce clause" simply as a condition of this privilege. Rather, applying strict scrutiny, the court required the state to show that the announce clause, even interpreted narrowly, was specifically tailored to serve the state's asserted compelling interests in preserving the impartiality, and appearance of impartiality, of the state judiciary. The state failed that test, and the announce clause was held to violate the First Amendment.

Specifically in the context of broadcasting, in *FCC v. League of Women Voters*⁷⁸ the Court in 1984 struck down a provision requiring public broadcast stations that receive federal funds from the Corporation for Public Broadcasting not to "engage in editorializing." Even applying only intermediate scrutiny, the majority found the statute incompatible with the First Amendment, rejecting the dissent's view that Congress could impose such a condition on the knowing receipt of public money.⁷⁹

Thus the mere presence of a government subsidy does not entail the government's right to control the speech supported by governmental funds. In *Rust v. Sullivan*⁸⁰ the Court upheld a program under which projects receiving federal family planning funds were forbidden to discuss abortion with patients. The Court rejected the argument that this restriction on speech was an impermissible condition—viewpoint discrimination—attached to a federal subsidy. But,

as the Court has explained in *Legal Services Corp. v. Velazquez*,⁸¹ the result in *Rust* depended on the fact that, pursuant to a federally funded program, the government was simply controlling its own speech, its own message, and its own program. In contrast, when a governmentally subsidized program seeks to facilitate private speech, not to promote a governmental message, the government cannot impose similar conditions on that speech. The Court made precisely this distinction in *Velazquez* in finding unconstitutional restrictions imposed on lawyers receiving federal funds from the Legal Services Corporation, restrictions that prevented lawyers representing indigent clients from challenging in court the validity of existing welfare law. Indeed, the Court in *Velazquez* relied in part on two public broadcasting cases in explaining that the traditional private nature of the speech or medium in question—the lawyer speaking on behalf of his or her private client and the broadcaster exercising its own editorial discretion—precludes the government from influencing that speech or medium.⁸²

Whether a federally mandated program for free airtime for candidates is viewed as a condition imposed on the general “subsidy” to broadcasters from the grant of a broadcast license itself, or as a specific limitation on the terms of the license granted, neither can support the intrusion on private broadcasters’ editorial discretion. As the Court put it in *Velazquez*, “Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.”⁸³

Many people rely on the “Carter-Mondale” case, *CBS v. FCC*,⁸⁴ as precedent to support free airtime mandates, but that decision does not alter the preceding analysis. That 1981 case, upholding a statutory requirement in 47 U.S.C. § 312(a)(7) that broadcasters sell some time to qualified candidates for federal office, belongs to the outmoded *Red Lion* era before the technological explosion of new electronic media. The Court dealt with the First Amendment argument in only a few paragraphs at the end of its opinion by simply invoking *Red Lion*. The Court surely stressed the importance of “enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process.”⁸⁵ Even so, the Court stressed that § 312(a)(7) merely “creates a *limited* right to ‘reasonable’ access” for which the broadcaster may charge and which is subject to considerable broadcaster discretion.⁸⁶ But in

the digital age of a plethora of communications media, the heavy burden would rest with proponents of free airtime to demonstrate, and not merely assert, that their proposals to commandeer broadcast time free of charge, on top of the equal opportunities provisions of § 315 and the affirmative access rights in § 312(a)(7), are both necessary for, and the least speech-restrictive way of achieving, this objective. At the same time, since there is no longer a meaningful constitutional distinction among the different forms of news media, this argument will somehow have to avoid the logical conclusion, which the Court surely would not accept, that *all* media of mass communication could be similarly commandeered. That would be, to say the least, a daunting task.

The Taxation Argument

Proponents of free airtime might hope to avoid constitutional difficulties by categorizing their proposals as merely a tax on broadcasters, for there is nothing in the First Amendment that immunizes the media from generally applicable business and economic regulation, including taxation.⁸⁷ The mandate for broadcasters to devote a minimum amount of time to specific campaign-oriented programming could not be so characterized, but perhaps the contribution of in-kind vouchers, or certainly the “spectrum usage fee,” might be portrayed as merely an unobjectionable tax. Yet, such a tax on a segment of the press could not escape strict scrutiny.

Cable operators pay a franchise fee to their municipalities for the burden they place on public rights-of-way by installing, maintaining, and using their systems. Similarly, a spectrum management fee imposed on all broadcasters and tied to supporting a necessary, minimal governmental role in spectrum allocation and management might be constitutionally uncontroversial. The Court has even upheld the extension of a generally applicable sales tax to one segment of the mass media (cable).⁸⁸ But a free airtime tax does not fit under any of these categories; rather, it is a special tax applicable to broadcasters and broadcasters alone. It lacks the political constraint on taxation available when a tax applies to a broad constituency.⁸⁹ If such a tax could be imposed, it would provide all too handy a lever, through potential rate adjustments, for indirect government coercion of all sorts of broadcast programming from campaign coverage to children’s television to indecency control.⁹⁰ The threat posed

to First Amendment interests by such a tax would require that it survive strict scrutiny.⁹¹

The free airtime tax is even worse, however, for it is not just a tax but a targeted tax coupled with a subsidy for a very particular class of speakers and for a very particular content of speech. If the government imposed a true and appropriate spectrum management fee on all broadcasters, placed the proceeds in general government revenues, and then decided to subsidize political campaigns with grants of money from all tax revenues, there might not be a constitutional problem. Although government subsidies for speech are not free of First Amendment concerns, there is considerably more flexibility for government action here than with direct regulation of speech.⁹² But a subsidy supported simply by a highly specialized and localized tax is not a subsidy;⁹³ it is speech compulsion that violates the First Amendment. As the Court recently articulated this principle, "We have not upheld compelled subsidies for speech in the context of a program where the principle object is speech itself."⁹⁴

If public financing of political campaigns, in whole or in part, is a good idea, the burden of achieving that public benefit should be spread among the public at large and not disproportionately imposed on radio and television broadcasters.⁹⁵ Politicians might like to posture that they are extracting a payback for the public from recalcitrant and ungrateful broadcasters. Willingness to pay, however, when the means to pay are available offers a good measure of perceived worth; the "public interest" should not have to depend on a seemingly costless appropriation from commercial broadcasters.⁹⁶ Taxpayers at large are the intended beneficiaries of subsidies for political ads, and taxpayers can insist on appropriate governmental accountability for such use of their tax dollars. The government should not seek to deflect responsibility for such ads by making it appear that funding is coming from commercial broadcasters at no cost to the public.

The Fifth Amendment

Broadcasters certainly own the tangible assets of their stations. Since the 1927 Radio Act, however, the cardinal principle of government regulation of broadcasting has been that broadcasters may use the portion of the spectrum in which they are granted licenses "for limited periods of time," but they have no ownership rights in the

spectrum itself. Rather, ownership and control of the spectrum, to the extent these concepts make sense, are reserved to the government.⁹⁷ Since broadcasters lack an explicit ownership interest,⁹⁸ some observers believe a regulation such as free airtime for candidates could not constitute a taking of broadcasters' property requiring just compensation under the Fifth Amendment.

But the matter is not so simple. The Fifth Amendment's Takings Clause states that "nor shall private property be taken for public use without just compensation." The Supreme Court has interpreted this provision to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁹⁹ Free airtime proposals, however, do precisely that: they transfer the burden of supporting political campaigns from backers and supporters of candidates who in "all fairness and justice" should provide their support. These proposals then place the burden not on the public at large (the next best "fair and just" source of support) but rather on commercial broadcasters, a small and select subset of the public who have no particular reason to financially support politicians and who should be left free to cover political campaigns according to their own, independent editorial discretion. Free airtime proposals thus violate at least the spirit, if not also the letter, of the Fifth Amendment.

Broadcasters' bundle of rights in their licenses has been increasing substantially in recent years. The privileges of a current licensee go well beyond those of earlier generations. Initial licenses for exclusive use of specified frequencies by analog commercial broadcasters now are granted by auction with a strong expectation of renewal.¹⁰⁰ Indeed, the statutory "limited" time of a license is becoming practically indefinite,¹⁰¹ and the license now is essentially freely transferable.¹⁰² The substantial deregulation of broadcasting in the last few decades¹⁰³ has further increased the property rights broadcasters now enjoy in their licenses. And the easing of structural ownership regulations the FCC is currently considering¹⁰⁴ most likely will accelerate this trend in which broadcasters, formally mere licensees, on a practical, functional basis, effectively own rights in the spectrum. Thus the substantial bundle of rights modern broadcasters now enjoy in their licenses easily comprises "property" for purposes of Fifth Amendment analysis of regulatory takings.¹⁰⁵

The test the Court applies to determine whether just compensation is required for such regulatory takings of property, however, is

far from straightforward. The classic, if Delphic, pronouncement is Justice Holmes's "general rule" that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."¹⁰⁶ Thus the Court has acknowledged that, with few exceptions, regulatory takings analysis requires "essentially ad hoc, factual inquiries" and cannot proceed according to any "set formula."¹⁰⁷ In this analysis, any claims about the weighty public benefits of a free airtime program would encounter difficulties similar to those involved in establishing the sufficiency of the state interest under First Amendment analysis.

One key factor in evaluating a regulatory taking is to ask whether the government regulation of property interests "frustrate[s] distinct investment-backed expectations."¹⁰⁸ That is exactly what free airtime for candidates would do. By mandating free airtime for candidates the government would be commandeering access to an audience to induce viewers to watch what the state thinks they ought to watch. This audience is what, in fact, the government program would be targeting. But an audience has to be *earned* by someone having something to say that other people *want* to hear and watch. Over the years broadcasters have been rather successful in creating and developing their audiences by satisfying the public interest in programming as best measured in the marketplace. Broadcasters then sell their audiences to advertisers—political candidates and others—to sustain their business. Government usurpation of such transactions, especially to the proposed tune of \$750 million every two years, would not only interfere with but also destroy reasonable investment-backed expectations.¹⁰⁹ Since broadcasters through their programming have created their audiences, it is singularly inappropriate and illegitimate, on both First and Fifth Amendment grounds, for government to appropriate and redirect those audiences in the name of the public interest.

As Justice Holmes admonished long ago, "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."¹¹⁰ Any merit of a public subsidy for political advertisements on television should be measured by the public's willingness to visibly and directly fund that subsidy. Such subsidy may not be achieved through an unconstitutional, forced transfer of wealth, disguised as regulation, imposed on broadcasters.

Conclusion

As Justice Stewart once noted, “There is never a paucity of arguments in favor of limiting the freedom of the press.”¹¹¹ Some people find compelling the “public interest” arguments advanced for requiring broadcasters to follow a government-ordained scheme of airing political campaign ads and bearing the financial cost of doing so. As the Supreme Court has noted, however, “[T]he ‘public interest’ standard necessarily invites reference to First Amendment principles.”¹¹² And that involves not only the interests of broadcasters as speakers but also the public’s preeminent interest in a free and unfettered press, not one managed by a government agency even for ostensibly good purposes.

A free press does not buy its freedom through content-based paybacks mandated by the government. The payback is serving the needs and interests of listeners and viewers by earning success in the marketplace. That, in turn, depends crucially on the media maintaining both actual and perceived independence from the government and the credibility that can come only from such independence.¹¹³ Journalists routinely go to great lengths, and often endure personal sacrifice and opprobrium, to protect their independence and legitimacy.¹¹⁴ And the American public’s reliance on the media is never more important than in times of uncertainty and crisis such as the present.¹¹⁵ Especially in such circumstances, it would be exceedingly foolish to compound the considerable practical and constitutional problems with free airtime proposals by casting broadcasters into a forced deal with the government on an issue as sensitive as the campaigns of political candidates. That would unwisely and inappropriately compromise the broadcasters’ traditional role as “watchdogs” over the government. All told, the price of free airtime for political candidates would be far too great.

Notes

1. The first “shoe,” the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (March 27, 2002) (BCRA), a comprehensive modification of federal election campaign law, was subject to constitutional challenge in the United States District Court for the District of Columbia, in *McConnell v. FEC*, 2003 WL 2010983 (May 1, 2003), and is now heading for expedited Supreme Court review pursuant to § 403(a) of that act. Original versions of the BCRA included a provision for free airtime for candidates, but that provision was removed to allow passage of the legislation. See an interview with Sen. John McCain (R-Ariz.), July 6, 2002, available at www.cnn.com/transcripts/0207/06/rs.00.html.

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2. See "McCain Calls for Free TV Time from Broadcasters," Press release, June 19, 2002, available at http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.Viewpressrelease&Content_id=531.

3. For an informative debate on free airtime for candidates, see Norman Ornstein and Barbara S. Cochran, "Slate Dialogue: Air Time for Candidates," August–November 1997, available at www.slate.msn.com.

4. See "Radio Address of the President to the Nation, June 28, 1997," *Weekly Compilation of Presidential Documents* 33 (July 7, 1997): 991–92. "For years, I have supported giving candidates free time . . . [and today] I'm appointing two distinguished Americans to lead a commission that will help the FCC decide precisely how free broadcast time can be given to candidates, as part of the broadcasters' public interest obligations." See also William J. Clinton, "Remarks to the Conference on Free TV and Political Reform and an Exchange with Reporters," March 11, 1997, *Weekly Compilation of Presidential Documents* 33 (March 17, 1997): 334; and *Broadcasting & Cable*, February 9, 1998, p. 80.

5. See James Bennet, "Clinton Suggests Licensing Deal for Free TV Time in Campaigns," *New York Times*, March 12, 1997, p. A1; and William J. Clinton, "State of the Union Address, January 23, 1996," *Weekly Compilation of Presidential Documents* 32 (January 29, 1996): 90. Clinton asserted that "the era of big Government [was] over."

6. Ken Auletta, "What Will Broadcasters Have to Give Up for Free TV?" *New Yorker*, November 9, 1998, pp. 34, 35 (quoting Gore Commission member Newton Minow).

7. See "Charting the Digital Broadcasting Future, Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters," December 18, 1998, available at www.ntia.doc.gov/pubintadvcom. The final report was the basis for an FCC proceeding, "In re Public Interest Obligations of TV Broadcast Licensees," MM Docket no. 99-360, Notice of Inquiry, 14 FCC Rcd 21633 (1999), as to how broadcasters can best serve the public interest during and after their transition from analog to digital transmission. This report was followed by "Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations," MM Docket no. 00-168, Notice of Proposed Rulemaking, 15 FCC Rcd 19816 (2000) (proposing rules regarding disclosure of broadcasters' activities in the public interest), and "Children's Television Obligations of Digital Television Broadcasters," MM Docket no. 00-167, Notice of Proposed Rulemaking, 15 FCC Rcd 22946 (2000) (clarifying broadcasters' obligations regarding children's programming in a digital television environment). These proceedings languished but now have been revived by the FCC's calling for additional, current comments in the course of its second periodic review of the progress of the conversion to digital broadcasting. "Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television," MB Docket no. 03-15, Notice of Proposed Rulemaking, 107-12 (Jan. 27, 2003).

8. See "McCain Calls for Free TV Time from Broadcasters"; and Paul Taylor, "The Case for Free Air Time," Alliance for Better Campaigns Working Paper, March 2002, available at www.bettercampaigns.org/freeairtime/monograph.pdf.

9. See Bill McConnell, "Maverick McCain Rides Again," *Broadcasting and Cable*, November 11, 2002, p. 7.

10. Sen. 3124, § 3, 107th Cong., 2d sess. (2002).

11. *Ibid.* § 4.

12. *Ibid.*

13. Ibid. § 2. See Paul Taylor "Gouging Democracy," Alliance for Better Campaigns Working Paper, 2001, available at www.bettercampaigns.org. This report claims local television stations were systematically gouging candidates in the closing months of the 2000 campaign by exploiting loopholes in the § 315(b) lowest unit rate provision to increase the prices of campaign ads. The Toricelli Amendment, eliminated from BCRA—the campaign finance reform measure enacted in 2002—would have strengthened the lowest unit rate provision. See Paige Albiniak, "Sound and Senate Fury," *Broadcasting and Cable*, March 26, 2001, pp. 6–10. Sec. 305 of the BCRA, however, now conditions a federal candidate's entitlement to the lowest unit rate upon the candidate's not directly referring in his ad to an opposing candidate or, if he makes such a reference, the candidate must personally appear in the ad for at least the last four seconds, and the ad must include a printed statement approving broadcast of the ad. This provision appears to be an indirect way of controlling so-called negative political ads.

14. See generally Alliance for Better Campaigns, available at www.bettercampaigns.org. In recent years, some major broadcasters have of their own volition been devising some innovative approaches, which are sometimes at odds with candidates themselves, who would prefer a little less exposure to the electorate. See Laurie Mifflin, "ABC Joins Others Offering TV Time," *New York Times*, May 9, 1996, p. A1.

15. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

16. See generally Annenberg Public Policy Center, "Free Television for Presidential Candidates: The 1996 Experiment," Working Paper, March 1997 (describing very mixed results from the voluntary donation by five major television networks of airtime to Bill Clinton and Bob Dole in the 1996 presidential campaign). The goals of free airtime proposals in terms of lessening and equalizing the costs of political campaigns and raising the level of political discourse, while seemingly laudatory in the abstract, are, in fact, quite problematic even on empirical grounds. See Lillian R. BeVier, *Is Free TV for Federal Candidates Constitutional?* (Washington, DC: American Enterprise Institute, 1998); and Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform* (Princeton, NJ: Princeton University Press, 2001).

17. But see Thomas E. Patterson, *The Vanishing Voter: Public Involvement in an Age of Uncertainty* (New York: Knopf, 2002), p.15 (reporting that while in 1960 about 60 percent of the nation's television households watched the fall presidential debates, that percentage fell to less than 30 percent in 2000).

18. See Adam Nagourney, "TV's Tight Grip on Campaigns Is Weakening," *New York Times*, September 5, 2002, p. A1. And broadcasters are hardly the only, or even still the most important, sources for campaign coverage. See, for example, Joe Schlosser, "CNN's Kind of Story," *Broadcasting and Cable*, March 13, 2000, p. 54, describing how the cable channel CNN is pulling out all the stops in coverage of presidential campaigns.

19. See Bill Carter, "Skipping Ads? TV Gets Ready to Fight Back," *New York Times*, January 10, 2003, p. C1, which describes the rise of personal digital video recorders that make it easy for viewers to skip commercials.

20. See Matthew Hindman, "How the Web Will Change Campaigns," *New York Times*, December 12, 2002, p. A23; and Jeffrey Selinger, "Campaigning Door to Door, and PC to PC," *New York Times*, October 24, 2002, p. E1. See also Tina Kelley, "Candidate on the Stump Is Surely on the Web," *New York Times*, October 19, 1999, p. A1; and Rebecca Fairley Raney, "Politicians Woo Voters on the Web," *New York Times*, July 30, 1998, p. D1. See generally the Democracy Network (DNet) available

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at www.dnet.org created by the Center for Governmental Studies and the League of Women Voters Education Fund. DNet is an interactive and unfiltered website "designed to improve the quality and quantity of voter information and create a more educated and involved electorate. . . . DNet encourages candidates to address a wider range of issues, and to address those in greater depth, than they might in other media. Our goal is to increase voter understanding of important public policy problems, allow candidates to debate their positions in an electronic townhall before online audiences, reduce the pressure on candidates to raise campaign funds, foster greater civic participation and interaction between voters and candidates, and create new online political communities." DNet's website even quotes Senator McCain: "On DNet, I was able to continually update my positions on multiple issues enabling voters to read my statements for themselves. I congratulate the LWV for using the Internet to reengage the public in the political process."

21. That is, people may make use of the "short, though regular, journey from mail box to trash can" the Court has endorsed as self-help for individuals who want to control their interaction with messages thrust upon them. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983).

22. See then-Justice Rehnquist's objection in *Buckley v. Valeo*, 424 U.S. 1, 293 (1976) (Rehnquist, J., concurring in part and dissenting in part), that the campaign finance law at issue there "enshrined the Republican and Democratic Parties in a permanent preferred position."

23. See *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998) (upholding right of public television station to exclude a "fringe" candidate—an abortion opponent—from a televised debate); and *Becker v. FCC*, 95 F.3d 75 (D.C. Cir. 1996) (holding that a television broadcaster could not relegate to late-night hours a federal candidate's campaign ads including images of aborted fetuses).

24. *Miami Herald Publishing Co.* at 241 (unanimously holding unconstitutional state "right of reply" statute giving political candidates space to respond to criticism or attacks on their records in a newspaper); see also *FCC v. League of Women Voters*, 468 U.S. 364, 376 (1984) (striking down a statutory ban on editorializing by public television stations that receive federal financial support).

25. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995) (holding that a privately organized parade may not be required to include a group conveying a message the organization does not wish to convey). Some people wish that the law was different including, for example, Cass Sunstein, a member of the Gore Commission who is well known for advocating a "New Deal" for speech and considerably greater government regulation of all media—including "more intrusive strategies" for regulating broadcasting—in the name of promoting his notion of Madisonian deliberative democracy and political equality. See Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1993), p. 82; Cass R. Sunstein, "A New Deal for Speech," *Hastings Communications and Entertainment Law Journal* 17 (1994): 137; Cass R. Sunstein, "Free Speech Now," *University of Chicago Law Review* 59 (1992): 255; and Cass R. Sunstein, "The First Amendment in Cyberspace," *Yale Law Journal* 104 (1995): 1757. For some, among many, contrary views, see Burt Neuborne, "Blues for the Left Hand: A Critique of Cass Sunstein's Democracy and the Problem of Free Speech," *University of Chicago Law Review* 62 (1995): 433 ("I find Professor Sunstein's thesis unworkable, unnecessary, and dangerous."); Robert Corn-Revere, "New Technology and the First Amendment: Breaking the Cycle of Repression," *Hastings Communications and Entertainment Law Journal* 17 (1994): 247;

J. M. Balkin, "Populism and Progressivism as Constitutional Categories," *Yale Law Journal* 104 (1995): 1955 ("Sunstein's 'Madisonian' theory of the First Amendment is about as Madisonian as Madison, Wisconsin."); John O. McGinnis, "The Once and Future Property-Based Vision of the First Amendment," *University of Chicago Law Review* 63 (1996): 49; and Glen O. Robinson, "The Electronic First Amendment: An Essay for the New Age," *Duke Law Journal* 47 (1998): 899. See generally "The Law and Economics of Property Rights to Radio Spectrum," *Journal of Law and Economics* 41, pt. 2 (1998). As Professor Sunstein acknowledges, his approach would place "severe strain" on "some of the core commitments of current First Amendment law." Sunstein, *Democracy and the Problem of Free Speech*, pp. xix, xi, xviii, and 50.

26. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). The Court's opinion in *Red Lion* was joined by only seven justices. Justice Douglas did not participate and one seat on the Court was vacant. Later, Justice Douglas noted his disagreement with *Red Lion*, *CBS v. DNC*, 412 U.S. 94, 154 (1973) (Douglas, J., concurring in judgment), and Justice Stewart expressed his "considerable doubt" about the opinion he had joined. *Red Lion* at 138 (Stewart, J., concurring).

27. See BeVier, *Is Free TV for Federal Candidates Constitutional?* pp. 38–39 ("[I]t is hard to imagine regulations that would be less content-neutral.').

28. See Sunstein, "The First Amendment in Cyberspace," p. 1803 (Government mandates for preferential access for public-affairs programming "[b]y hypothesis" would be content-based regulation.). The current McCain proposals appear to avoid the additional vice of some other suggestions that would attempt to mandate the format of the political ads—requiring, for example, that the candidate appear on screen in the hope that this would eliminate or lessen so-called negative advertising. See § 305 of the BCRA described at p. 166 n. 13 of this chapter.

29. See *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (emphasizing several times the need for strict scrutiny of content-based media regulation).

30. *Red Lion Broadcasting Co.* See also *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637–38, 640 (1994).

31. The classic critique goes back to Nobel laureate Ronald Coase's seminal papers, Ronald H. Coase, "The Federal Communications Commission," *Journal of Law and Economics* 2 (1959): 1; and Ronald H. Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3 (1960): 1. Unfortunately, in his 1959 testimony before Congress, well before his Nobel honor, Coase was asked if he was joking in suggesting Congress sell off the airwaves and get out of the business of regulating broadcasting. See Ronald Coase, "Comment on Thomas W. Hazlett, Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?" *Journal of Legal Studies* 41 (1998): 577, 579. See also Dean Lueck, "The Rule of First Possession and the Design of the Law," *Journal of Law and Economics* 38 (1995): 419 ("The broadcast spectrum holds a special, almost holy, place in the economic analysis of law and the economics of property rights.').; and Ronald H. Coase, "Law and Economics at Chicago," *Journal of Law and Economics* 36 (1993): 248–50 (noting that the issue of property rights in the electromagnetic spectrum was central to the development of law and economics analysis at the University of Chicago).

32. See, for example, *Turner Broadcasting System, Inc.* at 637–39; *FCC v. League of Women Voters* 468 at 376 n.11; *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998); *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing *en banc*, with whom Edwards, C. J., and

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Silberman, Ginsburg, and Sentelle, J. J., concur); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (1995) (Edwards, C. J., dissenting at 684; Wald, J., dissenting), *cert. denied sub nom. Pacifica Foundation v. FCC*, 516 U.S. 1043 (1996); *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1442–43 (8th Cir. 1993) (Arnold, C. J., concurring in the judgment); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 683 (D.C. Cir. 1989) (Starr, J., concurring), *cert. denied*, 493 U.S. 1019 (1990); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 506–9 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987). Cf. *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002) (stating that the lower federal court “is not in a position to reject the scarcity rationale even if we agree that it no longer makes sense”); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 164 (D.C. Cir. 2002) (“[T]he scarcity rationale adopted by the Supreme Court . . . is . . . binding on this court.”); *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (applying a form of scarcity rationale to the limited number of orbital satellite positions available for direct broadcast satellites), rehearing denied, 105 F.3d 723 (D.C. Cir. 1997). Two members of the FCC have noted the commission’s obligation to review the empirical basis of the spectrum scarcity rationale as the underlying premise of much of the FCC’s regulatory scheme. See Federal Communications Commission, “1998 Biennial Regulatory Review: Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,” MM Docket no. 98-35, Notice of Inquiry, Separate Statements of Commissioners Harold Furchtgott-Roth and Michael Powell, 13 FCC Rcd 11276, 11301 (1998). See also Michael K. Powell, “Willful Denial and First Amendment Jurisprudence,” Speech delivered to the Media Institute, April 22, 1998, available at www.fcc.gov/Speeches/Powell/spmkip808.html (“[T]he time has come to reexamine First Amendment jurisprudence as it has been applied to broadcast media and bring it into line with the realities of today’s communications marketplace.”). But cf. “In re Repeal or Modification of the Personal Attack and Political Editorial Rules,” FCC 00-360, 17–18 (2000) (disavowing FCC’s earlier position in eliminating the Fairness Doctrine that the scarcity rationale and *Red Lion* no longer support a lower level of First Amendment scrutiny for broadcasting). The FCC’s approach to those rules, however, was promptly rejected in *Radio-Television News Directors Association v. FCC*, 229 F.3d 269 (D.C. Cir. 2000).

33. See *Syracuse Peace Council*, 867 F.2d at 682–84 (Starr, J., concurring).

34. See *Radio-Television News Directors Association v. FCC*, 184 F.3d 872, 883 (D.C. Cir. 1999).

35. See Michael K. Powell, Acceptance Speech for the Media Institute’s Freedom of Speech Award, October 20, 1999, available at www.fcc.gov/Speeches/Powell/spmkip905.html (describing the “scarcity fiction” as a “willful denial of reality in order for government to retain the power to control speech, unimpeded by the First Amendment, [that is] a subversion of the Constitution”).

36. The Supreme Court, for example, has characterized the Telecommunications Act of 1996, as “an unusually important legislative enactment” whose “primary purpose was to reduce regulation and encourage ‘the rapid deployment of new telecommunications technologies.’” *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857 (1997) (quoting the act) (emphasis added). Indeed, in the section of the act on broadcast ownership, Congress instructed the FCC to biennially review all its ownership rules, stating, “The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.” 47 U.S.C. § 161(b).

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37. See, for example, *Radio-Television News Directors Association*, 184 F.3d at 887–88 (holding that the FCC had not yet satisfied its burden of justifying nonrepeal of the personal attack and political editorializing rules).

38. *Time Warner*, 105 F.3d at 724 (Williams, J., dissenting from denial of rehearing *en banc*).

39. *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984) (invalidating a statutory ban on editorializing by public broadcast stations that receive federal funds from the Corporation for Public Broadcasting, an issue conceptually akin to requiring broadcasters to provide free airtime for candidates).

40. *Turner Broadcasting System, Inc.*, at 649–52.

41. *Id.* at 650. See also *Hurley* at 573–74 (“[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message. . . . [O]ne who chooses to speak may also decide ‘what not to say.’”).

42. *Brown v. Hartlage*, 456 U.S. 45, 53 (1982), quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–72 (1971). See also *Buckley* at 48 (“Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.”).

43. *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (state prohibition against paying circulators of initiative petitions violates First Amendment).

44. *Id.* at 420, 426; see also *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347 (1995).

45. *Turner Broadcasting System, Inc.* at 664.

46. *Id.*

47. Even under less than strict scrutiny, the availability of reasonable alternatives is often fatal to speech-restrictive government regulation. See, for example, *44 Liquor-mart, Inc. v. Rhode Island*, 517 U.S. 484, 507–08 (plurality) (1996).

48. Any argument for regulating a segment of the media, such as broadcasting based on its effectiveness as a medium of communication or its presumed power to influence an audience—its importance in political campaigns, for example—would stand the First Amendment on its head. See *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

49. Cf. Elisabeth Rosenthal, “Beijing in a Rear-Guard Battle against a Newly Spirited Press,” *New York Times*, September 15, 2002, p. A1 (describing efforts of China’s Communist Party to maintain control over that country’s increasingly independent press).

50. See Daniel E. Garvey, “Secretary Hoover and the Quest for Broadcast Regulation,” *Journalism History* 3, no. 3 (1976): 67, quoting Herbert Hoover, Speech to the First National Radio Conference, February 27, 1922 (asserting the essence of a public trustee concept for government regulation of the nascent broadcast industry).

51. “In re Advanced Television Systems,” Notice of Proposed Rulemaking, 6 FCC Rcd. 7024 6 (1991).

52. Telecommunications Act of 1996, Pub. L. No. 104-104, § 201, 110 Stat. 56 (codified at 47 U.S.C. § 336) (1996). See “Advanced Television Systems and their Impact upon the Existing Television Broadcast Service,” Fifth Report and Order, 12 FCC Rcd. 12809 (1997).

53. Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, Title III, codified at 47 U.S.C. § 309(j)(14).

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54. See "McCain Calls for Free TV Time from Broadcasters."

55. In fact, current estimates based on recent spectrum auctions are far lower. See McConnell, "Maverick McCain Rides Again," pp. 7, 8 (citing a Bear Stearns estimate that the entire digital allocation is worth only about \$500 million, less than the total cost of broadcast stations converting to digital). Cf. Simon Romero, "Next Wave Victory May Not Prove Too Lucrative," *New York Times*, January 28, 2003, p. C2 (describing the considerable drop in prices for spectrum for personal communications services).

56. See "McCain Calls for Free TV Time from Broadcasters" (referring to a "spectrum heist").

57. See Glen O. Robinson, "Spectrum Property Law 101," *Journal of Law and Economics* 41 (1998): 620.

58. Congress now has moved to an auction system for awarding initial broadcast licenses. See 47 U.S.C. § 309(i), (j), (l).

59. See generally Stanley S. Hubbard, "The Effect of Privatization on Free Television," in *Regulators' Revenge: The Future of Telecommunications Deregulation*, ed. Tom W. Bell and Solveig Singleton (Washington: Cato Institute, 1998) (describing the difficulty the author's family had in the 1940s in raising investment capital to build a pioneering television station at a time when many doubted television had a future or that a free television broadcast license had any value).

60. "From fireside chats to the Kennedy assassination to Vietnam to the first man on the moon to the avuncular news anchor trusted to report the truth—and, as well, on the entertainment side, from the classics of the golden age of television to the 'big' game to the latest hot sit-com—free, universal television has played a central role in each of our lives." Laurence H. Winer, "Deficiencies of the 'Aspen Matrix,'" *Issues in Broadcasting and the Public Interest*, Paper no. 3 (Washington: Media Institute, April 1998), p. 7.

61. See Evan Kwerel and Alex D. Felker, "Using Auctions to Select FCC Licensees," FCC Office of Plans and Policy Working Paper no. 16, May 1985.

62. H.R. Rep. no. 204, 104th Cong., 2d sess. 48 (1995) (House Commerce Committee report on the 1996 Telecommunications Act).

63. See "Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television," Second Report and Order and Second Memorandum Opinion and Order, MM Docket no. 00-39, FCC 02-230 (August 9, 2002); and "Digital Broadcast Copy Protection," Notice of Proposed Rulemaking, MB Docket No. 02-230, FCC 02-231 (August 9, 2002). See generally Eric A. Taub, "The Big Picture on Digital TV: It's Still Fuzzy," *New York Times*, September 12, 2002, p. G1; and Bill McConnell, "FCC Turns DTV Sights on Cable," *Broadcasting and Cable*, August 12, 2002, p. 6.

64. "Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming," Ninth Annual Report, App. B and para. 80, FCC 02-338 (December 31, 2002).

65. See *Turner Broadcasting System, Inc.* at 646–47.

66. When it matters most, in times of emergency and great public need, broadcast journalism has a rich tradition of serving the public interest through extensive and crucial coverage of major events, often at substantial cost to the stations. See, for example, "Washington TV, Stretched and Spent," *Broadcasting and Cable*, October 28, 2002, p. 7 (describing the expense incurred in the extraordinary local broadcast coverage of the Washington area sniper story).

67. See *Time Warner Entertainment Co.*, 105 F.3d at 728 (briefly discussing a supposed subsidy, or discount, in the auction for direct broadcast satellite channels equal to the pecuniary burden imposed by mandated set asides of several such channels for noncommercial, educational, or informational programming).

68. See *Policies and Rules Concerning Children's Television Programming*, 11 FCC Rcd. 10660 (1996) (establishing a "processing guideline" for requirement of a minimum amount of children's programming on each television station).

69. 47 U.S.C. § 312(a)(7) (requirement to provide or sell reasonable access time to federal candidates); and 47 U.S.C. § 315 (equal opportunities provision for political candidates).

70. See Frederick Schauer, "Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency," *Denver University Law Review* 72 (1995): 989.

71. Kathleen M. Sullivan, "Unconstitutional Conditions," *Harvard Law Review* 102 (1989): 1413, 1415.

72. See *Time Warner Entertainment Co.*, 105 F.3d, at 728 (noting the "rather serious First Amendment problems" that would exist if the government controlled all newsprint that it then sold only to licensed newspapers that agreed to satisfy certain government-defined rules of content).

73. *Satellite Broadcasting and Communications Association of America v. FCC*, 146 F. Supp. 2d 803, 830, aff'd, 275 F.3d 337 (4th Cir. 2001).

74. *Thompson v. Western States Medical Center*, 122 S.Ct. 1497 (2002).

75. The government argued that advertising is a fair proxy for large-scale manufacturing, and that therefore conditioning the exemption from the FDA approval process on refraining from advertising was an ideal way to permit the easy availability of compounded drugs for individual patients who need them while also guaranteeing that compounding is not used on such a scale as to undermine the FDA approval process. See *id.* at 1505–06.

76. *Republican Party of Minnesota v. White*, 122 S.Ct. 2528 (2002).

77. *Id.* at 2531.

78. *League of Women Voters* 468 U.S. 364 (1984) (invalidating 47 U.S.C. § 399).

79. *Id.* at 376, 380.

80. *Rust v. Sullivan*, 500 U.S. 173 (1991).

81. *Legal Services Corp. v. Velazquez*, 121 S.Ct. 1043, 1048 (2001).

82. *Velazquez* at 1049 discussing *League of Women Voters and Arkansas Ed. Television Commission v. Forbes*, 523 U.S. 666 (1998). As *League of Women Voters* and *Forbes* involved public broadcasters that receive some direct federal funding, the principle that government subsidy does not entail the right to influence editorial discretion is all the more powerful as applied to commercial broadcasters.

83. *Velazquez* at 1052.

84. *CBS v. FCC*, 453 U.S. 367 (1981) (upholding 47 U.S.C. § 312(a)(7)).

85. *Id.* at 396.

86. *Id.* at 382 n. 8, 396 (emphasis in original). See also *Kennedy for President Commission v. FCC*, 636 F.2d 432, 445, 447 (D.C. Cir. 1980) (confirming that broadcasters have the option to charge for use of their stations under § 312(a)(7)).

87. *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 581 (1983).

88. *Leathers v. Medlock*, 499 U.S. 439 (1991).

89. *Id.* at 445–46.

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90. See *Minneapolis Star and Tribune Co.* at 588; and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987).

91. *Leathers* at 445–47. See also *Minneapolis Star and Tribune Co.* at 582, 585; and *Ragland* at 231.

92. See *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998). *Buckley* at 92–93 recognized that there are some ways in which the government may use public funds to support a system of campaign financing without exceeding Congress' spending power or violating equal protection. But for a trenchant critique of campaign finance reform in general, including the problems with government financing, see Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform* (Princeton, NJ: Princeton University Press, 2001). See also Joel M. Gora, "No Law . . . Abridging," *Harvard Journal of Law and Public Policy* 24 (2001): 841 (favorably reviewing Smith's book).

93. See *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (holding unconstitutional as a violation of the Commerce Clause a combined program of tax and correlated state subsidy whereas the tax itself, or the subsidy funded out of general state revenues alone, might have been permissible).

94. *U.S. v. United Foods, Inc.*, 533 U.S. 405 (2001) (invalidating under the First Amendment a federal assessment on mushroom handlers used primarily to support generic mushroom advertisements).

95. See Thomas G. Krattenmaker and L. A. Powe Jr., "Converging First Amendment Principles for Converging Communications Media," *Yale Law Journal* 104 (1995): 1719, 1732, and n. 65 (If a media marketplace is perceived as "impoverished . . . subsidies may be an effective way of correcting its inadequacies, so long as these are true subsidies rather than extractions from media competitors; . . . [t]o be a subsidy the costs must be spread generally.'").

96. As former FCC commissioner Harold Furchtgott-Roth noted, "'free airtime' is not a good idea; it is 'just bad policy.' It will simply shift costs of campaigning from candidates' willing contributors to the decidedly unwilling broadcast industry and American consumers." "1998 Biennial Regulatory Review," Notice of Inquiry at 21654, Separate Statement of Comm. Harold Furchtgott-Roth concurring in part and dissenting in part.

97. 47 U.S.C. § 301 ("[N]o such license shall be construed to create any right, beyond the terms, conditions, and periods of the license."). See also 47 U.S.C § 304 (licensee waives any claim, against the regulatory power of the United States, to any use of the spectrum based on prior use).

98. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) (dicta that "no person is to have anything in the nature of a property right as a result of the granting of a license"); and *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 331 (1945) (dicta that "[n]o licensee obtains any vested interest in any frequency").

99. *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 123 (1978), quoting *Armstrong v. United States*, 364 U.S. 49 (1960). See also *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

100. 47 U.S.C. § 309 (i), (j), and (k). The FCC now must renew the license of an incumbent broadcaster who is serving the public interest absent "serious violations" of the Communications Act or commission rules or a "pattern of abuse," without regard to other potential licensees.

101. Similarly, the constitutionally mandated limited time for copyrights seems to know no effective bounds. *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (upholding the 1998 Copyright Term Extension Act).

102. 47 U.S.C. § 310(d). The FCC may not consider whether a transfer to someone other than the proposed transferee would better serve the public interest.

103. See "In re Deregulation of Commercial Television," 98 FCC 2d 1076 (1984).

104. "In re 2002 Biennial Regulatory Review," Notice of Proposed Rulemaking, FCC 02-249 (September 23, 2002). See Stephen Labaton, "Dream Nears Reality: Ease Up at the F.C.C.," *New York Times*, February 2, 2003, p. C1. Cf. Stephen Labaton, "Policy Defeat Puts F.C.C. Chief in Awkward Spot," *New York Times*, February 22, 2003, p. C1 (describing "deep personal and philosophical rifts at the F.C.C." that could affect the deregulatory agenda).

105. A "regulatory taking" may arise from government regulation of property that does not constitute formal seizure and transfer of title but controls its use and diminishes its value. The Court has interpreted the Fifth Amendment and regulatory takings to apply to personal property as well as intangible interests such as intellectual property; see *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). The Court has also interpreted the Fifth Amendment and regulatory takings to apply to interest on private bank accounts; see *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), and *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003).

106. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

107. *Penn Central Transportation Co.* at 124; and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

108. *Penn Central Transportation Co.* at 127. See also *Palazzolo* at 616. (One factor in assessing a regulatory takings claim is the "extent to which the regulation interferes with reasonable investment-backed expectations."); Frank Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," *Harvard Law Review* 80 (1967): 1165, 1223 (describing deprivation of "distinctly perceived, sharply crystallized investment-backed expectations" as a basis for requiring just compensation).

109. It is no response to say that broadcasters, as public trustees, know they are subject to public interest obligations such as free airtime and therefore such impositions must be part of their reasonable business expectations. That can't be true of new, additional obligations imposed on current licensees, and, moreover, an owner's reasonable, investment-backed expectations are not defined by pre-acquisition restrictions on the property. *Palazzolo* at 625-30.

110. *Pennsylvania Coal Transportation Co.* at 416; see also *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994).

111. *CBS v. DNC* at 144 (Stewart, J., concurring).

112. *Id.* at 122.

113. "The separation of journalism from government . . . is part of the genius of our constitutional democracy." Rodney A. Smolla, "Free Air Time for Candidates and the First Amendment," *Issues in Broadcasting and the Public Interest*, vol. 2 (Washington: Media Institute, 1998), p. 6.

114. See, for example, Guillermo X. Garcia, "The Vanessa Leggett Saga," *American Journalism Review* (March 2002): 20 (describing the ordeal of six months in jail for an aspiring author who refused to turn over her notes and related materials to law enforcement authorities); Daniel Scardino, "Vanessa Leggett Serves Maximum Jail Time, First Amendment-Based Reporter's Privilege under Siege," *Communications Lawyer* (Winter 2002): 1 (discussing the legal issues in the Leggett matter).

Even the compelling moral duty to bear witness to war crimes committed in the Balkans has not persuaded some war correspondents to testify before the International

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Tribunal for the Former Yugoslavia in The Hague. See Nina Bernstein, "Should War Reporters Testify, Too?" *New York Times*, December 14, 2002, p. B9.

115. See, for example, Ralph Blumenthal and Jim Rutenberg, "Journalists Are Assigned to Accompany U.S. Troops," *New York Times*, February 18, 2003, p. A12 (describing preparations for allowing journalists to cover any military action in the Persian Gulf); Thom Shanker, "Pentagon Says It Will Give Journalists Access to Frontline War Units," *New York Times*, December 28, 2002, p. A10 (same as previous cite); and Walter Isaacson and Eason Jordan, "News from the Frontline," *Wall Street Journal*, January 6, 2003, p. A18 (describing the benefits of, and concerns about, allowing journalists to cover military operations).

9. Reform without Reason? The Scientific Method and Campaign Finance

Jeffrey Milyo and David Primo

Public interest groups and political commentators frequently intone about the nefarious role of money in politics. From entrenched and unresponsive incumbents to declining voter turnout and diminished trust in government, all manner of perceived ills with American democracy are blamed on uncontrolled campaign spending and the funding of campaigns by venal corporate interests. One solution proffered by state-level reformers is to offer public funds to candidates who restrict their campaign expenditures to some predetermined cap (a public financing scheme, for short). But the case for public financing is too often taken to be self-evident; the public debate over campaign reform rarely—if ever—makes use of serious scholarly research on the consequences of public financing. In part, that is due to the dearth of scientific inquiry into the subject. In fact, it is remarkable that public financing has continued to make such inroads in the absence of any systematic evidence that it “improves” democracy.

Even in other areas of campaign finance, however, where research is plentiful, platitudes and bromides trump facts. As political economists, we are not so naïve that we believe that policy analysis determines public policy; politics surely plays a larger role. What is fascinating about the debate over campaign finance is how little a role scientific analysis plays. This is fueled by three forces: First, the mass media, which is vital to the reform movement, deals in specific events and personalities and thrives on conflict; dispassionate analysis does not make headlines. Second, effective analysis of campaign finance requires complicated statistical techniques that are often obscured by anecdotes or all-encompassing generalizations (e.g., “they are all crooked”). Third, it is far easier to push for reform with grandiose

claims than by referencing serious research (especially when the data do not support a particular viewpoint).

Reformers are adept at telling stories about how money influences politics by noting the correlation between money and particular roll-call votes or policy positions. Legislators like Sen. John McCain (R-Ariz.) prefer to speak in vague generalizations about the corrupting influence of money in politics. When asked to name names, they become reticent. During the 1999 debate over one of the many versions of campaign finance reform, Sen. Mitch McConnell (R-Ky.), who was against the legislation, asked,

So I repeat to the Senator from Arizona, the question before us is not reading a list of what he considers to be inappropriate projects. That is not the issue. The issue is, where is the corruption? You cannot have corruption unless somebody is corrupt. There is not corruption without somebody being corrupt. You can't say the gang is corrupt and none of the gangsters are. If the Senator from Arizona believes there is corruption, he has an obligation, under the Senate rules and the Federal bribery statute, to name the people. Who is being corrupt? Who are the people putting all of these items in these bills? What was their impetus for doing it? Who made the contribution, as the Senator from Utah said, and to whom? Where is the corruption?

McCain declined to answer, saying that it is the entire system that is corrupt: "I am trying to change a system that corrupts all of us"¹ McCain's stratagem was brilliant, as there is no way to refute such a statement using the scientific method. If *everybody* is corrupted by the process (and since McCain didn't name names, we can reasonably assume that everybody is equally corrupted), then there is no way to test for the importance of money in determining policy outcomes without changing the law (conveniently for McCain), since otherwise there is no variation and hence causality cannot be assessed. A less charitable interpretation is that because there is no systematic evidence of corruption, the only effective rhetorical device is to claim that corruption is everywhere.

McCain can make such claims with impunity because they are consistent with the conventional wisdom presented in the media and elsewhere: campaign spending drives electoral results and campaign contributions are the functional equivalent of bribes. Therefore,

reforms that reduce the amount of contributions will restore probity to our democracy and increase public trust and participation in government. This is an all-purpose argument that works for most any campaign reform, including public financing.

Decades of scholarly research, however, give pause to reconsider: there is, in actuality, little evidence that campaign spending determines electoral outcomes or that campaign contributions have much influence over policy. Consequently, it is not so obvious that voter turnout and trust should respond to reforms that are likely to produce no noticeable changes in the workings of politics. Nevertheless, most research on the role of money in politics focuses on congressional elections, which are not subsidized with public funds; it may be inappropriate to make inferences about the likely effects of public financing without the benefit of examining evidence from treatment and control groups. In contrast, state elections provide a natural experiment for analyzing public financing.

There have been a handful of studies that compare the experience of states with and without public financing; their findings do not provide much succor for reform advocates. Further, most of these studies focus narrowly on the competitiveness of elections and fail to account for other factors that may influence the aspects of elections under study. Consequently, there is still insufficient evidence to evaluate the efficacy of public financing.

We are embarking on a study in this area and are currently struggling with complex statistical issues. This article, therefore, will not make any definitive claims about the influence of public financing on democracy. The goal of this paper, rather, is to encourage policymakers to consider systematic, scientific evidence in policymaking and to encourage members of the media to present the results from scientific studies alongside anecdotes. We are in a “mature” era of campaign finance regulation at the state level; most states have some limits on contributions. This implies that public financing, present in about a quarter of states, is the next area where reformers will make a big push. Therefore, it becomes even more important that systematic statistical evidence be brought to bear on the topic.

Causation and Correlation

In its simplest form, one could say that the goal of statistical analysis is to determine whether variation in one variable *systematically causes* variation in another variable. To use a metaphor, the

goal is to separate the wheat (systematic variation) from the chaff (random variation). There are a variety of straightforward statistical techniques that can be used to analyze data when the direction of the causality is clear. However, the causal links are often not clear on the issue of campaign finance. This causes many to mistake *correlation* for *causation*. Just because two variables move together (are correlated) does not imply that they are causally linked.

For instance, legislators may be more likely to vote on the side of interest groups that have given them campaign contributions. But without further advanced analysis, one cannot assert that the campaign contributions *cause* legislators to vote on the side of those interest groups. This problem is particularly acute in campaign finance because there are often issues of *recursive* relationships, or relationships where the variables cause each other. In other words, contributions may cause legislators to vote the way an interest group likes, but the interest group's contribution decision may be based on the legislator's positions on certain issues. To parse these connections requires more complicated analysis.

Unfortunately, the mass media and many policy analysts fail on two fronts. First, they argue by anecdote, which by construction does not allow for systematic analysis. Second, when they do present data, analysts and the media often (intentionally or not) confuse causation and correlation. There are several examples of both aspects at play. For instance, a *Wall Street Journal* article on the Crusader military program noted in the fifth paragraph that "[T]wo recipients of United Defense money, Sen. James Inhofe and Rep. J. C. Watts—both Oklahoma Republicans and members of the Senate and House Armed Services Committee—have launched efforts to save the program."² The article did not mention for many more paragraphs that United Defense planned to build a Crusader plant in Oklahoma. What was framed as a quid-pro-quo was in reality an example of representing local interests.

The *New York Times* reported on a Citizen Action of New York report that purported to find a link between economic development aid and campaign contributions. The *Times* demonstrated this by noting the connection between an initial series of economic development grants or loans that were awarded to Corning Glass Co. within a month of the company's contributing to New York Gov. George Pataki's 1998 reelection campaign. While the *Times* explicitly states

that “No one is directly accusing the state of exchanging aid for contributions,” the headline reads, “Companies Gave to Pataki; State Aid Came Their Way,” which suggests a causal relationship.³

In the wake of the 2002 election, the Center for Responsive Politics issued a press release entitled, “Money is the Victor in 2002 Midterm Elections,” which reported an analysis conducted by the center that found that “95 percent of U.S. House races and 76 percent of Senate races were won by the candidate who spent the most money.”⁴ This statistic was subsequently cited in editorials and analyses in the *Boston Herald* and *Washington Post*.⁵ The statistic is used to argue that money drives election outcomes, when this figure, in isolation, tells us absolutely nothing about the influence of money on election outcomes. For example, suppose that the money spent had absolutely no effect on election outcomes but that candidates who were the strongest were the ones likely to attract the most contributions. Then there would still be a positive correlation between contributions and election victories. In fact, as we show later, advanced statistical techniques fail to find consistent effects of money on election outcomes.

This problem is magnified whenever elected officials discuss the issue of “trust” in government. Elsewhere Primo has discussed in detail the lack of a robust link between citizen views on government and campaign finance.⁶ This does not prevent causal claims from being made—that if we just instituted campaign finance reform, then Americans would trust government more. These claims are made with no evidence to back them up. In fact, Senator McCain has admitted as much, saying that no such evidence exists but that he has a “hunch” that reform would improve trust.⁷ One would be hard-pressed to find another issue on which policymakers could push for reform with “hunches.”

This issue makes it all the more important to describe exactly what the literature on campaign finance *does* say about the role of money in American politics. Once this study is done, we can address how the type of research conducted at the national level should be conducted at the state level so as to provide further knowledge about the effect of campaign finance law on policy outcomes.

The Role of Money in American Politics

The academic literature on campaign finance is vast and the findings regarding the importance of money in politics are decidedly

mixed. In addition, the studies on this subject vary greatly in methodological rigor. By focusing on the more recent and sophisticated studies, a clearer picture begins to emerge. Contrary to popular belief, the best evidence suggests that money is not the primary factor determining political outcomes.

Campaign Spending

In general, the candidate who spends the most in a given election will be the winner. This does not imply that money buys elective office, because we expect that candidates who are adept at winning votes will also be adept at raising money. In addition, contributors are more likely to back candidates with a good chance of winning office, possibly because they are trying to buy access to candidates once in office, or because it's more fun to back a winner. Either way, an important lesson is that any attempt to identify the effects of money on a candidate's electoral chances must somehow account for the fact that likely electoral success is itself a determinant of a candidate's finances. Unfortunately, as we noted earlier, public interest group analyses and media reports on the electoral consequences of campaign spending do not go beyond simply describing this unadjusted correlation. Hence the popular belief that campaign spending buys elective office.

Even the simple descriptive statistics, however, reveal a jarring contradiction. As real campaign spending in federal races has increased over the last 30 years, so has the spending advantage of incumbents—but at the same time, the rate of turnover among congressional incumbents (a measure of overall electoral competitiveness) has also increased.⁸ Of course, recent years have also seen both the tightest presidential election in history and the majority control of both the House and Senate in constant play. These facts alone should give pause to reconsider arguments for limiting campaign spending, but it is the association between campaign spending and candidate success in any given year that attracts the most attention. Even so, that statistical association is not as straightforward as it might seem.

The positive association between campaign spending and electoral success holds for open seats and challengers, but higher campaign spending by incumbents is typically correlated with *lower* odds of winning reelection.⁹ The reason is incumbents who expect to find

themselves in tough races either retire or pull out all the stops and increase their efforts at winning reelection, which means more campaign speeches, more fundraisers, and more advertising. The ability of incumbents to crank up their efforts in tough races is another confounding factor that must be taken into account in any statistical analysis of the electoral consequences of campaign spending.

For decades, political scientists did not appropriately control for these two contrary types of reverse causality: (1) good candidates are adept at both raising money and winning elections, and (2) safe incumbents often avoid the hard work of raising money. For obvious reasons, then, early studies found that campaign spending was important for open-seat races and challengers, but less so for incumbents.¹⁰ This finding spawned a second generation of studies characterized by the heroic assumptions made in the service of finding statistically significant effects of incumbent spending.¹¹ Consequently, current textbooks of American politics still report that campaign spending definitely matters for challengers and open-seat candidates, but may or may not matter for incumbents. This understanding, however, is out of date. The most recent empirical work on this question is unified in two respects: earlier studies are marred by fatal methodological flaws, and there is no substantively significant effect of either incumbent or challenger campaign spending.¹²

Steven Levitt examines the association between *changes* in campaign spending and *changes* in electoral success among repeat meetings of candidates for the U.S. House; this method effectively controls for any unobserved candidate-specific characteristic, like charisma (or a lack thereof), that might generate a spurious positive association between candidate spending and electoral success. Levitt finds no significant effects of campaign spending, regardless of open-seat or incumbent status.¹³ In replicating Levitt's study, Milyo in 1998 found that the original results are robust to controls for sample-selection bias generated by Levitt's restricted sample. One important implication of these studies is that there do exist important unobserved candidate-specific attributes that bias the findings of previous work on the electoral effects of campaign spending. Consequently, the first-generation studies exaggerated the importance of spending by open-seat candidates and challengers, while second-generation studies exaggerated the importance of spending for all candidates.

Alan Gerber examines Senate elections. In order to identify the treatment effect of campaign spending, he isolates the variation

in candidate spending associated with personal wealth or other statewide races. Because these sources of variation are independent of unobserved candidate effort or attributes, Gerber avoids the pitfalls that were the downfall of most previous work. Much has been made of the fact that Gerber finds statistically significant effects of campaign spending for all candidates, in contrast to Levitt. Gerber's estimates, however, still suggest that even large increases in campaign spending will have only negligible effects on the outcomes of Senate races.

In a series of studies,¹⁴ scholars examine the electoral consequences of several different types of "shocks" to campaign spending. For example, wealthy candidates or candidates with large campaign war chests have access to funds that are unrelated to their immediate electoral prospects or effort. Similarly, incumbents who are transferred to important committees (e.g., Ways and Means) or sit on a committee that suddenly becomes important to moneyed interests also realize a bump in fundraising that may be independent of the confounding factors noted earlier. Looking across numerous examples of such spending shocks, these studies find no corresponding bump in the electoral fortunes of candidates, nor do windfalls of campaign contributions, large campaign war chests, or personal wealth appear to deter challengers to incumbents.

Of course, this third generation of empirical work may yet be overturned in the future. For instance, Robert Erikson and Thomas Palfrey have recently argued that existing techniques fail to account for the fact that the "reverse causality" problem should be less pronounced in close races, and they find spending effects (albeit modest ones) for both challengers and incumbents. Still, the weight of evidence is very much against the proposition that campaign spending drives electoral results.

Campaign Contributions

As was the case for campaign spending, popular wisdom on the consequences of campaign contributions is driven by the well-known correlation between the interests of donors and the voting records or actions of recipients and incumbents. The Center for Responsive Politics, Common Cause, and other reform-minded public interest groups make much of such correlations in their press releases, which are dutifully picked up by the major media. But once

again, the simple correlation does not imply a causal relationship; political scientists have long understood that donors may give money to support like-minded politicians. In fact, most studies of the link between the roll-call votes of legislators and the interests of their contributors find no significant statistical association, once the preferences of a legislator's constituents are taken into consideration.¹⁵ Consequently, few scholars of campaign finance would agree with the popular wisdom that campaign contributions are like bribes. Of course, this doesn't rule out the possibility that contributions buy access to legislators and thereby influence policy in more subtle ways.¹⁶

The access hypothesis is supported by several distinct pieces of evidence. First, interested groups allocate political contributions in a consistent manner: money flows more readily to legislators in leadership positions or on powerful committees,¹⁷ industry political action committees (PACs) contribute to legislators who sit on committees with relevant policy jurisdictions,¹⁸ and the timing of contributions is coincident with legislative hearings and votes.¹⁹ Second, PAC contribution patterns are consistent with the presence of a long-run relationship between interest groups and donors. All else being constant, PACs give less money to legislators who are expected to retire in the near future.²⁰ Third, there is some evidence of a link between PAC campaign contributions and attendance at hearings²¹ or time spent with lobbyists.²² In addition, firms with large PACs also tend to be the very same firms with a substantial lobbying presence in Washington, D.C.²³ Even so, there are some serious challenges to the access hypothesis.

First, the amounts of money contributed to political candidates are quite small, both from the perspective of individual donors and recipients, and in the aggregate.²⁴ Second, to the extent that PAC contributions are a proxy for unobserved lobbying effort, the repeated failure to establish a causal connection between PAC contributions and roll-call votes translates into a similar dearth of evidence for a relationship between lobbying and roll-call votes.²⁵ Third, a recent and comprehensive study of PAC contributions and legislator activities finds no support for the claim that PAC contributions influence attendance at hearings, bill mark-ups, and so forth.²⁶ Fourth, recent ethnographic research finds no evidence of a clear link between contributions and access for lobbyists.²⁷ Consequently,

there is good reason to doubt that campaign contributions influence policymaking in important and significant ways.

Even if contributions influence the content of policy, however, it is by no means clear that such influence is corrupt or even undesirable. The ability of minority interests to gain the ear of legislators is an important check on the tyranny of the majority, while statutes prohibiting bribery and influence peddling in turn prevent the outright sale of political favors.²⁸ Consistent with this claim, there appears to be no relationship between aggregate campaign contributions and political corruption.²⁹ Further, because there is no association between aggregate campaign expenditures and trust in government, there is reason to doubt the existence of a connection between aggregate contributions and even the appearance of corruption.

The Quality of Democracy

This doesn't imply, however, that campaign spending has no political consequences. One recent study³⁰ suggests that campaign spending in House elections increases voter turnout, improves voter information about candidates and their positions, and has no detrimental impact on trust in government or the democratic process. Of course, trust and turnout may not respond immediately to changes in campaign spending, and thus the absence of a contemporaneous relationship is not by itself convincing. However, Primo demonstrates that the increase in real campaign spending at the federal level over the last three decades is unrelated to national survey data on citizen trust in government.³¹ There is little evidence, then, that the "key indicators" of democracy are hurt by the way we finance our campaigns.

Summary

Overall, the existing evidence on the role of money in American politics is quite inconsistent with the conventional wisdom that money dominates American politics. This works to undermine the primary arguments in favor of public funding of campaigns. Nevertheless, if the public perceives campaign contributions as a corrupting influence on politicians, then there may yet exist a rationale for public funding. Further, there may be something different about public financing that causes it to influence outcomes differently. Most research on the role of money in politics focuses exclusively on Congress, which does not permit a comparison of political outcomes

Table 9.1
CAMPAIGN FINANCE REGULATIONS IN GUBERNATORIAL ELECTIONS
1970–2000

	<u>Contribution Limits by Type of Donor</u>		Public Financing Conditional on Expenditure Limits
	Organizations	Individuals	
1970	31	3	0
1980	36	25	4
1990	36	27	5
2000	42	34	13

NOTE: Cell entries describe the number of states with each type of regulation.
SOURCE: State laws, database created by authors.

before and after the institution of a public financing scheme. Of course, public funding has been employed in presidential elections for nearly 30 years, but the infrequency of such elections prevents any systematic statistical analysis. In contrast, the states offer an ideal laboratory for evaluating the efficacy of public funding.

Public Financing in the States

There is a great deal of variation in state campaign finance laws, both over time and across states (see Table 9.1). For example, some states still place few restrictions on campaign financing (e.g., Illinois, Texas, Utah, and Virginia), while others have long had fairly stringent regulations combined with public financing for qualifying candidates (e.g., Minnesota, New Jersey, and Wisconsin). In addition, several states have recently adopted significant reforms (e.g., Arizona, California, Maine, Massachusetts, Nebraska, North Carolina, and Vermont). This variation provides an ideal laboratory for analyzing the political and policy consequences of campaign finance reforms, but social scientists are only beginning to exploit this opportunity.

Most early studies of state campaign finance regulations do little more than present descriptive statistics across a subset of states and over a limited period.³² These early studies tend to find that public financing is associated with a slight increase or no change in electoral competitiveness. A recent study (2002) by Thomas Stratmann and Thomas and Francisco Aparicio-Castillo explores this same ground, but with more sophisticated statistical methods.³³ These authors use

multivariate regression methods to examine the effects of state contribution limits on the outcomes of individual state legislative races in nearly every state over the last 20 years. This study stands out from others in that the authors control for unobserved (time-invariant) state-specific factors that might otherwise confound their analysis. For example, Wisconsin may have public financing of campaigns, high turnout, and close elections as a consequence of that state's unique political culture. Failure to account for this state-specific effect would wrongly attribute high turnout and close elections to the presence of public financing. Stratmann and the Aparicio-Castillos find no significant effect of public financing on the competitiveness of legislative elections. Only two states (Minnesota and Wisconsin), however, provided public funds to legislative candidates who agreed to limit their campaign spending, and thus these findings are based on a comparison involving a very small "treatment" group.

Few studies of public financing go beyond an examination of the electoral competitiveness of legislative elections. Donald Gross and Robert Goidel's study is a recent exception. They find that public financing of gubernatorial campaigns is associated with modest improvements in voter turnout but has no direct effect on electoral competitiveness.³⁴ However, these authors do not control for unobserved state-specific factors (what statisticians call "fixed effects"). It is therefore difficult to make causal inferences from these tests. Consequently, it is no exaggeration to say that very little is known about the treatment effects of public financing of political campaigns. Put differently, if we could sweep into a state unannounced one day and change the campaign finance law to allow for public financing, what would happen to politics in that state?

In ongoing research, we are studying the effect of public financing on turnout, party advantage, competitiveness, and trust in government. Ours will be the first set of studies to examine in detail all of these features of democratic rule at the state level. There are several statistical challenges we face in this research that are prevalent in studies featuring multiple states and multiple years of data. For instance, suppose that we observe that there is a negative correlation between trust in government and having a public financing system in place? This result would contradict the conventional wisdom. But again, simple correlations can be deceiving. After all, it may be that states with low levels of trust are the ones most likely to implement

public financing schemes. Regardless of what our ultimate findings are, policymakers will be able to use them as they decide whether and how to proceed on the issue of public financing. Although both of us are philosophically opposed to public financing on free speech grounds, we believe that it is important that rigorous, impartial statistical analyses guide policy debates whenever possible. While admittedly this is not a completely realistic goal, we at least hope that our future work will be considered amid the fallacies and unsubstantiated claims that commonly find their way into campaign finance debates.

Conclusion

The conventional wisdom greatly exaggerates the role of money in American politics. Recent research suggests that campaign spending has little impact on electoral outcomes and that campaign contributions do not influence the content of public policy. Given this, we admit to being skeptical that public financing will yield either more competitive elections or influence the perception or reality of corruption. In turn, this raises doubts for claims that public financing can be expected to improve voter turnout or trust in government. However, this conclusion is far from unassailable. Much of what is known about the role of money in American politics comes solely from studies of congressional elections.

Fortunately, variation in state campaign finance laws provides an ideal laboratory for identifying the treatment effect of public financing. While previous studies have lacked methodological rigor or have focused narrowly on legislative elections or both, the future looks bright. We are presently engaged in further research to probe the effects of campaign finance law on key features of the democratic process, and there is increasing interest in using all or some of the U.S. states as laboratories for institutional analysis. This research can only improve the quality of the debates over campaign finance reform.

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10. The Failure of Taxpayer Financing of Presidential Campaigns

John Samples

Almost 30 years have passed since Congress adopted the current system of taxpayer financing of presidential elections. By the end of the presidential election of 2004, taxpayers will have handed about \$2 billion in subsidies to the major political parties and to candidates for the presidency.¹ For at least the last 10 years, the system has experienced serious problems of democratic legitimacy and financial solvency. Now several individuals and groups are calling for salvaging the presidential public funding system by increasing its funding (and thereby increasing everybody's taxes).² Before Congress rushes to the rescue, we ought to ask what the public has received for its money. The answer is not much.³ The presidential public funding system has failed and should be killed by Congress.

How the System Works

The presidential public funding system subsidizes primary and general election campaigns for candidates and the presidential nomination conventions of the major parties. The system also limits the contributions and expenditures of candidates and requires them to submit to an audit by the Federal Election Commission and to repay any overpayments to the U.S. Treasury.

Candidates seeking a party's presidential nomination qualify for matching funds by raising more than \$5,000 in each of 20 states. Only individual contributions count toward that qualifying sum, and only a maximum of \$250 of any contribution counts toward the threshold. Once the threshold is met, the candidate is eligible to receive matching funds, including the \$250 contributions that met the threshold. Those who seek matching funds agree in exchange for public funding to limit their overall national spending for all primaries and to constrain their spending in each state on the basis of its voting age population. Candidates also agree to limit spending

of their personal funds for the campaign. Taxpayer financing in the primaries is a mixed public-private program.

The nominee of each major party is eligible for a grant of public money for the general election (in 2000 that grant equaled \$67.5 million). To get the grant, candidates agree to limit their spending to the sum of the grant and to accept no private contributions for the campaign. Candidates may, however, spend up to \$50,000 of their own money on their campaign. Minor parties may receive funding based on their performance in earlier general elections or after a general election if they receive more than 5 percent of the vote. The parties also receive a public grant to support their nominating conventions; in 2000 each major party received \$13.5 million, and the Reform Party received \$2.5 million. The general election part of the system relies solely on taxpayer financing.

Unlike most programs, the presidential public funding system does not come from an annual appropriation from Congress. Instead, the funding depends on taxpayers checking a box on their federal income tax form. Originally, a checkoff directed \$1 to the presidential fund; later, that sum was increased to \$3.⁴

The Purposes of Presidential Public Funding

The goals of any government program provide a starting point from which to assess its success or failure. The U.S. Supreme Court in its decision in *Buckley v. Valeo* (1976) said Congress created the presidential public funding system to attain four goals:

- (1) To reduce the deleterious influence of large contributions on our political process,
- (2) To facilitate and enlarge public discussion,
- (3) To broaden participation in the electoral process, and
- (4) To free candidates from the rigors of fundraising.⁵

Of course, those goals are hardly beyond criticism. However, the stated purposes of a program are a good basis for policy evaluation. After all, if a program cannot fulfill even the purposes for which it was designed, why should it continue to spend taxpayers' money?

Reduction of Influence

The first goal, reducing the influence of large contributors, requires elaboration. Since 1976 all presidential candidates have been

required to raise campaign funds under contribution limits established by federal law. Those limits, not the presidential funding mechanism, eliminated contributions larger than \$1,000 by individuals.⁶ The presidential public funding system matches only the first \$250 of a contribution to a primary campaign, thereby discouraging at the margins presidential campaign contributions from \$251 to \$1,000. Such sums are hardly “large contributions” by any ordinary standard. The system and its contemporary defenders seem less concerned with corruption than with the size of donations.⁷

By offering incentives for matching funds, the system aimed at lowering the proportion of private contributions a presidential candidate would use for a primary campaign compared with a candidate running without the taxpayers’ help.⁸ In the general election, if a candidate accepts public funding, the system completely prohibits private contributions or spending. The creators of the system and its current guardians assumed that private money corrupts candidates for the presidency. Indeed, the moral superiority of public money over private informs most advocacy favoring taxpayer financing of campaigns.⁹

Private Money and Small Donations. Has the system limited private money in presidential campaigns? Federal law does not forbid running a presidential campaign funded by private contributions. The presidential public funding system could have failed if a large number of candidates had relied on private contributions. However, all major party candidates for the presidency in general elections since 1976 have used taxpayer financing and accepted limits on their spending. Only four candidates have forgone public funding: John Connolly in 1980, Ross Perot in 1992, Steve Forbes in 1996, and George W. Bush in 2000.¹⁰ All except Perot did so during the pre-convention primaries. If we assume that, absent the presidential funding mechanism, all candidates for the presidency in all elections since 1976 would have run with the support of private money, it is clear that public financing has reduced the proportion of private contributions in presidential campaigns from what it would have been under a purely private system.¹¹

That conclusion requires qualification. Shortly after the presidential public funding system started, Congress and the Federal Election Commission decided that the political parties could raise funds without contribution limits for party-building activities. Such “soft

money'' grew over the years and had some effect on presidential campaigns. Because some—though hardly all—soft money contributions were well into six figures, we can conclude that taxpayer financing did not stop large contributions from being part of presidential elections.

The soft money story suggests a larger lesson about campaign finance restrictions: such limits are unlikely to effectively restrain candidates and parties involved in competitive elections for high stakes. The two parties and their candidates do not compete for the presidency to play fair; they run to win. To accomplish that, they will do whatever they can within the law. That truth, not policy arguments or empty moralizing, will have the greatest influence on the fate of presidential public funding.

Soft money notwithstanding, the presidential public funding system probably reduced the relative amounts of private donations to presidential campaigns. The real question is not the effectiveness of the system on this score but the propriety of the goal. Do private donations harm presidential campaigns?

Advocates often argue that private donations should be restricted or prohibited to prevent corruption or the appearance of corruption. Indeed, the *Buckley* court wrote,

The primary interest served by the limitations and, indeed, by the Act as a whole, is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidate's positions and on their actions if elected to office.¹²

Most claims of corruption in the executive branch take the following form: X received benefit B from an executive branch decision; X contributed sum A to the president's election campaign; person or company X bought B with A. Such claims rarely offer any concrete evidence that A procured B. Absent such evidence, it is possible that X contributed money to a presidential campaign for reasons of partisanship or ideology or friendship. The executive branch decision that led to B may have followed a shared ideology or partisan identification rather than a contribution. Moreover, even if the contribution bought the benefit, one case does not prove that money corrupts policy generally. Indeed, any one case may not be representative of the population of cases involving campaign contributions.

The intriguing anecdote often obscures the more numerous and less interesting cases in which contributions have little effect on policy.

The most famous campaign finance scandals following Watergate undoubtedly took place during the Clinton administration. The names of John Huang, Charlie Trie, and Roger Tamraz may be recalled even today. Congressional investigations of Huang and Trie suggested violations of the law but little in the way of a quid pro quo for donations they made on behalf of foreign companies or individuals. Tamraz was an international oil financier who hoped to talk to President Clinton about his proposal to build an oil pipeline across the Caspian Sea. His contributions to the Democratic Party may have led to a meeting with the president, but Tamraz did not get the Clinton administration's approval for his pipeline.¹³ The evidence that private donations, even if they are not to the president's campaign and involve large soft money donations, buy actual influence or policy favors seems remarkably skimpy.

Beyond these particular cases, we lack systematic studies of the influence of money on presidential policymaking. By "systematic studies," I mean studies of sizable data sets analyzed in ways that meet normal standards of social scientific inquiry. In particular, such studies meet conventional standards of statistical significance and internal validity.

There are, however, systematic studies of the influence of contributions by interest groups on legislators. Three Massachusetts Institute of Technology professors recently surveyed research on the link between contributions and voting by legislators and added their own research that addressed the shortcomings of earlier studies. Their conclusions are worth quoting at length.

The evidence that campaign contributions lead to a substantial influence on votes is rather thin. Legislators' votes depend almost entirely on their own beliefs and the preferences of their voters and their party. Contributions explain a miniscule fraction of the variation in voting behavior in the U.S. Congress. Members of Congress care foremost about winning re-election. They must attend to the constituency that elects them, voters in a district or state and the constituency that nominates them, the party.¹⁴

Of course, those studies concern Congress, not the executive branch. Nonetheless, we should wonder why political action committees (PACs), the most "interested" of all contributors, give only

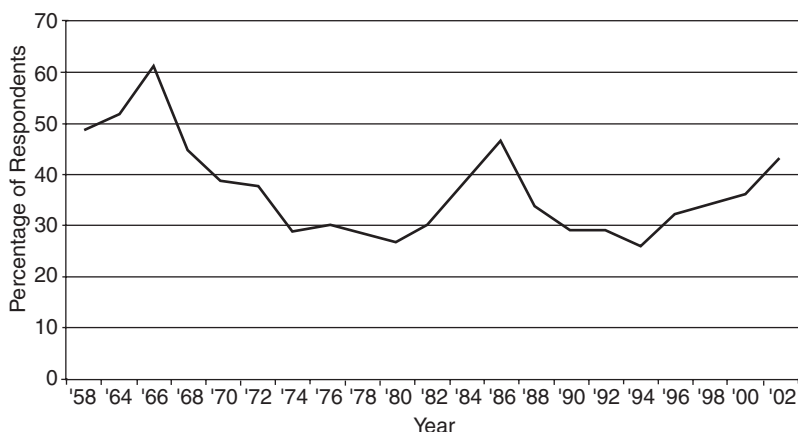
1 percent of their donations to presidential campaigns.¹⁵ The findings from Congress and PAC data should shift the burden of proof to defenders of taxpayer financing. Given that contributions have so little effect on legislators and PACs devote such small sums to presidential campaigns, those who decry private contributions should have to prove such donations affect the executive branch.

The Appearance of Corruption. The rationale for campaign finance regulation goes beyond a desire to eliminate real corruption marked by an exchange of favors for cash. The Supreme Court has said that preventing even the “appearance of corruption” can justify restrictions on money in politics.¹⁶ The appearance of corruption rationale concerns trust in government, not corruption per se. If citizens believe campaign contributions buy policy favors, they will no longer trust the political system, a putatively bad outcome. Supporters of public financing expected that, by removing private contributions from presidential elections, they would reduce the appearance of corruption in contests for the highest office and thus increase the trust Americans have in government. Have those expectations been met? Has the presidential public financing system raised the level of trust compared with the system it replaced?

For some 40 years the National Election Studies project has inquired about the public’s trust in government. Figure 10.1 shows public trust in government since 1958; higher scores reflect higher trust among those surveyed.¹⁷ Trust in government was declining in the decade before the creation of the presidential public funding system. However, public financing for the elections of 1976 and 1980 apparently did not increase public trust. Trust did go up after the 1980 and 1984 contests, but it declined after the 1988 and 1992 presidential elections, to rise again only after 1996. (The events of September 11, 2001, may account for the rise from 2000 to 2002.) Since public financing of presidential campaigns began, public trust has twice (1980, 1994) been lower than it was in the Watergate year of 1974; on three separate occasions since 1976 (1978, 1990, 1992) public trust has been as low as it was in the depths of the Watergate crisis. More than one-third of the surveys since 1976 have reported public trust lower than, or equal to, that reported in the 1974 survey. Presidential public financing can hardly be called a success on the trust question.

The idea of an “appearance of corruption” can be tested directly. Since 1958 surveys by the National Election Studies project have

Figure 10.1
TRUST IN GOVERNMENT INDEX



SOURCE: University of Michigan, Center for Political Studies, National Election Studies, *Trust in Government Index*, 1958–2002, www.umich.edu/~nes/neguide/neguide.htm.

also asked, “Do you think that quite a few of the people running the government are a little crooked, not very many are, or do you think hardly any of them are crooked?” The results are displayed in Figure 10.2.

After the inception of public financing, we see a haphazard pattern of rising and falling views of the criminality of public officials. More Americans believed that “quite a few” government officials were crooked after the elections of 1984, 1988, and 1992. In fact, the numbers rose continuously from 1984 to 1994, a period that saw three presidential elections funded by taxpayers. Moreover, the public financing era has seen four years (1980, 1990, 1992, 1994) when more Americans believed “quite a few” government officials were crooked than did in 1974, the peak year of the Watergate crisis. As is the case with the general public trust index, the worst years recorded come after the inception of the presidential public funding system.

In general, public financing of presidential contests has not convinced Americans that they should trust their government or that government officials obey the law. Insofar as taxpayer financing aimed at dispelling an “appearance of corruption” in Washington, it has failed.

Figure 10.2
ARE GOVERNMENT OFFICIALS CROOKED?



SOURCE: University of Michigan, Center for Political Studies, National Election Studies, *The NES Guide to Public Opinion and Electoral Behavior*, 1958–2002, www.umich.edu/~nes/neguide/neguide.htm.

Public Discussion and Competition

In *Buckley v. Valeo*, the Supreme Court's per curiam opinion argued that the presidential public funding system of taxpayer financing supported "First Amendment values":

Subtitle H [the portion of the IRS code creating the checkoff system] is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, Subtitle H furthers, not abridges, pertinent First Amendment values.¹⁸

Taxpayers fund candidates, and thereby public discussion. Money can enlarge public discussion by increasing the number of candidates who make a serious run for the presidency. When new candidates enter the fray, they may well raise new issues and provoke public debates. The public discussion criterion is thus quite similar to a competition criterion.¹⁹ The same could be said of political parties.

Before turning to the data, we should be clear about how to evaluate the performance of the presidential public funding system.

Recently, a task force sponsored by the Campaign Finance Institute argued that public financing has enhanced competition. Its report cites several prominent liberal and conservative candidates from both parties as evidence that public funding "has played a role in enhancing competition in presidential primary campaigns."²⁰ That claim is unsupported. To see why, imagine the presidential funding system did not exist. Would Gary Hart, Pat Robertson, and the other candidates mentioned in the report have forgone a race without public money? We do not know, and the task force report offers no evidence that they would have. In itself, the fact that a number of candidates accepted public money and ran in primaries proves nothing about the effects of public financing on competition.

To ascertain the effects of the presidential public funding system, we should systematically compare it with an alternative system. In this study, the comparison is with the privately funded system the current system replaced. At a minimum we should want to know whether the current system has improved on the performance of the old system. Accordingly, this study uses data on candidates in the presidential general elections and primaries for seven elections before and after the inception of taxpayer financing. Those data are used to test the hypothesis that the presidential public funding system had no effect on candidate entry in the primaries or the general election. As we shall see, the evidence does not allow us to reject that hypothesis.

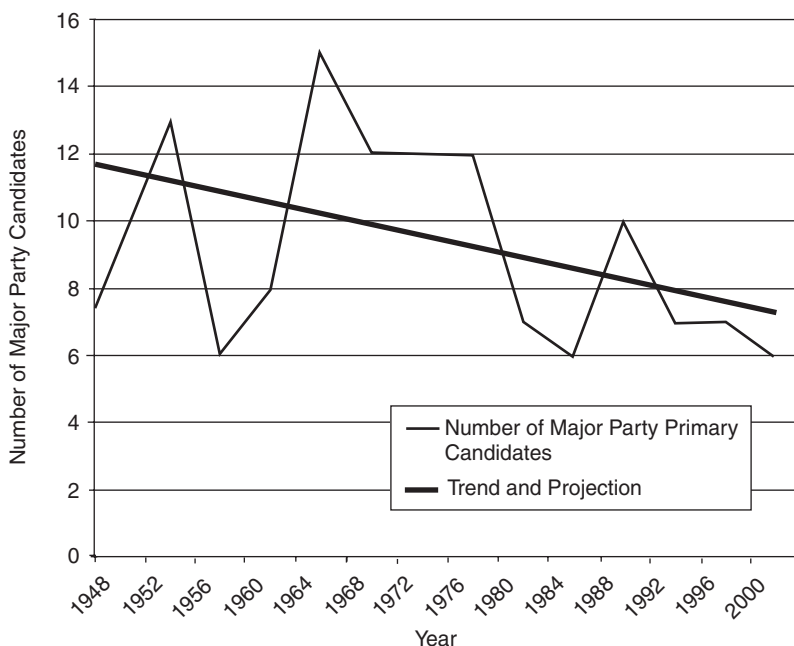
General Elections. We would expect that the availability of public money would increase the absolute number of candidates for the presidency compared with elections before 1976. By subsidizing the cost of running for president, taxpayer financing makes it easier to mount a campaign. Has public financing led to more candidates for the presidency?

We can set aside the major party candidates in the general elections for the presidency. They have all taken taxpayer financing. Before 1976, however, the two parties found the means to finance the campaigns of their candidates. In that sense, the presidential funding system did not change whether the major parties had a presidential candidate. No doubt the system did make it easier for the parties and their candidates to raise the money necessary for campaigns. But making life easier for major party presidential candidates was not a goal of taxpayer financing.

Apart from the major party candidates, nine presidential candidates in the general elections since 1948 have received more than 1 percent of the total vote in an election. Five of those candidates ran after the presidential public funding system was created in 1976. Not all five accepted public financing. Ross Perot did not accept taxpayer financing in 1992, preferring to spend \$65 million of his own money on his candidacy.²¹ Ed Clark, the Libertarian candidate in 1980, also did not take taxpayer financing. In all, six of the nine non-major-party candidates who made a mark in presidential elections after 1948 ran their campaigns without the help of the taxpayer. Moreover, the two top vote getters during the period—George Wallace in 1968 and Ross Perot in 1992—brought their campaigns before the electorate without subsidies.²² Public presidential funding might be credited with three additional presidential campaigns in seven general elections (Ralph Nader in 2000, Ross Perot in 1996, and John Anderson in 1980). The private system in place before 1976 produced four serious candidates apart from the major party candidates in the previous seven general elections. In other words, the taxpayer has spent \$153 million to support general election campaigns, an investment that has yielded one candidate less than the private system of financing it replaced.

Candidates in Primaries. What about the party nominations? Surely the availability of taxpayer money has increased the number of candidates contending for each major party's nomination. Most of the money paid out by the presidential public funding system has gone to fund the conventions of the two major political parties (10 percent of all funding) and their candidates in the general election (61 percent of all funding). Candidates running in the primaries have received a little more than \$506 million, or about 29 percent of all outlays by the system. That money has funded 83 candidates in the primaries.²³ Of those, 71 were candidates for the nominations of the two major political parties. Of those 71 candidates, 55 received more than 1 percent of the total number of votes cast in a party's presidential primaries for a given year, an average of 7.8 candidates each presidential election.²⁴ How does that compare with the number of primary candidates before the presidential funding system? The seven elections before 1976 had an average of 10.7 candidates in the party primaries. Figure 10.3 shows the number of primary candidates who received more than 1 percent of the total party vote for

Figure 10.3
MAJOR PARTY PRESIDENTIAL PRIMARY CANDIDATES, 1948–2000

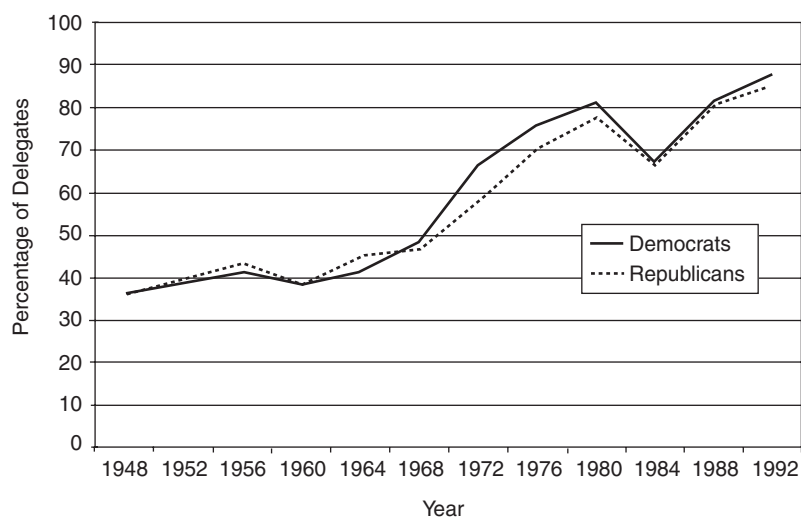


SOURCE: John L. Moore, Jon P. Preimesberger, and David R. Tarr, eds., *Congressional Quarterly's Guide to U.S. Elections* (Washington: Congressional Quarterly, 2001), pp. 339–410.

the period 1948 to 2000, along with a trend line for the period. Clearly, introducing the presidential public funding system did not increase the number of primary candidates. The trend line in Figure 10.3 indicates that the decline in primary candidates was especially steep after 1964.

It might be argued that we are comparing apples and oranges in comparing the pre-1976 era with the era of presidential funding. Up until 1968 party leaders for the most part controlled the nomination of each party's presidential candidate. After 1968 the total number of presidential primaries began to rise. Starting in 1968 primaries became increasingly important in selecting delegates to the national party conventions that in turn chose the parties' presidential nominees. In 1968 primary voters selected 48.7 percent of the delegates to

Figure 10.4
 DELEGATES SELECTED BY PRESIDENTIAL PRIMARIES, 1948–1992



SOURCE: Lyn Ragsdale, *Vital Statistics on the Presidency: Washington to Clinton* (Washington: *Congressional Quarterly*, 1996), p. 40, Table 2-3.

the Democratic nominating convention and 47 percent of the delegates to the Republican counterpart. In 1976 the numbers were 76.1 percent and 70.4 percent, respectively. The overall trend in both parties confirms the growing importance of primaries (see Figure 10.4).²⁵ It makes little sense, so the argument might go, to compare elections in which the primaries did not matter with those in which the primaries mattered most.

For purposes of argument, we might ignore the data on primary candidates from the party-centric era and look only at the years when primaries dominated the selection of presidential nominees. Indeed, the importance of the primary might itself be an incentive for candidates to enter the race. How can we tell whether the primary or the public funding had a greater effect on the number of primary candidates? In 1972 party primaries had a strong influence on the nomination of each party's candidate for the presidency. Democratic primary voters directly selected 66.5 percent of the delegates to their presidential nominating convention; Republican primary voters

chose 58.2 percent of the delegates. The presidential funding system did not yet exist. The 1972 election should indicate the influence of the incentives connected to primaries (apart from the money provided by public financing) on the number of primary candidates for the presidency.

In 1972 a total of 12 primary candidates received more than 1 percent of the overall vote in the respective party primaries. That total equals the number in 1976 and is greater than the number in all subsequent years. In fact, the number of primary candidates is almost double the post-1976 average. The data suggest that introducing public financing might have led to a decline in the number of primary candidates after 1976. My colleague Peter Van Doren has done a more complex analysis that yields results consistent with this conjecture.²⁶

Many more primary candidates received public funding (75) after 1976 than received more than 1 percent of their party's vote (55). The number of funded candidates after 1976 equals the number of candidates receiving more than 1 percent of the vote before 1976 (75 candidates). The marginal effect of taxpayer financing seems to have been to subsidize abject failure (or an ego trip) for 20 candidates. What the system has not done is produce more presidential primary candidates than the older system it replaced. From the taxpayer's point of view, that result hardly seems worth \$500 million.

A final point on how to answer the competition question seems in order. To assess whether presidential public financing has increased competition, we need a plausible counterfactual scenario. We have data about candidates and campaigns since presidential funding came into existence. What we do not know is how many candidates might have launched campaigns after 1974 if the public financing system did not exist. Ideally we need to know what the world would have been like if everything were the same except for the presidential public funding. The difference between the world as it has been (with public financing) and the world as it might have been (without public financing) would reveal the effects of the presidential funding program. I have offered in this essay an interrupted time series that looks at the number of candidates entering primary elections before and after public financing. No doubt the eight elections before 1976 are an imperfect counterfactual for measuring the effects of the public financing system. But anyone who wishes to show that the

presidential system has increased competition must offer a better baseline for evaluation.²⁷ In chapter 11 of this volume, Michael Malbin notes that several candidates in presidential primaries were running short of money when they received public funding. Unfortunately, such private funding cannot offer a convincing counterfactual for assessing the public financing system. The examples Malbin offers are part of a world in which public presidential financing existed; it is rather like doing an experiment in which the treatment (the presidential financing system) is introduced into both the control and the treatment group. We cannot conclude anything about the effects of the presidential system by looking at a world in which the system exists. Moreover, any study of the competitiveness of the system needs to be systematic, utilizing all relevant data about the public financing system and a counterfactual. A study that does not make systematic use of data—one that looks at a selected group of candidates rather than all candidates—inevitably introduces a selection bias into its conclusions.

Third Parties. The two major political parties have dominated general elections for president for more than a century. The presidential public funding system has done little to promote competition to the two-party system. The Green Party and the Reform Party must be counted as the only two third parties with sizable followings to receive funding from the taxpayer. Ross Perot, the publicly funded Reform candidate in the general election of 1996, received a little more than 8 percent of the total vote. By 2000 the Reform Party candidate, Patrick Buchanan, received less than one-half of 1 percent of the popular vote despite spending more than \$13 million in public funding on the effort. Ralph Nader, the Green Party candidate in 2000, received 2.7 percent of the national vote. The availability of taxpayer financing has not enabled any new parties to challenge the two-party duopoly in presidential elections. To the contrary, the presidential public funding system has subsidized the two major parties and their general election candidates to the tune of \$1.27 billion.

Finally, the taxpayer has also funded a few fringe candidates over the years. Lyndon LaRouche, a perennial candidate in Democratic presidential primaries, initially ran for president in 1976 and has been a candidate in every election since, including a 1992 effort from prison. He was serving 5 years of a 15-year sentence for mail fraud and defaulting on more than \$30 million in loans from campaign

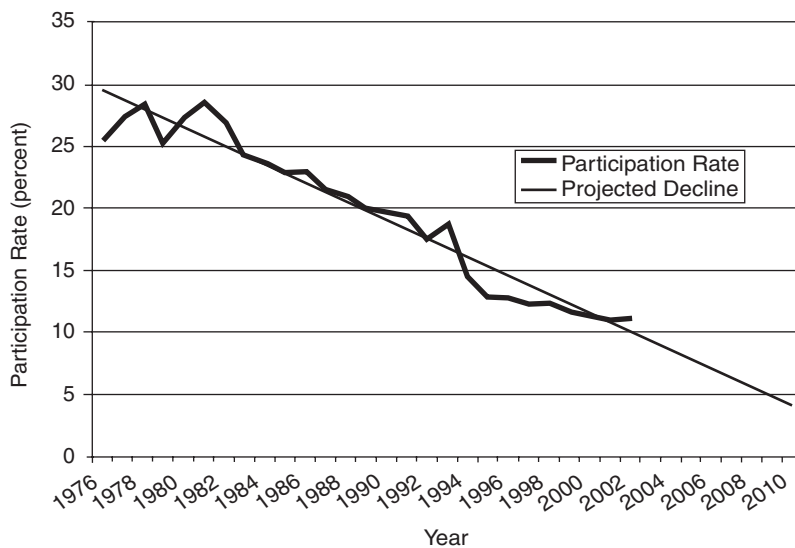
supporters.²⁸ LaRouche recently denounced "leading members of the Synarchist banking crowd, which . . . is currently involved in a criminal conspiracy to bring down the world financial system, in what might be called a 'Financial 9-11,' and use the collapse to impose a dictatorship."²⁹ LaRouche has received more than \$5.5 million from the public to underwrite his five attempts at gaining the Democratic nomination for the presidency.³⁰ Lenora Fulani of the New Alliance Party once headed a political group deemed "armed and dangerous" by the Federal Bureau of Investigation. She received almost \$4 million in her two runs for the presidency.³¹ John Hagelin, the head of the Natural Law Party, might thank the taxpayer for the \$1.75 million he has obtained from the presidential public funding system. Hagelin foresees an ideal government that combines "modern science and ancient Vedic Science."³² Hagelin proposed in 1999 to end violence in Kosovo by sending there an elite group of "Yogic flyers," who would levitate themselves through meditation, thereby spreading peace "with a quantum-mechanical consciousness field."³³ Whether propagating the views of LaRouche, Fulani, and Hagelin at a cost of more than \$11 million to the taxpayer improved American democracy might be debated in the abstract. It is fair to say that average Americans would be enraged to learn that they are subsidizing such efforts.³⁴

Compared with the system it replaced, the presidential public funding system has failed to generate more public discussion or competition by increasing the number of general election candidates, primary election candidates, or challenges to the two-party system. The average citizen might be tempted to think that almost \$2 billion in subsidies should have more to show in fostering presidential candidates and electoral competition. As far as candidates go, much of what has happened in presidential elections since 1976 would have happened anyway. The two parties would have funded their presidential candidates, as many or perhaps more primary contenders would have run, party conventions would have been funded, and Ross Perot would have run in 1992. Public financing has not changed what happens so much as who pays for what happens. Taxpayers will win no prizes for guessing who that might be.

Participation

The presidential public funding system also aimed at increasing public participation in elections by allowing individuals to easily

Figure 10.5
 PARTICIPATION RATE IN PRESIDENTIAL TAX CHECKOFF,
 1976–2002, WITH PROJECTED DECLINE



SOURCE: Federal Election Commission Press Office, "Presidential Matching Fund Income Tax Check-Off Status," March 2003, www.opensecrets.org/2000elect/other/presfund/checkoff.htm.

give a small contribution to presidential campaigns by checking a box on their federal income tax form. One might assume that taxpayer financing would easily foster more participation through contributions. After all, taxpayers need only check a box on their tax form, and their contribution to the presidential fund does not increase their tax burden. Here again experience contravenes that expectation.

The participation rate in the presidential public funding system has declined steadily since its inception (Figure 10.5). The highest participation rate came in the early years of the fund when as many as 28 percent of taxpayers diverted money to the system. Recently, the rate has been slightly higher than 10 percent. Survey research indicates that in 2000 about 12 percent of Americans over the age of 18 gave to political candidates, party committees, or political

organizations.³⁵ Compared with the private system, public financing does not broaden participation in donating to campaigns.

Moreover, participation in the presidential public funding system continues to steadily fall. If the current trend continues (and it has already continued for about 20 years), the system will have a participation rate of 5 percent by 2008 (see trend line on Figure 10.5).

Defenders of taxpayer financing have often argued (and argue still) that, if the checkoff had more publicity, it would attract higher participation.³⁶ As far back as 1989, the Federal Election Commission became concerned about falling participation rates and supported publicity campaigns in 1991 and 1992 to inform citizens about the program. The FEC claims those campaigns reached 90 million Americans in 1991 and 203 million in 1992.³⁷ Those efforts had little effect. The FEC's efforts began in March 1991. In April 1991 the participation rate for the program was 19.5 percent. In 1992, after a year of publicity, the participation rate *fell* to 17.7 percent, a 12 percent decline! In 1993, after a year of even more publicity, the participation rate rose to 18.9 percent, which was higher than that in 1992 but still below the starting point of the publicity campaign in 1991. In other words, the FEC did what the defenders of the system wanted and publicized the program. Those efforts resulted in the participation rate declining further. In 1994 the rate dropped again (to 14.5 percent), which meant it had declined 25 percent in three years, the period of steepest decline in participation in the history of the program.

Some people now argue for additional efforts to persuade taxpayers to check off their returns in support of public financing. Such an effort would be no more likely to succeed than the earlier one in the 1990s. Apparently, the more Americans learned about the presidential public funding system, the less inclined they were to check the box on their tax forms. Why should taxpayers be taxed to support a publicity campaign for a program they have already rejected?

The lack of participation is not an aberration caused by the public's lack of knowledge of the presidential program. The public's rejection of public financing is not limited to federal schemes. The 13 states that had checkoff schemes for taxpayer financing saw a steady decline in participation from 1975 to 1994. The typical checkoff program dropped from 20 percent participation to 11 percent during that period.³⁸

Table 10.1
POLLING ON PUBLIC FINANCING 1994–2000

	Favor	Oppose	Don't Know	Feature of Question	Sponsor
1995	18	77	5	Tax money involved	U.S. News
1997	18	78	4	Tax money involved	CBS News
2000	20	75	5	Tax money involved	CBS News, New York Times
2000	31	65	4	Government funds used	CBS News, New York Times
1994	38	54	8	Special interests mentioned	CBS News
1997	43	46	11	Special interests mentioned	CBS News
1999	37	58	5	Special interests mentioned	CBS News

SOURCE: These polls were downloaded from the online survey research archive at the Roper Center at the University of Connecticut. These poll results may be obtained online at the Roper Center by entering the keyword "public financing" and the following accession numbers for each poll as listed in the table: 1995: 0237790, 1997: 0276551, 2000: 0352427, 2000: 0352428, 1994: 0221203, 1997: 0274653, 1999: 0339778.

None of that should be surprising. Public financing of campaigns is not popular with the public. Over the past decade, *CBS News* has asked six times about support for public financing of campaigns; *U.S. News and World Report* sponsored one question in 1995. The results are summarized in Table 10.1.

The responses are affected by the wording of the question. When respondents are simply asked if they wish to use only tax money to finance campaigns, about three in four oppose it. When the wording of the question includes some mention of public financing as the solution to the problem of "special interests," taxpayer financing does better, but not that much better considering how loaded the

question is. Even when presented as a way to reduce the influence of special interests, public financing is still opposed by a majority in two of three polls, and those favoring public financing do not outnumber those opposed in the third poll. All in all, the public strongly opposes public financing of campaigns, a disposition confirmed by another study of the relevant surveys.³⁹

Such public opposition to public financing bears on current policy debates. Two members of the FEC as well as a separate task force have proposed increasing both the spending by the presidential fund and the amount of the checkoff.⁴⁰ They propose to spend more on campaigns through public financing, even though Americans suspect that such programs “would cost taxpayers too much money.”⁴¹ The FEC commissioners are concerned about a funding shortfall in 2008. Yet this continual crisis of the presidential financing system comes directly from its lack of popular support. If even as few as 20 percent of Americans supported the current checkoff, funding would not be a problem. Supporters of the system say inflation has eaten away at the value of the checkoff. If the original checkoff sum of \$1 had kept up with inflation, it would have been worth \$3.22 in 2002. That would improve the system’s finances slightly, but it would hardly make much difference at current participation rates. Some people now urge that the checkoff sum be increased to \$5, a real increase of 50 percent.⁴² Supporters of the system are trying to obscure the system’s central failing: it lacks popular support. A lack of democratic legitimacy cannot be set right by technical fixes or by extracting ever more wealth from taxpayers.

The presidential public funding system is a remarkable example of minority rule. It allows about 10 percent of taxpayers to spend taxes paid by everyone on presidential campaigns by the major political parties. If the system did not exist, its funding could be returned to current or future taxpayers. In other words, the presidential public funding system allows a small percentage of taxpayers (10 percent and dropping) to tax either the other 90 percent of current taxpayers or all future taxpayers. The system allows a small number of citizens with strong antipathy to private funding of presidential campaigns to compel the overwhelming majority to pay the costs associated with their antipathy. That can hardly be democratic or efficient.

Michael Toner, a commissioner on the FEC, summarized the democracy deficit of the presidential fund:

Any system of public financing must have popular support to succeed. Today's low taxpayer checkoff rates cast serious doubt on whether the public financing system has this support. . . . When only one in nine taxpayers are [*sic*] participating, it is very difficult to conclude that the public financing system has broad popular support.⁴³

Why continue at taxpayer expense a program that reflects nothing more than the preferences of a small minority?

The Rigors of Fundraising

In *Buckley v. Valeo* the Supreme Court said the government had a vital interest "in relieving major-party candidates from the rigors of soliciting private contributions." No doubt fundraising is a problem for candidates. Many of them have testified that they do not enjoy the task. But that is a private burden and a private problem. Why are the rigors of fundraising a public problem that justifies public subsidies?

We might pause to reflect on the asymmetry here. Americans have to work to make a living and to pay the taxes that support the government. In contrast, taxpayer financing assumes that candidates for office cannot be expected to work to fully fund their campaigns for office. Public financing thus offers "welfare for politicians" funded by Americans who work for a living and consumed by politicians who are not willing to support themselves. That difference may go a way toward explaining public antipathy to public financing in general and the apathy toward the presidential system in particular.

Of course, defenders of the program see things differently. They argue that Congress might have assumed that candidates for the presidency would better use their time on some task other than raising campaign funds. Two analysts of campaign finance observe:

The pursuit of money has become a campaign in and of itself. This comes with a price for democracy. Candidates could better spend their time meeting with voters, and incumbents could better use their time to perform their official duties.⁴⁴

Moreover, critics say, absent public funding, the costs of fundraising would be astronomical. Without the system, a leading defender

of public financing argues, “presidential candidates would have to devote most of their time to the burdensome task of raising money,” especially for general elections. Writing in 1993, Anthony Corrado speculated that, absent taxpayer financing, presidential candidates would rely more on PAC donations and soft money to fund their campaigns.⁴⁵

In economic life, government regulations often lead to problems that prompt calls for more regulation. So it is with the rigors of fundraising. Under current law, candidates must raise money within specific and aggregate contribution limits. Until 2002 the limits for individuals were \$1,000. Compared with a system of higher or no limits, the current system inevitably requires more time and resources to raise the funds necessary to run for office. The costs (including the candidate’s time) of finding and persuading a donor are fixed while the returns from that investment are limited. If the returns were higher or unlimited, the “rigors” of raising necessary funding (including the candidate’s time and effort) would be lower. Federal election law itself (though not public financing per se) causes much of the problem the presidential system purports to solve.

Absent taxpayer financing, would presidential candidates have to spend “most of their time” raising money? During the primary contests of 2000, George W. Bush declined public funding. His primary and general election campaigns spent more than \$100 million, a sum entirely adequate to his task.⁴⁶ Bush did not spend all of his time fundraising. Throughout his public and private career, President Bush has delegated tasks with clear goals and constraints.⁴⁷ Bush and his team put together an organization of fundraisers called “Pioneers,” each of whom pledged to raise \$100,000 for the Bush campaign. Doing that within the contribution limits set by federal law required the organization to develop an extensive network of contributors and fundraisers. In other words, the candidate had to build a fundraising organization by recruiting talented individuals with fresh ideas about fundraising who in turn brought in other fundraisers and contributors. Bush had more than enough money for the primaries, and we have no evidence that the candidate felt pressured by his oversight of, and contribution to, fundraising.

Indeed, the fundraising challenge, though partially created by perverse regulations, serves the public by providing valuable information about a presidential candidate. Presidents must persuade

people to do their will and organize an effective executive branch.⁴⁸ Meeting the fundraising challenge (or failing to do so) tells Americans a lot about a candidate's ability to persuade others, to organize an undertaking, and to exert leadership. Moreover, fundraising shows that the candidate has persuaded some individuals to actually spend money supporting his campaign. Such support is far more serious and real than the backing revealed in a public opinion poll. The fundraising challenge is so large that a candidate cannot do it by himself. He has to persuade talented individuals to join his campaign and to help him raise money. They in turn must create and administer an organization that meets the candidate's goals. Far from being a waste of time, the rigors of fundraising are a good test for anyone who wants to be president, and the public benefits by knowing that a candidate can meet that challenge. Given the relevance of fundraising to presidential performance, the time spent by candidates on that task is well worth spending less time with voters or on enhancing the advantages of incumbency.

By making it easier to run for the highest office, the presidential funding system deprives the electorate of important information about a candidate. Absent the system, would a candidate have evinced the persuasiveness and organizational ability to meet the fundraising challenge? The voters will never know because the taxpayer provided much of the candidate's funding.

Measured by its own standards, the presidential campaign finance system has come a cropper. It has not led to more candidates or electoral competition or new parties vying for the presidency. Most important, the American taxpayer has rejected the system as fewer and fewer citizens check off the tax form to contribute to the system. By the election of 2008, the system may be supported by half as many Americans as make private campaign contributions. The system lacks democratic legitimacy, a failure that cannot be overcome by adjusting this or that technical requirement. Why should a system without any popular support impose costs on current and future taxpayers?

Political Purposes

To this point I have assumed that Congress created the presidential public funding system to attain common goals like preventing corruption or increasing electoral competition. That assumption is false.

The Democratic majority in Congress in 1976 created taxpayer financing of presidential campaigns to advance its narrow partisan interests. Does public financing still support that partisan agenda?

We must first establish the partisan purpose of the presidential funding program. The first serious proposals to publicly fund presidential campaigns date from the mid-1960s, though the current system was not enacted until 1974. Supporters said spending limits served the public interest by controlling rapidly growing spending on campaigns.⁴⁹ In constant dollars, spending on presidential campaigns did rise in the 1960s, but expenditures did not exceed earlier peaks until the election of 1972. The record did not show a sustained growth in spending on presidential campaigns. The data contravene the public interest rationale for spending limits.⁵⁰

From 1960 to 1976 the national Democratic Party had enjoyed great success. Lyndon Baines Johnson had won the presidency in 1964 in a landslide. The party dominated Congress throughout the 1960s. Its members held 61 percent of all seats in the House of Representatives from 1959 to 1971; its majorities ranged from 68 percent in the House in 1965–67 to 56 percent in 1969–71.⁵¹ The party enjoyed similar success in the U.S. Senate. The average Democratic share of Senate seats from 1959 to 1971 was 64 percent with a range from 57 percent (1969–71) to 68 percent (1965–67).⁵²

Yet all was not well for the party starting about 1965. Public support for expanding the federal government began to decline. Trust in the federal government began to drop about the time of John F. Kennedy's death and would continue to decline until 1980.⁵³ Moreover, public support for more government spending began declining in 1961, fell until 1965, rose slightly, and then fell in 1969 to its lowest point in the decade. The public mood in the 1970s would be worse for big government. Support for more spending and larger government dropped steadily throughout the decade.⁵⁴

Politicians are skilled at sensing shifts in the public mood and public opinion. By the late 1960s—especially after the Nixon victory in 1968—professional politicians knew support for larger government, and hence for the Democratic Party, was waning. They also might have guessed that the shifts in public support would translate sooner or later into policy moves away from an activist state.⁵⁵ While the party firmly held Congress, its presidential efforts were more troubled. During most presidential elections in the 20th century, the

Figure 10.6
REPUBLICAN ADVANTAGE IN PRESIDENTIAL FUNDRAISING,
1952–1972



SOURCE: Burton A. Abrams and Russell F. Settle, "The Economic Theory of Regulation and the Financing of Presidential Elections," *Journal of Political Economy* 86 (April 1978): 250, Table 3.

Republicans had more funding than the Democrats. In 1948 the Democrats enjoyed a substantial advantage. However, in the six presidential elections before the creation of the presidential funding mechanism, the Republicans enjoyed a consistent fundraising advantage. From 1960 onward the Republican advantage grew rapidly (Figure 10.6).

If we assume that fundraising advantages translate into relative gains in votes, by 1972 the Democrats were looking at upcoming electoral disasters. The Federal Election Campaign Act of 1974 put

limits on campaign spending, thereby constraining the growth of the Republican advantage. The presidential funding mechanism both provided money to presidential candidates and equalized their outlays. The spending limits in the law and public financing were predictable responses to pressing political problems for the Democrats; 80 percent of Senate Democrats and 98 percent of House Democrats voted for the 1974 law.⁵⁶

The presidential funding system was created to provide political rents to the dominant party at the time of its creation. That party, the Democrats, had reason to believe the public mood was shifting away from them, a change that would eventually weaken or end their grasp on power. To preclude or at least slow those changes—perhaps to buy time to change the direction of the public mood—the dominant party created a regulation and subsidy program aimed at equalizing spending of the major party candidates on presidential campaigns. If successful, that equalization of expenditures might have affected the outcome of presidential elections after 1976. Even if it did not change the outcome, it would decrease the Republican vote share (compared with what it would have been without the presidential funding mechanism) and thereby improve the Democratic candidate's performance.

We might note in passing the impropriety of this purpose. The presidential public funding system was sold to the American public as a way to allegedly achieve public purposes like increasing competition or enhancing citizen participation. Improving electoral outcomes for the Democratic presidential candidate constitutes a narrow partisan goal, not a public purpose. In that sense, the presidential funding mechanism may be said to be the work of a special interest, a reality as common as it is deplorable.

Has taxpayer financing fulfilled this practical if improper goal? We have some evidence that the system changed the outcome of the very close presidential election of 1976.⁵⁷ Shortly thereafter, Congress liberalized the campaign finance system to allow the political parties to raise funds for grassroots campaign activities. Such funding, later called "soft money," was not covered by federal ceilings on contributions. The money could not be directly spent by each party's presidential nominee, but presidential campaigns did indirectly put soft money to use.⁵⁸ The rise of soft money tended to undermine the partisan purposes of the presidential financing system. From 1992

to 1998 the Republican Party raised 55 percent of all soft money and thus enjoyed a 10 percent lead over the Democrats.⁵⁹ The equality of presidential spending sought by the creators of the presidential funding system could not survive the rise of soft money.

The Bipartisan Campaign Reform Act of 2002 prohibited soft money fundraising by federal officials. If that prohibition stands up to constitutional scrutiny, soft money fundraising will be done by quasi-party groups rather than by the major political parties.⁶⁰ Such quasi-party activity may or may not lead indirectly to unequal funding for presidential campaigns. Whatever happens on that score, we will not return to the world of presidential elections that existed before soft money. The presidential public funding system will not be able to equalize the money spent by the candidates of the major parties.

George W. Bush competed in the Republican primaries in 2000 without the help of taxpayer financing. He did so again in 2004, though his campaign was allowed to accept public money for the brief fall race. Being free of the spending limits of the presidential public funding system means a candidate can spend more money than his opponents in the months before the presidential election. Bush proved in 2000 that such sums can be raised within the current system of contribution limits and that a candidate pays little if any electoral price for going outside the system. Rejecting presidential subsidies will be appealing for future candidates if they can raise enough money.

President Bush's refusal to accept public money also weakened the grip of presidential funding on the Democratic side. Howard Dean's insurgent campaign for the Democratic nomination in 2004 used the Internet to raise money. Confident he could raise enough to compete, Dean refused presidential funding for his campaign.⁶¹ He was concerned that, if he accepted public funding and if all of it was spent to get the nomination, he would have no money available to project his message from the end of the primaries to the Democratic convention. During that period, President Bush was free to spend as much as he might like both projecting his message and criticizing the Democratic nominee. The need to compete with the first mover out of the system—President Bush—drove Dean (and eventual Democratic nominee, John Kerry) to avoid taxpayer financing. Ironically, a regulatory and subsidy system set up to make the Democratic presidential candidate more competitive threatened in 2004 to make its standard bearer less competitive.

What about 2008? Will the same competitive pressures force both of the major party candidates outside the system? Much depends on the closeness of the race and the skills of the two candidates. Both candidates will know how Bush and Dean raised enough hard money to be able to go without public subsidies. There is a high probability that both candidates will forgo public funding. Doing so will be less risky. If the Democratic nominee pays a small electoral price for forgoing public funding, the Democratic nominee in 2008 will be free of all such concerns. On the other hand, every candidate would face some risk that the other party's nominee might forgo public subsidies. Facing those risks and voter diffidence about public funding, the most serious candidates will opt for going outside of the presidential system. For that reason, the supporters of taxpayer financing say doing nothing will lead to its demise.⁶²

The presidential public funding system has spent almost \$2 billion since 1976. What has the taxpayer received in return for this sum? Very little. Government subsidies have not fostered additional candidates for the presidency in the general election or in the primaries. They have not generated serious electoral competition to the two major political parties. Indeed, almost all of the \$2 billion has been devoted to candidates associated with the two major parties or to subsidizing the national party conventions. The system has not even accomplished its major (and illegitimate) political purpose of improving the prospects of Democratic presidential candidates. Killing public financing would hardly be "a real loss for democracy."⁶³ To the contrary, it would kill off a failed program, disliked by the American people.

The fact that the presidential public funding system has spent almost \$2 billion and accomplished little or nothing would not normally threaten its existence. Most federal programs acquire congressional sponsors and interest group supporters whose efforts ensure their continuation, their failures notwithstanding. Public financing has congressional sponsors and interest group support. But the system also differs from most federal programs in two ways.

First, the checkoff introduces a test of popular consent to the program. The system has failed that test completely. Normally, the mere fact that the general public does not like or support a government program has little effect on its fate.⁶⁴ In this case, defenders said increased participation in financing presidential elections was

an explicit goal of the program. Having failed so miserably at increasing participation, the funding mechanism may be open to congressional review and elimination.

Second, the presidential public funding system may become a zombie program, apparently alive but actually dead. If most serious presidential contenders go outside of the public funding system, the program will continue to exist but only as a source of support for guaranteed losers. Accepting public funding will become a sign that a candidate cannot win the presidency. The system may continue spending taxpayers' money on hopeless causes and fringe candidates, yet another federal effort persisting without purpose, apart from the rents delivered to the special interests that support the program. Unlike other programs, however, every four years the public will be reminded that their tax money is going to sure losers, colorful publicity hounds, and wacky extremists. That steady reminder might shorten the life of the program.

Defenders argue that the presidential public funding system needs an overhaul, including, of course, large increases in taxpayer funding. Why should Americans throw more money at a program that has failed to meet its goals and that has been rejected by taxpayers? In the end, the presidential public funding system raises the question of whether Congress can rise above the interests of the political parties, the campaign finance regulation lobby, and sheer inertia to save the American taxpayer some money. Will Congress have the correct answer to that question?

Appendix
CANDIDATES WHO HAVE RECEIVED FUNDS FROM THE
PRESIDENTIAL FUNDING SYSTEM

Year	Candidate	Nominal Outlays	2002 Dollars
1976	Birch Bayh (D)	\$545,710.39	\$1,755,174.25
	Lloyd Bentsen (D)	511,022.61	1,643,607.57
	Edmund Brown, Jr. (D)	600,203.54	1,930,441.16
	Jimmy Carter (D)	3,886,465.62	12,500,081.57
	Frank Church (D)	640,668.54	2,060,589.18
	Gerald Ford (R)	4,657,007.82	14,978,384.81
	Fred Harris (D)	639,012.53	2,055,262.94
	Henry Jackson (D)	1,980,554.95	6,370,080.39
	Ellen McCormack (D)	247,220.37	795,137.56
	Ronald Reagan (R)	5,088,910.66	16,367,518.61
	Terry Sanford (D)	246,388.32	792,461.43
	Milton Shapp (D)	299,066.21	961,889.90
	Sargent Shriver (D)	295,711.74	951,100.88
	Morris Udall (D)	2,020,257.95	6,497,777.58
	George Wallace (D)	3,291,308.81	10,585,872.26
	Total Primary Funds	\$24,949,510.06	\$80,245,380.09
	Convention Committees		
	Democratic Committee	\$2,185,829.73	\$7,030,307.89
	Republican Committee	1,963,800.00	6,316,191.26
	Total Convention Funds	\$4,149,629.73	\$13,346,499.15
	General Funds		
	Jimmy Carter (D)	\$21,820,000.00	\$70,179,902.91
	Gerald Ford (R)	21,820,000.00	70,179,902.91
	Total General Funds	\$43,640,000.00	\$140,359,805.81
1980	John Anderson (R)	\$2,733,077.02	\$6,502,606.49
	Howard Baker (R)	2,635,042.60	6,269,360.50
	Edmund Brown, Jr. (D)	892,249.14	2,122,861.89
	George H. W. Bush (R)	5,716,246.56	13,600,239.48
	Jimmy Carter (D)	5,117,854.45	12,176,529.72
	Phillip M. Crane (R)	1,899,631.74	4,519,652.24
	Robert Dole (R)	446,226.09	1,061,672.48
	Edward Kennedy (D)	4,134,815.72	9,837,658.92
	Lyndon LaRouche (D)	526,253.19	1,252,075.00

(continued next page)

Appendix
 CANDIDATES WHO HAVE RECEIVED FUNDS FROM THE
 PRESIDENTIAL FUNDING SYSTEM (*continued*)

Year	Candidate	Nominal Outlays	2002 Dollars
	Ronald Reagan (R)	7,330,262.78	17,440,348.00
	Total Primary Funds	\$31,431,659.29	\$74,783,004.73
	Convention Committees		
	Democratic Committee	\$4,416,000.00	\$10,506,659.73
	Republican Committee	4,416,000.00	10,506,659.73
	Total Convention Funds	\$8,832,000.00	\$21,013,319.46
	General Funds		
	John Anderson (I)	\$4,242,304.00	\$10,093,397.78
	Jimmy Carter (D)	29,440,000.00	70,044,398.19
	Ronald Reagan (R)	29,440,000.00	70,044,398.19
	Total General Funds	\$63,122,304.00	\$150,182,194.16
1984	Reubin Askew (D)	976,179.04	\$1,692,737.02
	Alan Cranston (D)	2,113,736.44	3,665,311.16
	John Glenn (D)	3,325,382.66	5,766,358.54
	Gary Hart (D)	5,333,785.31	9,249,016.31
	Ernest Hollings (D)	821,599.85	1,424,689.97
	Jesse Jackson (D)	3,053,185.40	5,294,356.62
	Sonia Johnson (C)	193,734.83	335,944.64
	Lyndon LaRouche (D)	494,145.59	856,870.00
	George McGovern (D)	612,734.78	1,062,508.83
	Walter Mondale (D)	9,494,920.93	16,464,606.93
	Ronald Reagan (R)	10,100,000.00	17,513,840.42
	Total Primary Funds	\$36,519,404.83	\$63,326,240.46
	Convention Committees		
	Democratic Committee	\$8,080,000.00	\$14,011,072.34
	Republican Committee	8,080,000.00	14,011,072.34
	Total Convention Funds	\$16,160,000.00	\$28,022,144.68
	General Funds		
	Walter Mondale (D)	\$40,400,000.00	\$70,055,361.70
	Ronald Reagan (R)	40,400,000.00	70,055,361.70
	Total General Funds	\$82,800,000.00	\$143,578,810.61

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Year	Candidate	Nominal Outlays	2002 Dollars
1988	Bruce Babbitt (D)	\$1,078,939.44	\$1,640,133.05
	George H. W. Bush (R)	8,393,098.56	12,758,638.56
	Robert Dole (R)	7,618,115.99	11,580,560.83
	Michael Dukakis (D)	9,040,028.33	13,742,058.81
	Pete DuPont (R)	2,550,954.18	3,877,793.42
	Lenora Fulani (NA)	938,798.45	1,427,099.90
	Richard Gephardt (D)	3,396,276.37	5,162,796.83
	Albert Gore (D)	3,853,401.56	5,857,688.60
	Alexander Haig (R)	538,539.20	818,652.01
	Gary Hart (D)	1,124,708.09	1,709,707.55
	Jesse Jackson (D)	8,021,707.31	12,194,073.91
	Jack Kemp (R)	5,984,773.65	9,097,660.81
	Lyndon LaRouche (D)	825,576.99	1,254,988.05
	Pat Robertson (R)	10,410,344.83	15,825,124.18
	Paul Simon (D)	3,774,344.77	5,737,511.64
	Total Primary Funds	\$67,550,247.72	\$102,685,461.04
	Convention Committees		
	Democratic Committee	\$9,220,000.00	\$14,015,639.95
	Republican Committee	9,220,000.00	14,015,639.95
	Total Convention Funds	\$18,440,000.00	\$28,031,279.91
	General		
	George H. W. Bush (R)	\$46,100,000.00	\$70,078,199.76
	Michael Dukakis (D)	46,100,000.00	70,078,199.76
	Total General Funds	\$92,200,000.00	\$140,156,399.53
1992	Larry Agran (D)	\$269,691.68	\$342,159.98
	Edmund Brown (D)	4,239,404.83	5,378,566.71
	Pat Buchanan (R)	5,199,987.25	6,597,265.29
	George H. W. Bush (R)	10,658,520.94	13,522,550.50
	Bill Clinton (D)	12,536,135.47	15,904,695.03
	Lenora Fulani (NA)	2,013,323.42	2,554,319.48
	John Hagelin (NLP)	353,159.89	448,056.77
	Tom Harkin (D)	2,103,361.85	2,668,551.95
	Bob Kerrey (D)	2,195,529.81	2,785,486.18
	Paul Tsongas (D)	2,995,449.27	3,800,350.37
	Doug Wilder (D)	289,026.67	366,690.44

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Appendix
 CANDIDATES WHO HAVE RECEIVED FUNDS FROM THE
 PRESIDENTIAL FUNDING SYSTEM (continued)

Year	Candidate	Nominal Outlays	2002 Dollars
	Total Primary Funds	\$42,853,591.08	\$54,368,692.70
	Convention Committees		
	Democratic Committee	\$11,048,000.00	\$14,016,685.69
	Republican Committee	11,048,000.00	14,016,685.69
	Total Convention Funds	\$22,096,000.00	\$28,033,371.38
	General Funds		
	George H. W. Bush (R) 50.0	\$55,240,000.00	\$70,083,428.46
	Bill Clinton (D)	55,240,000.00	70,083,428.46
	Total General Funds	\$110,480,000.00	\$140,166,856.92
1996	Lamar Alexander (R)	\$4,573,443.84	\$5,200,670.56
	Pat Buchanan (R)	10,983,474.85	12,489,807.75
	Bill Clinton (D)	13,412,197.51	15,251,618.52
	Robert Dole (R)	13,545,770.94	15,403,510.93
	Phil Gramm (R)	7,356,221.26	8,365,093.07
	John Hagelin (NLP)	504,830.79	574,066.00
	Alan Keyes (R)	2,145,766.41	2,440,048.37
	Lyndon LaRouche (D)	624,692.04	710,365.67
	Richard G. Lugar (R)	2,657,244.26	3,021,673.05
	Arlen Specter (R)	1,010,457.16	1,149,036.70
	Pete Wilson (R)	1,724,257.09	1,960,731.00
	Total Primary Funds	\$58,538,356.15	\$66,566,621.63
	Convention Committees		
	Democratic Committee	\$12,364,000.00	\$14,059,665.56
	Republican Committee	12,364,000.00	14,059,665.56
	Total Convention Funds	\$24,728,000.00	\$28,119,331.12
	General Funds		
	Bill Clinton (D)	\$61,820,000.00	\$70,298,327.80
	Robert Dole (R)	61,820,000.00	70,298,327.80
	Ross Perot (Reform)	29,055,000.00	33,039,759.21
	Total General Funds	\$152,695,000.00	\$173,636,414.80
2000	Gary Bauer (R)	\$5,052,747.59	\$5,256,797.75
	Bill Bradley (D)	12,462,047.69	12,965,315.02
	Pat Buchanan (Reform)	4,509,673.04	4,691,791.68

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Year	Candidate	Nominal Outlays	2002 Dollars
	Albert Gore (D)	15,456,083.75	16,080,262.24
	John Hagelin (NLP)	700,286.06	728,566.41
	Alan Keyes (R)	5,043,341.03	5,247,011.31
	Lyndon LaRouche (D)	1,448,388.83	1,506,880.56
	John McCain (R)	14,777,748.06	15,374,532.64
	Ralph Nader (G)	723,307.65	752,517.71
	Dan Quayle (R)	2,087,749.86	2,172,061.55
	Total Primary Funds	\$62,261,373.56	\$64,775,736.87
	Convention Committees		
	Democratic Committee	\$13,512,000.00	\$14,057,668.61
	Republican Committee	13,512,000.00	14,057,668.61
	Reform Party Committee	2,522,690.00	2,624,566.31
	Total Convention Funds	\$29,546,690.00	\$30,739,903.53
	General Funds		
	George W. Bush (R)	\$67,560,000.00	\$70,288,343.04
	Albert Gore (D)	67,560,000.00	70,288,343.04
	Pat Buchanan (Reform)	12,613,452.00	13,122,833.65
	Total General Funds	\$147,733,452.00	\$153,699,519.73

SOURCE: Scott Thomas, Campaign Finance Institute, "The Presidential Election Public Funding Program—A Commissioner's Perspective," Testimony before the Campaign Finance Institute on Presidential Nomination Financing, January 31, 2003, available at www.cfinst.org.

Notes

1. See appendix for a complete list of candidates who have received funds from the presidential public funding system. The nominal outlays are translated into 2002 dollars. The \$2 billion number is in 2002 dollars as are all subsequent references to spending by the presidential public funding system.

2. Scott Thomas, "The Presidential Election Public Funding Program—A Commissioner's Perspective," Testimony before the Campaign Finance Institute on Presidential Nomination Financing, January 31, 2003, available at www.cfinst.org. See also Campaign Finance Institute Task Force on Presidential Nomination Financing, *Participation, Competition, Engagement: Reviving and Improving Public Funding for Presidential Nomination Politics* (Washington, DC: Campaign Finance Institute, 2003). Cited hereafter as CFI Task Force.

3. If the funding were applied to the government deficit, for example, future taxpayers would receive both that sum and the foregone debt servicing connected to that sum.

4. This basic information on the system comes from Federal Election Commission, "The Presidential Public Funding Program," April 1993, available at www.fec.gov/info/pfund.htm.

5. *Buckley v. Valeo*, 424 U.S. 1, 92 (1976).

6. The law also established a \$5,000 limit on contributions by political action committees (PACs). PACs typically do not contribute much to presidential elections. Recently, they have provided about 1 percent of presidential funding. Jeffrey Milyo, David Primo, and Timothy Groseclose, "Corporate Campaign Contributions in Perspective," *Business and Politics* 2 (2000): 78.

7. See CFI Task Force, ch. 3.

8. "The present system of public funding has evolved since first being proposed by Representative William Bourke Cockran in 1904 and, notably, President Theodore Roosevelt in 1907, as a means of curbing corruption by reducing (if not eliminating) the role of private money in elections." Joseph E. Cantor, "The Presidential Election Campaign Fund and Tax Checkoff: Background and Current Issues" Congressional Research Service Report RS20/33, March 18, 1997.

9. "Private funding, in effect, gives a large number of extra votes to a small number of unrepresentative individuals. These votes are not tabulated in the ballot result, but they play a role in the process of influencing how the ballots are cast." Richard Briffault, "Public Funding and Democratic Elections," *University of Pennsylvania Law Review* 148 (December 1999): 576 and *passim*.

10. See Cantor, "The Presidential Election Campaign Fund and Tax Checkoff."

11. We should not assume, however, that the matching fund mechanism has reduced the size of the average individual contribution. We do not know what the average contribution would have been without the system, and we lack data on the average contributions to presidential campaigns before the creation of the presidential public funding system.

12. *Buckley* at 25.

13. See "Probe into 1996 Democratic Fundraising, 1997 Legislative Chronology," CQ Electronic Library, CQ Public Affairs Collection, cqal97-0000181143. Originally published in *CQ Almanac 1997* (Washington, DC: CQ Press, 1998). Other scandals centered on the location of Vice President Al Gore's fundraising calls and his knowledge about a visit to a Buddhist temple.

14. Stephen Ansolabehere, John M. Figueiredo, and James M. Snyder Jr., "Why Is There So Little Money in U.S. Politics?" *Journal of Economic Perspectives* 17, no. 1 (Winter 2003): 116.

15. Jeffrey Milyo, David Primo, and Timothy Groseclose, "Corporate Campaign Contributions in Perspective," *Business and Politics* 2 (2000): 82.

16. The following analysis does not mean I accept the validity of the "appearance of corruption" justification for campaign finance regulation. The analysis is purely conditional. If we assume for purposes of argument that the "appearance of corruption" standard is legitimate, the analysis asks whether public financing has increased public trust.

17. The National Elections Studies project constructed this index using data from the following questions: "How much of the time do you think you can trust the government in Washington to do what is right—just about always, most of the time, or only some of the time?" "Would you say the government is pretty much run by a few big interests looking out for themselves or that it is run for the benefit of all the people?" "Do you think that people in the government waste a lot of money we pay in taxes, waste some of it, or don't waste very much of it?" "Do you think that quite a few of the people running the government are [1958–72, a little] crooked, not

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very many are [crooked], or do you think hardly any of them are crooked [1958–72, at all]?” Available at www.umich.edu/~nes/nesguide/toptable/tab5a_5.htm.

18. Buckley at 92.

19. The CFI Task Force posits competition as a purpose of the presidential public funding system. CFI Task Force, p. 3. Since my interpretation of both public discussion and competition focuses on candidate entry into elections, the two criteria are similar if not identical.

20. Ibid., p. 28.

21. See Kenneth Jost, “Campaign Finance Reform,” *CQ Researcher* 5, no. 6 (February 9, 1996), available at <http://library.cqpress.com/cqresearcher/document.php?id=cqresrr19960209&type=hitlist&num=3&>.

22. George Wallace financed his campaign largely through small donations. See Dan T. Carter, “From George Wallace to Newt Gingrich: Race in the Conservative Counterrevolution, 1963–1994,” in *Walter Lynwood Fleming Lectures in Southern History* (Baton Rouge: Louisiana State University Press, 1996), p. 11.

23. See appendix for a comprehensive list of the candidates who have received public funding since 1976.

24. Data on presidential primary candidates comes from John L. Moore, Jon P. Preimesberger, and David R. Tarr, eds., *Congressional Quarterly’s Guide to U.S. Elections*, vol. 1 (Washington, DC: Congressional Quarterly, 2001), pp. 339–410.

25. L. Sandy Maisel, *Parties and Elections in America: The Electoral Process*, 3rd ed. (New York: Rowman and Littlefield, 2002), pp. 266–67.

26. Van Doren used two models in his analysis. In the first, the total number of primary candidates who received more than 1 percent of the vote from 1948 through 2002 was estimated as a function of a constant, a time counter, and a dummy variable for 1976, the year in which public financing of primaries started. The coefficients on neither the time counter nor the 1976 dummy were different from zero with 95 percent confidence. In the second model, the total number of candidates was estimated as a function of the time counter interacted with the 1976 dummy so that the value of the variable was zero before 1976 and a time counter after 1976. The coefficient on this variable was different from zero and negative with greater than 99 percent confidence. The results are consistent with an interpretation that the introduction of public financing (or whatever else happened in 1976) did not increase and may have decreased entry by candidates. Regression results available upon request from the author at the Cato Institute.

27. On causality and scientific inference, see Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry* (Princeton, NJ: Princeton University Press, 1994), ch. 3.

28. See “Solid Fund-Raising by Lyndon LaRouche,” unsigned editorial, *New York Times*, May 3, 2003, p. 16.

29. See the press release, available at <http://larouchein2004.net/pages/pressreleases/2003/030707synarchist.htm>. The nature of LaRouche’s outlook may be discerned from his official biography, available at www.larouchepub.com/resume.html.

30. The actual total is \$5,581,179.28 in 2002 dollars. See appendix. All subsequent dollars figures are in 2002 dollars.

31. On Fulani’s political views and background, see David Grann, “Coming Soon to a Presidential Campaign Near You,” *New Republic*, December 13, 1999, p. 20. There were allegations that some of the presidential funding was embezzled.

32. Hagelin's general outlook is available at www.natural-law.org. Perhaps not surprising, the Natural Law Party supports public funding along with requiring the television networks "to sponsor equal coverage of all qualified candidates during the election season." See Hagelin's statement to the Campaign Finance Institute on January 31, 2003, available at www.natural-law.org/testimony/index.html.

33. Bob Park, "Applied Physics: Hagelin Offers to End Violence in Kosovo," American Physical Society, April 9, 1999, available at www.aps.org/WN/WN99/wn040999.html#3.

34. I would like to thank the staff of the Federal Election Commission for assistance in compiling the data in this paragraph.

35. Candice J. Nelson, "Spending in the 2000 Election," in *Financing the 2000 Election*, ed. David B. Magleby (Washington, DC: Brookings Institution Press, 2002), p. 35. Another survey found that 10 percent of Americans contribute to campaigns. See Ansolabehere, Figueiredo, and Snyder, "Why Is There So Little Money in U.S. Politics?" p. 108.

36. See CFI Task Force, p. xvii; and Anthony Corrado, *Paying for Presidents: Public Financing in National Elections* (New York: Twentieth Century Fund Press, 1993), p. 18.

37. Federal Election Commission, *The Presidential Public Funding Program* (Washington: Federal Election Commission, April 1993), ch. 5, available at www.fec.gov/info/pfund.htm.

38. Michael J. Malbin and Thomas L. Gais, *The Day after Reform: Sobering Campaign Finance Lessons from the American States* (Albany, NY: Rockefeller Institute Press, 1998), pp. 68, 70, and Figure 4-1.

39. William G. Mayer, "Public Attitudes on Campaign Finance," in *A User's Guide to Campaign Finance Reform*, ed. Gerald C. Lubenow (Lanham, MD: Rowman and Littlefield, 2001), pp. 59-61.

40. Scott Thomas, "Better Presidential Campaigns for Only \$2 More," *New York Times*, July 1, 2003, p. 23.

41. In 1997, 78 percent of respondents thought public financing of political campaigns "would cost taxpayers too much money." See CBS News, New York Times poll, April 2-5, 1997, 1,347 participants, available at the Roper Center, Accession number 0276553.

42. CFI Task Force, pp. 54-55.

43. Michael Toner, "Reforming Campaign Finance," *Washington Post*, July 6, 2003, p. B7.

44. Peter L. Francia and Paul S. Herrnson, "Begging for Bucks," *Campaigns and Elections* (April 2001), p. 51.

45. Corrado, *Paying for Presidents*, pp. 84-85.

46. Nelson, "Spending in the 2000 Election," pp. 28-29.

47. Carolyn B. Thompson and James W. Ware, *The Leadership Genius of George W. Bush: 10 Commonsense Lessons from the Commander in Chief* (New York: Wiley and Sons, 2003), pp. 168-69.

48. On the importance of persuasion, see Richard Neustadt, *Presidential Power and Modern Presidents* (New York: Free Press, 1991); on the value of organizational abilities, see Charles E. Walcott and Karen M. Hult, *Governing the White House: From Hoover to LBJ* (Lawrence, KS: University Press of Kansas, 1995).

49. For a history of proposed spending limits in campaign finance regulation, see Robert E. Mutch, *Campaigns, Congress and Courts: The Making of Federal Campaign Finance Law* (New York: Praeger, 1988), pp. 32-34, 69-70.

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50. Burton A. Abrams and Russell F. Settle, "The Economic Theory of Regulation and the Financing of Presidential Elections," *Journal of Political Economy* 86 (April 1978): 249, Table 2.

51. Charlie Rose, *History of the United States House of Representatives, 1789–1994* (Washington: Government Printing Office, 1994), available at http://clerk.house.gov/histHigh/Congressional_History/partyDiv.php].

52. See the official website of the U.S. Senate for the raw data of those years, available at www.senate.gov/pagelayout/history/one_item_and_tasers/partydiv.htm.

53. University of Michigan Center for Political Studies, National Election Studies, *The NES Guide to Public Opinion and Electoral Behavior, 1995–2000*, Table 5A.5, available at www.umich.edu/~nes/neguide/neguide.htm.

54. See the data on public mood at the website for James A. Stimson, a professor of political science at the University of North Carolina, available at www.unc.edu/~jstimson/; and James A. Stimson, *Public Opinion in America: Moods, Cycles and Swings*, 2nd ed. (Boulder, CO: Westview, 1999).

55. On anticipation of the public mood, see James A. Stimson, Michael B. MacKuen, and Robert S. Erikson, "Dynamic Representation," *American Political Science Review*, 89 (1995): 543–65.

56. Abrams and Settle, "The Economic Theory of Regulation and the Financing of Presidential Elections," p. 251.

57. See the model and specifications in *ibid.*, pp. 253–56.

58. See Corrado, *Paying for Presidents*, p. 64.

59. Marianne Holt, "The Surge in Party Money in Competitive 1998 Congressional Elections," in *Outside Money: Soft Money and Issue Advocacy in the 1998 Congressional Elections*, ed. David B. Magleby (New York: Rowman and Littlefield, 2000), p. 32, Table 2.3.

60. The organization Americans Coming Together has already formed to raise such funds for the Democrats. See Thomas B. Edsall, "Liberals Form Fund to Defeat President," *Washington Post*, August 8, 2003, p. A3.

61. Glenn Justice, "Mix of Donors Adds to Dean Coffers," *New York Times*, October 2, 2003, p. A22.

62. CFI Task Force, p. 8.

63. *Ibid.*, p. 3.

64. For example, the affirmative action policy has long been opposed by majorities and yet persists. See Elaine Sharp, *The Sometime Connection: Public Opinion and Social Policy* (Albany, NY: State University of New York Press, 1999), ch. 3.

11. Are Matching Funds Only “For Losers”? A Post-2004 Vision for a Renewed Public Funding System¹

Michael J. Malbin

Let's start with an obvious point: the partial public funding system for presidential nominating campaigns is in big trouble. The question is whether it should be revived or taken off life support. George W. Bush and John Kerry refused matching funds in the 2004 primaries so they would not have to stay within the \$50 million spending limit that comes along with the money. Then, each raised more than four times \$50 million in private funds by the time of their party conventions. No wonder one columnist could say on the eve of the New Hampshire primary: “Matching funds are for losers.”² In one respect, the columnist was surely right: public money means more for underdogs than frontrunners. We need to ask whether on balance this is—or, with change to the system, can be—good for the country.

Before the 2004 primaries the Campaign Finance Institute (2003)—a bipartisan research institute affiliated with George Washington University—appointed a task force to consider this issue. Far from being a stacked deck chosen to represent predetermined positions, the task force included former Republican and Democratic National Committee chairs (William Brock and Charles Manatt, respectively), the current Secretary of State of Ohio (J. Kenneth Blackwell, a conservative Republican), and a prominent social conservative who has been active in presidential primary campaigns of Republicans from Ronald Reagan through Gary Bauer (Jeffrey Bell). Joining them was a distinguished group of experienced Republican, Democratic, and third-party campaign professionals, political scientists, current and former state campaign finance officials, and members with citizens' group experience. The task force also commissioned additional scholars to conduct a thorough analysis of past presidential contribution data, which CFI continued through 2004. After publishing its

conclusions, Vin Weber, Gary Bauer, Leon Panetta, Michael Dukakis, George McGovern, Patricia Schroeder, and the late Paul Simon all endorsed the general thrust of the task force's unanimous findings and recommendations. Following is a summary of the CFI Task Force's recommendations (Box 11.1).

Box 11.1

CFI Task Force Recommendations

The following recommendations are from *Participation, Competition, Empowerment: How to Revive and Improve Public Funding for Presidential Nomination Politics*, the 2003 Report of the Campaign Finance Institute's Task Force on Presidential Nomination Financing. The list only includes the report's main recommendations for presidential candidates. Additional topics cover national party conventions, third party and independent candidates, and political contribution tax credits.

- **Revive and improve the public funding system.** The voluntary matching fund system for presidential candidates is worth saving but needs to be changed.
- **Increase the spending limit.** The prenomination spending limit for candidates who accept public funds should be the same as the general election limit (about \$75 million in 2004).
- **Spending limit escape hatch.** A publicly funded candidate should be able, without losing public funding, to raise and spend as much as an opponent who opts out of the public funding system. (That is, the spending limits apply only if everyone in the same party participates.)
- **Change the matching fund formula to focus on small donors.** To enhance the role of small donors, the government should give qualified candidates a three-for-one match for the first \$100 a candidate raises from every donor, instead of the current one-for-one match for the first \$250.
- **Control costs with caps.** The main purpose of public funding is to enhance competition. To ensure that limited funds concentrate on this goal while controlling costs, there should be a limit on the amount of public funds for any one candidate. (The recommendation in 2003 was for a \$20 million cap.)

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- **Earlier funding.** To help candidates with early money, which is the most important money for competition, qualified candidates should be able to draw public funds early instead of waiting until January 1.
- **Increase the income tax checkoff and index it for inflation.** The only money in the Presidential Election Campaign Fund comes from the voluntary checkoff on the federal income tax form. To pay for the modest increase in costs of a three-for-one matching fund, the checkoff should go up from the present \$3 (\$6 for joint filers) to \$5 (\$10 for joint filers) and be indexed for inflation. (The checkoff is not indexed, even though costs are.)

Members of the 2003 CFI Task Force on Presidential Nomination Financing: Jeffrey Bell, J. Kenneth Blackwell, William E. Brock, Becky Cain, Anthony Corrado, Carol Darr, Richard Davis, Donald J. Foley, Ruth S. Jones, Michael. J. Malbin, Charles T. Mannatt, Ross Clayton Mulford, Phil Noble.

The task force was able to reach unanimity in part because it stepped outside of the set of arguments that have come to dominate campaign finance debates in recent years. Those debates have tended to focus on regulations or constraints. Specifically, the years-long debate over the McCain-Feingold bill was about whether (1) limits should apply to all contributions to national political parties, and (2) whether previous bans on using corporate or labor treasury funds for federal election activities should extend to "electioneering" advertising during a specified period before an election. Whatever one's position on the merits of those questions, partial public financing for presidential primary candidates raises fundamentally different kinds of issues. Under current rules—which as interpreted so far during the 2004 election include unlimited independent spending by the parties—a policy decision about whether to continue a matching fund program is not at its core about restraint or regulation. It is about whether the public's money is money well spent. Do (or can) matching funds add something important to presidential election politics?

Why Public Matching Funds?

An American presidential election may be the single most important election in the world. It certainly is the most important in the United States. This point was well understood at the Constitutional Convention. After the nation-state and representational concerns leading to the "Great Compromise," no issue preoccupied the 1787 delegates as much as presidential selection. The delegates wanted the president to be a leader—someone who would be up to the job they thought a president would have to do—and not a mere clerk. After a lot of talk and ingenuity, they came to a complex solution under which the Electoral College would vote first and the House of Representatives would hold a runoff if needed. The mechanism, which had flaws, tried to combine democratic input with peer review by political leaders. The leaders' review was included because the Framers thought a candidate's peers would be in the best position to judge whether a potential president was competent and had a sound character.^{3,4} Judging competence and character remain among the most important matters for voters today.

Presidential selection has changed a lot over 200 years. The post-1968 growth of primaries shoved peer review into the background because primaries came to displace the role of party leaders in choosing nominees. Then came the "front-loaded" primary calendar, which since 1988 has had most convention delegates chosen within weeks of the first primary. Compressing the process has put deliberation by the voters at severe risk.⁵ Early primaries are crowded, multi-candidate races. Voters have to sort out an incredible amount of information about candidates who wear the same party label and who, in many ways, may be more alike than they are different. In fact, the typical voter absorbs little information about the primary candidates until Super Tuesday, but the selection essentially is over by then.⁶

The calendar has put enormous strains on candidates as well as on voters. After spending an inordinate amount of time in Iowa and New Hampshire, the campaign season becomes compressed into a blur of state primaries leading within six weeks to the multiple, and probably decisive, primaries of Super Tuesday. A candidate who might once have cultivated voters in a sequence of states, spread over months, must now fly from state to state frantically, barely visiting the main cities. To get their messages across to voters, candidates have to rely on the media. But there is less free media coverage

today than there used to be of the content of candidates' positions and statements.⁷ As a result, the messages have to be carried by advertising, the cost of which has escalated. Front-loading therefore has contributed to an increase in early campaign costs in a way never contemplated by the 1974 campaign finance law. The leading candidates need to spend more to be heard, and they tend to spend whatever they can to win the nomination, months before the national nominating convention.

The new process gives a huge advantage to candidates who can raise a lot of money early. In 1976, the first election under the current campaign finance system, Jimmy Carter would do well in Iowa and New Hampshire and still have enough time to capitalize on the early wins by raising more money to run in the later states. He did not wrap up his victory that year until late June. That does not work any more. Candidates have to raise almost enough by the first primary in January to keep running until the effective end of the process in early March.

Some critics of public funding view it in isolation as just another form of intrusive regulation that should disappear. But doing away with public funding would not deregulate the rest of the system, let alone produce a classic market. The presidential selection process is highly structured and sequenced by state laws. Rather than facing a free market in which the consumers (voters) have the information and time they need to make a decision among competing products, the state laws create an artificial market in which the sellers (candidates) are favored (unintentionally) by law, for reasons that have little to do with the quality of the product they offer. Specifically, the national primary calendar (set through the separate actions of 50 state legislatures) combined with the cost of modern communications, favors rich, well-connected, or front-running candidates.

True, being rich and well-connected is not *incompatible* with being a good president. I would even be willing, for the sake of argument, to agree with John Samples, who sees fundraising as one test of a president's coalition building skills (see Samples' article on the presidential system in chapter 10 of this volume). But it is not the *only* test; it does not begin to probe the full range of the skills needed for campaigning, let alone governing. In fact—consider Abraham Lincoln—the person with the best qualities in any given year could well be neither rich nor well connected.

To answer whether some kind of public assistance to candidates is helpful, therefore, we should ask: what kind of candidates are likely to be able to raise enough early money to win in a front-loaded system, strictly from private sources? Over the past 30 years, the only candidates who have been able to break free from public funding have been

- Rich candidates who were willing to invest personal funds (Ross Perot, Steve Forbes and, in part, John Kerry),
- A factional candidate with an intense following on an emotional issue (Howard Dean), and
- A well-connected front-runner, strongly favored by his party's establishment (George W. Bush).

Without public funding, it is hard to imagine the campaigns of candidates who meet none of these conditions—such as John Edwards, Wesley Clark, Richard Gephardt, and Joseph Lieberman in 2004, John McCain in 2000, and many others before—surviving much beyond New Hampshire to keep going through February. I am not suggesting that any of these candidates should have been president. I am saying that the public deserved to make that choice. And neither 2000 nor 2004 was an anomaly. Let's start with the first election under the 1974 law and move forward.

Ronald Reagan had only \$43,497 cash on hand at the end of January 1976. The former California governor was an underdog that year. His 1976 campaign was funded by small contributors, as were all of Reagan's three presidential campaigns. His opponent, the incumbent President Gerald Ford, had 15 times as much in the bank as Reagan did on January 31. If the challenger's campaign had not received \$1 million in public money in January, and another \$1.2 million in February, he could not have continued. The public fund saved Reagan again later in the campaign: Reagan had \$107,000 in cash at the end of March, before an infusion of public money, at a time when Ford had \$1 million in the bank. The 1976 Republican nomination was not settled until a week before the convention in August. If the campaign had ended in January or February—which would have happened without public money—Ronald Reagan probably would not have been elected president in 1980.

Reagan is the most dramatic example of an underdog whose campaign needed public money, but there have been others every year.

- Jimmy Carter had \$42,000 in cash at the end of 1975. He was in debt at the end of March and again in May 1976.
- George Herbert Walker Bush was down to his last \$75,000 on December 31, 1979, at a time when Reagan had seven times as much cash on hand.
- Gary Hart had about \$2,200 at the end of December 1983, \$2,500 in January 1984, and \$3,700 at the end of February. Walter Mondale had \$2.1 million in cash on January 31, 1984—more than 800 times as much as his opponent.
- Jesse Jackson was down to \$5,700 at the end of 1987 at a time when the front-runner, Michael Dukakis, had \$2.1 million.
- Paul Tsongas had \$80,000 in cash on January 31, 1992, compared with Bill Clinton’s \$1.4 million. Republican Pat Buchanan had \$12,000 in cash on the same day, compared with the incumbent President Bush’s \$8.9 million.
- Pat Buchanan managed to have \$101,000 on January 31, 1996, compared with Bob Dole’s \$4.9 million.
- John McCain was comparatively the richest of these underdogs, with \$350,000 in cash on January 31, 2000. His opponent, George W. Bush, had \$20.5 million in cash on the same day, spent down from \$31 million the previous month.

In each of these cases, the “money primary” could have settled the race early, before the voters made a decision. Instead, public money helped these underdogs to pick up their campaigns from the bottom and bring their respective cases before the voters. All of them—after their financial low points—garnered significant public support, testing the front-runners, until the voters, and not just the donors, could make their decisions.

In an essay on the presidential system in chapter 5 of this volume, John Samples said there was no evidence that public funding helped competition because, since 1948, as many candidates entered the race in the years before public funding as after. But this is not a serious test of competition. The health of a presidential selection process is not measured by the number of people who are willing to dip their toes into the water.

The key policy questions are, first, whether candidates who potentially have the competence and character to be president may need public funds to be heard by the voters in today’s political context

(not the context before the expansion of primaries and front-loading) and, second, whether the public is well served by hearing those candidates. Every one of the candidates listed earlier—from Ronald Reagan and Jimmy Carter through John McCain and John Edwards—needed public funds to stay in the race until the decisive primaries. In each of these examples, I would argue that the public was well served by the candidate's ability to keep going. For three of them (Carter, Reagan, and the elder Bush) public money kept alive the hopes of candidates who later became presidents. In every case, either the eventual winner became stronger by being tested, or the public learned something important about the front-runner because of that test. Every year, the public came away from that test as a winner. It is perfectly appropriate, therefore, to use federal resources to keep the race going for a while, so otherwise qualified candidates will have a chance to be heard and judged. If this means that some public money is "wasted" on candidates who would not be good presidents, so be it. That is a small price for so important a decision.

The Spending Limit Trap

Of course, a general argument for public funding without specification would not be enough under current circumstances, because the system is doomed unless it is changed. Dozens of repairs have been suggested but the time for decision may be short. Before settling on any particular proposal, therefore, it would be better to consider why the current system has failed, and to return to the question about the goals a repaired system should most importantly serve.

Skeptics of campaign finance regulation have long argued that spending limits do not and cannot limit all campaign spending. Instead they encourage convoluted evasions of the law. The argument has some merit: under the U.S. Constitution—as interpreted by the Supreme Court consistently since 1976 in *Buckley v. Valeo*—people with the means and will to spend can find ways to do so, as long as they act independently. But there was nothing complicated about what happened during the 2004 primary season. George W. Bush, John Kerry, and Howard Dean simply declined matching funds, freeing themselves to spend whatever they could raise.

The 2004 decisions to reject public funds had their roots in an unrealistic law whose spending limits are too low and too rigid.

Those decisions are not for all candidates, of course: most candidates do not raise enough to come close to the limit. For those candidates, public matching funds are a pure benefit—part of the money they need to launch their campaigns and compete early. But for the last one or two candidates who are left standing after a competitive field has been narrowed in early contests, the limits have been real constraints. Practically every winner since 1980 has spent nearly 100 percent of the limit. More tellingly, in the seven elections under the system, six losing candidates spent at least 90 percent of the limit and probably could have spent more.

Despite these constraints, most candidates until recent years stayed within the system. They judged the public money to have been worth accepting the limit, calculating that as long as all candidates played by the same rules, the ones who made it to the end would all more or less be in the same boat. They all would be struggling, looking for free media coverage, and looking for tactical advantages. But however much they might strain against the limits, the candidates for the most part had to run against only those opponents who were also operating within the same boundaries.

Two recent developments, however, have made the limits much more problematic for candidates than they once were. The first is the front-loaded schedule, mentioned earlier, which forces candidates to run a national campaign early. Second, 1996 was the first year in which a serious contender for the nomination decided to forgo public funding and exceed the spending limits, producing a huge escalation in the risks for a candidate who stayed inside. That year, the Republican front-runner, Bob Dole, accepted public funds. Steve Forbes, one of his opponents, was a self-financed multimillionaire who chose not to be bound by the spending limits. By the time Dole had clinched the Republican nomination toward the end of March, he had used almost his full spending limit. But because of the compressed primary season, Dole then now faced a new problem. The nomination contest may have been over in practical terms but not legally. Meanwhile President Clinton, unopposed for his nomination, could now spend his primary money and run what amounted to a general election campaign, while Dole had to stay within his already spent limit.

In July 1999 George W. Bush—faced with the knowledge that he could also be running against the self-financed Forbes in the

Republican primaries as well as an incumbent Vice-President in the general election—announced that he would opt out of public funding. Referring to Dole's experience, the Texas governor said, "I'm mindful of what happened in 1996 and I'm not going to let it happen to me."⁸ By avoiding spending limits, Bush ended up spending almost twice as much as a publicly funded candidate.

Meanwhile, the public funding system proved crucial to the front-runner's principal challenger, who turned out to be—once voters had a say—Senator McCain, and not Forbes. McCain ultimately lost to Bush during the first week of March and withdrew from the race. However, even if McCain had done better with the voters in early March, he still would not have been able to continue because he had already spent as much money as the limits allowed. McCain had made something of a Faustian bargain. In return for the milk that nurtured his insurgent campaign in January and February, he had to limit himself to a diet that would starve the campaign by mid-March. The system offered him no escape, even though he was running against a candidate whose spending was not limited.

In many ways 2004 was a repetition, with candidates looking over their shoulders as they made their decisions. President Bush looked at his own success and announced early that he would not use public funds during the primary. Howard Dean, stunned as most were by his Internet fundraising success, cited the president's decision as he followed suit. John Kerry then cited Dean as he made the same choice. Kerry's decision was not only about spending limits: by rejecting public funds he also freed himself from a self-financing restriction, which let him mortgage his house and save his nearly bankrupt campaign before the Iowa caucuses. The infusion of money from a wealthy candidate's mortgage thus played the same role that public money played for less wealthy non-front-runners in past elections.

Recommendations, Objections, and Responses

These stories carry compelling lessons for future candidates and their campaign managers. Candidates who are weighing their risks under the current rules have to worry that the current spending limits could mean their defeat. This is absurd on its face: a voluntary system cannot remain relevant if staying in is equivalent to suicide.

Fortunately, there is a simple two-step solution. First, raise the spending limit: CFI's Task Force concluded that the limit should be the same for the prenomination period as it is for the general election. This would have upped the inflation-adjusted primary limit from about \$49 million to \$75 million in 2004. But raising the limit is not enough by itself. As an escape, candidates who stay in the system should be allowed to spend as much as someone who gets out. That probably will deter candidates from being the first to get out because there would not be as much of an advantage to doing so. And if deterrence fails, having an escape hatch means that the candidates who stay in the system will not be penalized for doing so.

Three broad questions can be raised about this approach, once one gets beyond the objections to having a system at all.

- Are the limits adequate? John Kerry and George W. Bush each raised more than \$200 million during the prenomination period. How could \$75 million be enough to satisfy a candidate in the future? One answer is that Bush spent "only" \$58 million through March 2000 and Kerry spent \$37 million through March 2004. By then, each had sewed up his party's nomination. Any spending after that was geared toward the general election.
- What about the period between Super Tuesday and the convention? The fact that post-Super Tuesday spending was geared toward the general election does not mean candidates will easily give it up, especially if those candidates will be put at a disadvantage. Suppose all of the candidates in one party were to stay in the system, leaving the winning candidate with a \$75 million limit, but the candidates from the other party were free from the limit. How could the candidate who is bound by the limit avoid being swamped before the convention?

—The answer is, political *parties* can raise and spend all of the money that a presumptive *nominee* could have raised for himself, without limit. (The presumptive nominee can even help raise the party's money, as both did in 2004.) Before the McCain-Feingold bill, parties used soft money to pay for advertising during this "bridge period." When Howard Dean and John Kerry stepped out of the system in late 2003, it looked as if unlimited party spending might not be possible under the new law. However, the Supreme Court's decision

in *McConnell v. FEC*, which upheld the law's ban on raising soft money, also reaffirmed the right of political parties to make *unlimited independent hard money expenditures* in support of their candidates. While some legal questions about independent party spending in a presidential campaign may still have to be resolved, this vehicle would satisfy any concern about a publicly funded candidate being shut out of the dialogue after effectively wrapping up a party's nomination.

- Why have any spending limits at all? The CFI Task Force considered recommending public money for qualified candidates, without requiring participating candidates to accept a spending limit—the proverbial floor without a ceiling. In the end, it concluded that a candidate who could raise \$75 million without public funds did not need public funds to be heard. Because the main goals were to promote voice, and competition, and because the amount of money available was limited, the task force saw no need to subsidize candidates who did not need the money.

Empowering Small Donors through Matching Funds

Increasing the spending limit and providing candidates with an escape hatch would take care of the two biggest problems undermining the present system. Nevertheless, that is far from a complete answer about what to do. If the main purpose of the system is to let voters hear and choose their potential presidents, some of the key questions remaining are

- (1) What kind of public funding system—grants or matching funds—would best help to accomplish this goal?
- (2) Toward what other major goals should the system be geared and how?
- (3) How can you control costs and pay the bills?

We shall gloss over the first question here. A case can be made that competition would be well served by giving flat grants to all candidates who pass a qualifying threshold. The problem is that—because a large number of candidates might qualify under any reasonable formula—a lot of money would have to be given to marginal candidates if potentially competitive ones are going to have enough to be heard. Because of this problem, matching funds have proved

Table 11.1
PERCENTAGE OF CANDIDATES' FUNDS FROM LARGE AND SMALL
DONORS, 2000

	Percent of Candidates' Individual Contributions That Came from \$1,000 Donors	Percent of Candidates' Individual Contributions That Came from Donors of \$200 or Less
Al Gore	63	18
Bill Bradley	66	13
George W. Bush	72	10
John McCain	48	27

SOURCE: Campaign Finance Institute 2003.

themselves reasonable for distributing benefits fairly in a multi-candidate field. Matching funds also, by definition, do a better job stimulating participation by private contributors, to which we now turn.

One stated goal of the public funding system in 1974 was to enhance the role of small donors. In this respect, the system has not been successful. While the overwhelming majority of private contributors to presidential primary candidates give \$100 or less to any one candidate (about 600,000 of the approximately 800,000 individuals who gave in 2000), the bulk of the private money has come from large donors. Table 11.1 shows the distribution of individual receipts for the four leading candidates in 2000.

In other words, even though most of the people who gave any money at all in 2000 were small donors, the money from these people represented only a small part of each candidate's total receipts. Because of low participation rates, the people who gave \$50 (the average for small donors) simply could not overcome the 20 times greater value of a \$1,000 check.

The number of donors who gave any amount to a presidential candidate in 2000 were less than one-quarter of one percent of the voting age population. As a result, the bulk of the money in 2000 (and most other presidential elections of recent memory) came from the extremely small slice of people (slightly more than 100,000 people in the entire country) who gave \$1,000 contributions. And while the

next fact may not settle all of the policy arguments, it is well known that these donors are not remotely a cross-section of America. According to the best academic survey of presidential donors to date, a full 35 percent of the \$1,000 donors, and 14 percent of the \$200–999 donors, have incomes of more than \$500,000 a year. In contrast, only 1 percent of donors who gave less than \$200, less than 1 percent of the general public, and less than 1 percent of those who designated some of their income tax money for the Presidential Election Campaign Fund, had incomes this high.⁹

Based on the information for 2000, similar numbers for 1996, and a 20-year record of growing dependence on large contributions, the CFI Task Force argued that it would make good sense to use matching funds to increase the relative importance of small donors. We will soon consider whether the argument remains valid after the increase in small contributions that took place in 2004 without help from matching funds. But first, consider the basic recommendation.

Under the current matching fund system, the federal government gives participating candidates a dollar for every dollar they raise (within the spending limit) for up to the first \$250 from every contributor. Under this system, a \$1,000 contribution is worth \$1,250 (including matching funds), while three-quarters of all contributions that averaged about \$50 in 1996 and 2000 are worth about \$100 each with the match. The CFI Task Force recommended that the matching fund formula be changed to match the first \$100 from every contributor (instead of the first \$250) on a three-for-one basis (instead of one-for-one). This would have three effects:

- First, *small contributors* would be more likely to give, or increase the amount they give, if candidates could tell them that their \$50 would be worth \$200.
- Second, *candidates* would reorient their fundraising to give more emphasis to small donors. Combining a multiple match with the Internet would make soliciting for small donors far more cost-effective than it has been in the past.
- Finally, on a *systemwide* level, this change should help tilt the funding balance in favor of small donors, at little extra cost to the U.S. Treasury.

—Specifically, we ran a model assuming the three-for-one match had been in effect with the donor pool of 2000. (We will do

the same for the 2004 donor pool, but have not done so as of this writing for reasons explained later.) We first ran the model assuming no change in the donor pool, and then assuming that the multiple match would increase the yield from the 600,000 under-\$100 donors by 50 percent. (That would happen if 300,000 new donors came into the process—which would only be about one-tenth of one percent of the voting age population—or if previous donors were each to give only \$25 more, or some combination of these two effects.) We thought at the time that the 50 percent assumption was moderate. What actually happened in 2004 shows it to have been very conservative. Under the current rules (including the Bipartisan Campaign Reform Act's higher contribution limits of \$2,000 per donor) the pool of major (\$1,000 +) donors, plus their matching funds, would have provided 333 percent as much money for the candidates as did the pool of small donors. With the system the CFI Task Force recommended, and under its conservative assumptions, the two groups of donors would have provided just equal amounts of money to candidates!

This recommendation and these data do have to confront 2004. As of this writing, CFI has not yet merged contributions from 2004 donors who gave more than once to the same candidate. Therefore, the following discussion about 2004 as well as the direct comparisons between 2004 and 2000 are based on the number of *contributions* (not donors) at various levels. Whatever the method, it is clear that the number of small contributions went up substantially, along with the funding totals. The increase was especially strong among candidates who had opted *out* of the public funding system. On the surface, that seems problematic for parts of our argument, but not upon closer inspection.

As of June 30, 2004, presidential candidates had raised two and one-half times as much from individuals, and more than one and one-half times as much from all sources (including public funds) as candidates had raised in 2000.¹⁰

- Of the total amount from individuals, 53 percent came in contributions of \$1,000 or more in 2004, and 32 percent came in amounts of \$200 or less.

- While the percentage of \$1,000-or-more contributions is down only slightly from the 56 percent for 2000, the \$200-or-less amounts are up a significant 8 percentage points, and more than triple the 2000 figure in raw dollars.

When we combine these numbers later in the year to look at contributors, and not contributions, we do expect the \$1,000-and-up figures to increase, while the \$200-or-less figures will decrease. But this will affect both years. Even if preliminary, the comparable, uncombined contributions data show there has been a real change. The question is whether the change should negate the CFI Task Force's previous concern about small donors. The answer—which is no—will become clear if we look at how these numbers developed over the course of the primary season (See Table 11.2).

From these data, it appears that the major participation by small donors came at two different parts of the 2004 cycle in support of three candidates. During the second half of 2003, more than half of Howard Dean's support came from small contributors. His donor base looked like that of previous competitive outsider or factional candidates, such as George McGovern, Ronald Reagan, Jesse Jackson, Pat Robertson, and Pat Buchanan. And like McGovern and Reagan—early users of computerized direct mail—Dean was able to marry an issue-based passion with new fund raising technology. His campaign's creative use of the Internet sharply lowered the cost of organizing a grassroots political organization and finding large numbers of new, small donors. But Dean was the *only* fully competitive candidate to rely on small donors while the 2004 nomination was in doubt.

The second major wave of under-\$200 contributions began *after* Super Tuesday. As of June 30, George W. Bush and John Kerry each had raised more than \$60 million in small contributions. Most of these record-high figures were run up after the nomination was settled and the race had merged into a general election contest. As is obvious from Table 11.2, Kerry's small contributions took a leap in March after the nomination was settled; Bush's grew more steadily during the year.

What have we learned about small contributors from the 2004 election? First, we see that potentially there are many more small contributors than participated in the past. Second, the Internet puts

Table 11.2
LARGE AND SMALL CONTRIBUTIONS DURING THE COURSE OF THE
PRIMARY SEASON, 2003–2004

Cumulative Through	Total Receipts (\$ millions)	Public Funds (\$ millions)	Total from Individuals (\$ millions)	Individual Contributions of \$1,000 or More (percent)	Individual Contributions of \$200 or Less (percent)
George W. Bush					
December 31	132.7	0	129.5	79	15
January 31	145.6	0	142.2	78	16
February 29	159.4	0	155.8	75	17
March 31	185.7	0	181.8	71	20
April 30	201.4	0	197.4	68	22
May 31	214.8	0	210.6	65	25
June 30	228.0	0	223.6	63	27
John Kerry					
December 31	25.3	0	14.3	73	13
January 31	32.9	0	23.6	69	16
February 29	41.4	0	31.5	66	18
March 31	85.6	0	74.9	54	29
April 30	117.1	0	105.9	53	30
May 31	148.5	0	136.6	51	32
June 30	186.2	0	171.2	47	35
Howard Dean					
December 31	41.3	0	41.0	22	56
January 31	47.6	0	47.1	20	58
February 29	41.4	0	31.5	19	59
March 31	52.6	0	51.3	19	59
April 30	52.8	0	51.3	19	59
May 31	52.8	0	51.4	19	60
June 30	52.9	0	51.4	19	60
Other Democrats					
December 31	73.0	0	67.0	66	17
January 31	97.2	19.4	72.8	64	18
February 29	109.0	22.7	78.5	67	20
March 31	115.9	25.3	79.7	62	21
April 30	119.6	25.7	80.0	62	21
May 31	120.9	25.7	80.3	61	21
June 30	121.5	25.3	80.7	61	21
Total for 2004					
December 31	272.3	0	257.0	66	22
January 31	323.4	19.4	285.7	64	23

(continued next page)

Table 2
LARGE AND SMALL CONTRIBUTIONS OVER THE COURSE OF THE
PRIMARY SEASON (*continued*)

Cumulative Through	Total Receipts (\$ millions)	Public Funds (\$ millions)	Total from Individuals (\$ millions)	Individual Contributions 0 \$1,000 or More (%)	Individual Contributions of \$200 or Less (%)
Total for 2004 (cont.)					
February 29	361.5	22.7	316.4	62	25
March 31	439.8	25.3	387.7	59	27
April 30	490.9	25.7	434.6	58	28
May 31	537.0	25.7	478.9	55	30
June 30	588.6	25.3	526.9	53	32
Total for 2000					
December 31	200.3	0	152.6	65	16
January 31	232.8	35.9	166.7	62	18
February 29	263.7	39.2	108.4	59	21
March 31	288.3	44.8	194.7	57	23
April 30	311.3	49.8	200.5	57	23
May 31	331.0	51.1	205.8	56	21
June 30	338.8	52.4	211.4	56	24

SOURCES: Campaign Finance Institute, 2003, Notes 9–15.

a tool in the candidates' (and others') hands to help find those donors more cheaply. And third, we know something about two kinds of candidates who are able to use the Internet to get money from small donors. One was a high-intensity candidate riding an emotional issue. The other two were running in a simplified two-candidate general election race in the country's highest visibility election. Although the Internet is promising, there is no reason to believe from the evidence of this election to believe that without something like a revised matching fund system, most candidates will be able in 2007 to unlock the key to small contributions in time to pay for what is still likely to be a front-loaded set of primaries in 2008.

Controlling Costs with a Matching Fund Cap

One aspect of the 2004 election should give us pause. Two candidates opted out of the system on the Democratic side. Suppose CFI's recommended rules had been in place? The remaining Democratic

candidates could have stayed inside the system, getting a three-for-one match for small contributions, and been exempt from the spending limit. There is a risk that this would mean unpredictable costs and therefore could break the bank. To prevent this, the CFI Task Force recommended that no candidate should get more than \$20 million in public funds. This year's experience might call for revisiting how high the ceiling should be, but the two premises underlying the recommendation are sound. First, some kind of limit is needed to make sure costs do not get out of hand. We have argued that matching funds are a worthwhile use of taxpayers' money, but the amount of money needs to be kept under control. Second, the most important public money for a candidate is early money. If it came down to a choice between giving more money to established candidates late, or increasing the multiple match early—maybe with a four-to-one formula instead of three-to-one—the task force was more interested in stimulating small donors early.

The Tax Checkoff and Public Support

We briefly acknowledge a few subjects that could easily be given more complete treatment. The recommendation to institute a three-for-one matching fund for small contributions would cost more money than the present system. That means revenues have to be faced as well as expenditures.

The present system is supported entirely by people designating a portion of their income taxes (\$3 for individuals and \$6 for a joint filers) for the Presidential Election Campaign Fund. The fund also pays for the grants to general election candidates for the presidency (\$75 to each major party candidate in 2004) and \$15 million each for the Republican and Democratic National Party Conventions. In recent years, the fund has come perilously close to running out of money. It surely cannot take on a new expense, however modest, without generating more money.

The matching fund would not take a lot of money. The original checkoff of the early 1970s was for \$1 (\$2 for joint filers). Congress increased that amount to \$3 (\$6 for joint filers) in 1993, which was *not* enough to make up for the cost-of-living increase since 1974. The lack of an inflation adjustment has built a structural deficit into the system, because spending *is* adjusted for inflation under the law. The CFI Task Force recommended that the checkoff be increased to

\$5 (\$10 for joint filers) and then be adjusted for inflation. That amount is about equal to what the checkoff would have yielded if it had been indexed from the beginning: the \$1 checkoff, originating with the Revenue Act of 1971 (Public Law 92-178), would have been worth \$4.68 in 2004 and presumably more by the time a new law is passed. That would be more than enough to pay for a three-for-one match for each donor's first \$100, as long as the costs were controlled with an appropriate cap. (For detailed estimates, see Campaign Finance Institute 2003, 36–37, 54–55.)

A second reason for the fund's shortage has received more publicity than the inflation issue: a decline of participation among taxpayers. During the late 1970s and early 1980s, about 27 to 28 percent of all tax returns had the appropriate box checked. More recently the figure has been closer to 11 percent. The decline is significant and important. The questions are what to make of it, and what to do about it.

Some opponents of public funding present the 11 percent figure as if it confirms what they see as a succession of negative public opinion polls about public funding. (For example, see Samples' article on the presidential system in chapter 10 of this volume.) We should get the point about public opinion polls out of the way first, before discussing the checkoff directly. In our view, most of the claims about negative public opinion findings are based on a selective use of surveys. A comprehensive CFI review of post-1990 surveys on public funding show a mixed picture, with results highly dependent on question wording as well as political context.¹¹ Generally speaking,

- Questions that are relatively neutral and that describe the financing system and actual or proposed funding rules (including contribution and spending limits) in nonjudgmental terms get support for a public financing system in the 50 to 65 percent range.
- Questions that refer to "public financing" without mentioning spending limits get support of about 40 percent.
- Questions that prime the answers with words such as "special interests" evoke 60 to 70 percent support.
- Questions that describe the program as using "taxpayer dollars to pay for political campaigns" get about 20 percent support.

During all of that time, only one survey asked specifically about matching funds for presidential primary candidates. In response to a question included in a presidential preference poll by the *Los Angeles Times* in November 1999, 49 percent approved of candidates receiving matching funds, 42 percent disapproved, and the remainder had no opinion.

So if public opinion is ambiguous, what explains the declining use of the checkoff? In some respects, one should be impressed that almost 15 million filers do check the box at all. Consider the following:

- The high point for the checkoff came in the years immediately after the 1974 law was passed, when many taxpayers had strong personal memories about Watergate and the other circumstances surrounding the law's passage.
- About one-fourth of the voting age (18-and-older) population was not even born at the time of Watergate. These people can rely on only contemporary information sources to learn about the checkoff.
- About one-fourth of all tax filers today (but not before the tax reforms that began in the mid-1980s) owe no federal income taxes, and only those who owe taxes are eligible to earmark \$3 for the fund. These ineligible filers are included in the denominator showing lower participation.
- An increasing number of tax filers use either accountants or personal computer programs to help file their taxes. The leading personal and professional accounting software programs either default to "no" on the checkoff question or describe the checkoff as a "contribution," thus implying (inaccurately) that the \$3 might be in addition to the filer's tax liability. This problem applies to many of the computer-generated fill-in information forms professional accountants send to their clients, as well as to the computer programs used by self-filers.
- In the face of this annual disinformation, and filers who are new to the tax system every year, the Federal Election Commission has done virtually nothing during the program's 30-year history to publicize the tax checkoff, with the exception of one very limited round of public service announcements in 1991-92.

Despite these problems, more than 10 times the number of people still check off the box on their tax forms as contribute directly to a

presidential candidate. That number would surely grow if the FEC were to conduct a significant public education effort. But that is not likely to happen if the FEC has to take the money out of its budget, on its own initiative. Therefore, Congress should authorize the FEC to use a prudent percentage of the money in the Presidential Election Campaign Fund to promote the checkoff.

Conclusion

The state of public opinion cannot settle whether to revive and improve the presidential matching fund. And a supposed lack of money is no excuse. The money is readily available, which means the policy issue will have to be settled with answers to more basic questions. We have argued that a properly revised matching fund will

- Improve participation by small donors,
- Help sustain competition through the early primaries,
- Help strengthen the voters' knowledge of and ability to choose among competing candidates, some of whom might not have the personal wealth or moneyed backers to sustain their candidacies without public support, and
- Ultimately—by leaving the competition open to underdogs who may not win the “money primary,” but who may possess the necessary qualities of potential presidents—be likely to produce better quality presidents than the same primary system without public funding.

So the choice boils down, as it did in 1787, to two basic issues: first, what election system will help produce a better presidency and, second, what system will help strengthen the ties between citizens and their government? We have argued that a revised matching fund system would serve both of these ends. After these considerations, all other proposals come in a distant third place.

Notes

1. Portions of this article have been adapted from *Participation, Competition, Engagement: How to Revive and Improve Public Funding for Presidential Nomination Politics*, Report of the Campaign Finance Institute Task Force on Presidential Nomination Financing (Campaign Finance Institute 2003).

2. Tod Lindberg, “Dancing Dollars,” *Washington Times*, January 27, 2004.

3. James W. Ceaser, *Presidential Selection: Theory and Development* (Princeton, NJ: Princeton University Press, 1979).

Are Matching Funds Only “For Losers”?

4. Charles C. Thach Jr., *The Creation of the Presidency, 1775–1789* (Baltimore, MD: Johns Hopkins University Press, 1969, originally published 1923).
5. William G. Mayer and Andrew E. Busch, *The Front-Loading Problem in Presidential Nominations* (Washington, DC: Brookings Institution Press, 2003).
6. Thomas E. Patterson, *The Vanishing Voter: Public Involvement in an Age of Uncertainty* (New York: Alfred A. Knopf, 2002).
7. Thomas E. Patterson, *Out of Order* (New York: Random House, 1994).
8. Mike Glover, “Bush Says He’ll Forgo Matching Funds,” *Associated Press*, July 15, 1999.
9. See Wilcox, Clyde, Alexandra Cooper, Peter Francia, John Green, Paul S. Herron, Lynda Powell, Jason Reifler, Mark J. Rozell, and Benjamin A. Webster, “With Limits Raised, Who Will Give More? The Impact of BCRA on Individual Donors,” in *Life After Reform: When the Bipartisan Campaign Reform Act Meets Politics*, ed. by Michael J. Malbin (Lanham, MD: Rowman & Littlefield, 2003); and “Participation, Competition, Engagement: How to Revive and Improve Public Funding for Presidential Nomination Politics,” Report of Campaign Finance Institute Task Force on Presidential Nomination Financing, appendix A.3.1, Campaign Finance Institute, Washington, DC, 2003, available at www.cfinst.org/presidential/index.html.
10. “Democrats Harvested Ten Times As Much in Under-\$200 Donations as in 2000. Bush’s Small Donors Quadrupled But Large Donors Still the Biggest Funders of a Record Haul. Candidates, Parties and 527s Are Geared Up for the Fall” Campaign Finance Institute Press Release with Tables, Campaign Finance Institute, Washington, DC, July 23, 2004, available at <http://www.cfinst.org/pr/072304.html>.
11. Stephen R. Weissman and Ruth A. Hassan, *Public Opinion Polls on Public Financing of Federal Elections, 1972–2000: A Critical Analysis and Proposed Future Directions* (Washington, DC: Campaign Finance Institute, forthcoming).

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12. Taxpayer Financing in Comparative Perspective

Patrick Basham

Government-funded political campaigns are a long-standing tradition in many countries. Countries with some level of government funding include Australia, Canada, Germany, and Japan. In several European nations, government funding dominates the respective political systems.¹ The United Kingdom is one of many countries with partial, yet significant, government funding. According to political scientist Scott Bennett, an expert on political parties, in the UK and elsewhere, "Public funding is seen as reducing the scope for private interests to 'buy influence,' and also helping reinforce limits on spending."²

In the United States, self-described campaign finance reformers believe that a fundamentally new campaign framework is needed to meet the needs of contemporary American politics, to instill public confidence in the political future, and to bring the political system into line with the best practices in the other mature democracies.³ As they generally favor increased government regulation of campaign finance, most reformers idealize a particular campaign environment. This political nirvana is distinguished by strict spending limits on parties, candidates, and independent groups; "free" television and radio advertising; and inexpensive, short campaigns. In this reformers' paradise, elections are envisioned to be fairly contested, highly competitive affairs between evenly matched partisans. Campaigns are driven by policies, not personalities. Negative campaigning is vanquished from the airwaves. Consequently, an informed and engaged citizenry surges to the polls.

That is certainly the reformers' dream. For the reality, we need look no further than the UK, which provides us with a revealing comparative case study in highly regulated, government-funded politics. British journalist Julian Glover notes that "British politics is still relatively low cost, especially compared with the U.S."⁴ Further,

political scientist Harold D. Clarke and his colleagues remind us that "Particularly arresting, and in sharp contrast to the American experience, is the image of voters streaming to the polls in periodic general elections."⁵ For more than a century, American political scientists have gazed longingly across the Atlantic at the British political system.⁶ The British tradition of the "Responsible Party" model of electoral politics has long been the ideal against which the American political system is measured.⁷

The most prominent advocates of the view that strong parties are essential to democracy were Woodrow Wilson⁸ and E. E. Schattschneider.⁹ From their vantage points across the Atlantic, these distinguished American academics clearly envied the "Westminster Model" of responsible party government.¹⁰ Responsible party advocates viewed the Westminster model as subordinating a party's electoral function to its ideological function, unlike the American situation whose emphasis is on a party's electoral function and, therefore, partisan activity is geared to the electoral cycle. In its critics' opinion, the latter constituted "a peculiarly American brand of politics, one already 'decentered,' at least in European terms, more pragmatic than programmatic."¹¹ According to the responsible party model, political parties form because groups of ideologically like-minded people seek power to execute their favored policy programs. Normally, this model is founded upon a class-based system. In Britain, for example, the Conservative Party represented the owners of capital and the Labor Party represented the working class.

The responsible party model calls for centralized, well-disciplined political parties, each of which take clear, principled policy stands, substantially different from each other, so that voters have real grounds for choice between them. In the words of former American presidential contender Barry Goldwater, voters are offered "a choice, not an echo." (This was the campaign slogan for Goldwater's 1964 bid.) Voters then choose the party whose policies are closer to their own views. The winning party, it is argued, possesses a policy mandate to govern.

Such envy notwithstanding, the British election process is hardly utopian. On the contrary, as this chapter details, it is a grossly overregulated affair that offers no solution to the problems, real and imagined, experienced by the United States.

British Campaign Finance Regulation

As political scientist Karl-Heinz Nassmacher, an expert on political regulations, observes, "Electoral systems based on single-member constituencies have made the political culture of the countries in the Anglo-Saxon orbit predominantly campaign-oriented. In these countries, the term 'political finance' is virtually synonymous with 'campaign finance'—money spent in order to influence the outcome of an election."¹² Campaign finance plays a particularly important role for British parties, as British campaigns (unlike American campaigns) are run mainly by these organizations.

The UK currently has a mixed system of government and private funding for parties and campaigns. In the UK, direct government funding was first seriously mooted in the 1970s when the Houghton Committee recommended to the British parliament that the state become the dominant funder of political activity. Over the past three decades, British politics has gradually crept toward a system of direct government funding. Michael Pinto-Duschinsky, the leading scholar of British party funding, categorizes the evolution of British political finance as "public funding by stealth."¹³

Full-scale direct government funding of British politics may occur in time for the next general election, expected during 2005. Prime Minister Tony Blair's Labor government seeks to preempt more alleged cash-for-votes scandals, and many individual contributors and corporations dislike the intense media attention that attaches itself to large individual publicly disclosed donations.¹⁴ The debate surrounding these donations to both the Labor and the Conservative parties has stimulated new calls from within the political class for massive direct government funding.

The *Representation of the People Act* of 1983 is the principal legislation detailing British electoral procedure. This legislation is a consolidation of laws dating back to the *Illegal and Corrupt Practices (Prevention) Act* of 1883, which became the mother of political finance regulation for English-speaking democracies around the world. British journalist Melanie Phillips reminds us that "British politics in the 18th and early 19th centuries was corrupt. MPs were enmeshed with networks of producer interests, nepotism raged and peerages were dished out as rewards for services rendered. The Victorians cleaned up and set standards of public life that lasted until the 1960s."¹⁵ At the time, general elections were fought largely at the

district level and the overriding concern was ending the practice of wealthy candidates buying their constituents' votes.¹⁶

The 1983 Act maintained the 1883 Act's provisions limiting campaign spending by parliamentary candidates but not by the national parties. Spending by independent "third parties," that is, individuals or organizations other than candidates or parties, was also very tightly controlled and constrained. Regulations governing campaign contributions were first introduced in February 2001 following the enactment of the *Political Parties, Elections, and Referendums Act*.

After taking power in 1997, the new Labor government asked the Parliamentary Committee on Standards in Public Life (known as the Neill Committee) to recommend campaign finance reforms. The committee published its recommendations in October 1998,¹⁷ most of which found their way into the new legislation. *PPERA* fulfilled Labor's election platform commitment to examine the nature and sources of party funding. As one senior Labor cabinet minister saw it, "The Government was elected in May 1997 committed to cleaning up British politics and to ensuring that the way political parties were funded was open and transparent."¹⁸ *PPERA* revolutionized British party funding by introducing new rules on party fundraising and spending. The regulations governing contributions to British parties are now among the most stringent in the world. The act's main reform was to introduce, for the first time, a limit on overall spending by the parties on their campaigns.

Why limit party-level spending as well as district-level spending? According to the Blair government, "spending by or on behalf of candidates now forms only a proportion of what a party spends on contesting an election. Restrictions on candidates' expenses at a constituency level no longer serve as an effective control of what the political parties as a whole spend on fighting elections." The goal, of course, was to penalize the historically richer Conservative Party. The limit for 2001 was set at £15.4 (\$28) million; it will be £20 (\$37) million in 2005.¹⁹ The *PPERA* also established an Electoral Commission to regulate election campaigning along the lines of the U.S. Federal Election Commission. The new rules came into effect in time for the 2001 general election.

Direct and Indirect Government Funding

Although there is a substantial amount of government funding of political activity, the British political system largely does not

Table 12.1
SHORT MONEY, 1999–2000 FINANCIAL YEAR²¹

Party	£
Conservative	3,377,973
Liberal Democrat	1,085,009
Scottish Nationalist	134,643
Welsh Nationalist	61,859
Ulster Unionist	138,749
Democratic Unionist	33,871
Social Democratic & Labor Party	54,111
Total	4,886,215

feature direct cash subsidies from the government to the parties. Instead, the British government transfers significant subsidies-in-kind, the provision of free or below-cost services or facilities for candidates and parties. At the time of the Neill Committee report, the most significant existing political subsidies were the free mailing of candidates' election literature and free airtime for parties' election broadcasts. The Neill Committee also recommended the augmentation of existing arrangements for the direct financial support of political parties.

Currently, Britain's nongoverning parties' day-to-day parliamentary operations are government subsidized. Since 1975, British opposition parties in the House of Commons have received government funds under a scheme known as "Short money."²⁰ The official purpose of Short money is to assist opposition parties in carrying out their parliamentary duties. The money is used to provide research assistance and office staff. A similar arrangement, known as "Cranborne money," has existed in the House of Lords, Parliament's upper chamber, since 1996. As detailed in Table 12.1 and Table 12.2, the Blair government has increased Short money by a factor of 2.7.

The Blair government stopped short of wholesale government funding. Instead, it introduced direct funding for party research and policy development. The government accepted the Neill Committee's recommendation of a "Policy Development Fund" to assist the parties (at least those represented in Parliament by at least two Members of the House of Commons) in the formulation of long-term policy. In 2002, the Electoral Commission took the inaugural

Table 12.2
SHORT MONEY, 1996–1997 FINANCIAL YEAR²²

Party	£
Labor	1,530,191
Liberal Democrat	316,480
Scottish Nationalist	36,782
Welsh Nationalist	22,040
Ulster Unionist	46,357
Democratic Unionist	15,954
Social Democratic & Labor Party	23,134
Total	1,990,938

step toward direct government funding with the administration of an annual £2 (\$3.75) million grant to the seven qualifying parliamentary parties to facilitate policymaking and enhance democratic participation.

This fund supplements the provision of Short money and is distributed among the parties on the basis of the proportion of the vote won at the last general election. This grant, an inaugural step on the path to full government funding, constitutes the first significant government funding of partisan activity outside of the parliamentary context.²³ As Pinto-Duschinsky observes, "Though intended to enable opposition parties to carry out policy research and other functions within Parliament, the allowances undoubtedly operate as a form of indirect subsidy to the extra-parliamentary headquarters of the opposition parties."²⁴ Further, each party receives a large postal subsidy to underwrite their respective partisan propaganda machines.

It is difficult to estimate with absolute precision the value of government subsidies-in-kind to British political parties.²⁵ There are a number of increasingly important sources of government funding. Employing a subsidy dating from 1918, parliamentary candidates send free of charge one piece of direct-mail campaign literature to each elector in their districts. In the 1997 general election, the cost of this free mailing was £20.5 (\$38.3) million. Parliamentary candidates are also entitled to rent halls for rallies or meetings without cost.

Figures for the first quarter of 2003 reveal that the Conservative Party's income was £1.9 (\$3.6) million, of which 53 percent came in the form of direct government funds.²⁶ The Conservatives will receive £16 to £20 (\$30 to \$37) million in such government funding during the course of the current parliament.²⁷ Two smaller parties, the Scottish and Welsh Nationalists, are almost entirely government funded between elections.²⁸ Since 1969, Members of Parliament have received ever-increasing financial allowances to employ research and administrative staff. The governing party also uses government funds to employ an increasing number of "special advisers" to the Prime Minister and to cabinet ministers.

Political Advertising

In stark contrast with the American political system, in the UK paid political advertising on radio or television is prohibited. The traditional argument in favor of the prohibition is that paid advertising would advantage the best-financed candidates and parties and could reduce the campaign to sound bites and slogans. Since 1924, the parties have been provided with free airtime for party election broadcasts (PEBs) and, subsequently, for party political broadcasts (PPBs), which are shown during non-campaign periods. The broadcasting regulators in consultation with the parties determine the rules governing these broadcasts. These rules determine which parties are entitled to broadcasts and the broadcasts' length and frequency. PEBs and PPBs represent a significant government subsidy. The political broadcasts provided free to the major parties are estimated to be worth £55 to £60 (\$103 to \$112) million annually.²⁹

During a general election campaign, both the Labor and Conservative Parties are allocated five free party election broadcasts. The Liberal Democrats are allowed four broadcasts. Each broadcast may last from 5 to 10 minutes, although most recent PEBs have lasted approximately 5 minutes in recognition of the viewing audience's growing disinterest in lengthy political advertisements.

For the past 80 years, the government-owned BBC has played a central role in determining arrangements for political broadcasts. BBC Radio first carried party election broadcasts in 1924. In 1947, the process of allocating political broadcasts became structured, and the evolving structure has always discriminated in favor of major parties. In October 1951, viewers saw the first televised PEBs. The

Conservative, Labor, and Liberal Parties were each given one 15-minute broadcast in addition to their radio broadcasts. In subsequent decades, a rigid formula for allocating broadcasts was devised. In 1953, the PPB was introduced as a noncommercial vehicle for Britain's major parties to provide the then-two (BBC and the private broadcaster ITV) television networks' audiences with information and opposing political viewpoints. The length of each PPB was set at 10 minutes, based on the view that important ideas and substantive policies could not be communicated in a shorter period of time.

The actual number of PPBs allocated to a party is based on an evolving formula whose variables include the number of seats held in the House of Commons, the party's past electoral performance, and the number of candidates standing for the party at the upcoming General Election. In 1974, political broadcasts were allocated on the basis of 10 minutes for every 2 million votes cast at the previous general election. The government party and the main opposition party were allocated the same number of broadcasts, and no party could receive more than 5 broadcasts. ITV has carried PEBs and PPBs since 1956, although private broadcasters were not legally required to do so until the 1990 *Broadcasting Act*. This legislation requires Britain's three private terrestrial television networks and the private national radio stations to transmit PEBs and PPBs.

As a response to low viewing figures, the broadcast length was reduced to 5 minutes. In January 1996, the BBC rejected the Labor Party's proposal for a further reduction in length to only 2 minutes for each of the 5 slots allocated the Conservative and Labor Parties, respectively. Any minor party fielding more than 50 candidates in a General Election was allocated a 5-minute broadcast on television and radio. In 1998, a higher threshold of one-sixth of the total seats contested was introduced for PEBs. This raised the candidate threshold from 50 to 110 districts. Qualifying parties were also offered a number of different-length broadcasts, ranging from 2 minutes 40 seconds to 4 minutes 40 seconds, rather than the traditional 5- or 10-minute slot. Currently, neither satellite nor cable networks are obligated to transmit political broadcasts. However, the most popular satellite channel, Sky TV, "voluntarily" airs party political broadcasts.

The British Electorate: Cynical, Distrustful, and Uninterested

How successful is Britain's increasingly regulated and government-funded political system? The answer is not very successful at

all. That is the view expressed across the spectrum in contemporary British politics. According to an editorial in the *Guardian* newspaper, an influential left-wing voice, "The central question concerning the future of Britain's political parties is not whether there is a crisis but how the crisis is to be addressed."³⁰

Trust in British politicians and the British political system has reached a historic low.³¹ A recent Electoral Commission study confirmed, "There is a profound sense of dissatisfaction with the body politic."³² Pollster Martin Boon and political scientist John Curtice's statistical analysis of British Social Attitudes data finds Britons "less trustful nowadays of politics and the political system."³³ According to the Electoral Commission, "skepticism about the efficacy of voting is increasingly being shared by many of those who do actually vote."³⁴

The last two British elections clearly demonstrate the negative trend. The 1997 general election campaign took place amid an apolitical, disillusioned electorate distrustful of politicians, critical of the latter's confrontational public behavior, and certain the political class remained out-of-touch with the everyday concerns of ordinary people.³⁵ During the campaign, this attitude was reflected in the relatively sparse election coverage in local newspapers and broadcast media, poor attendance at public meetings,³⁶ and little day-to-day discussion of the campaign by most voters.³⁷

In 1997, the average audience for PEBs fell by one-third from the 1992 figure despite a shortening of the length of most PEBs (from 10 to 5 minutes) and their broadcast on 5, instead of only 3, channels.³⁸ The sales of both tabloid and broadsheet newspapers were down during the course of the campaign. Young voters, categorized as a "post-modern, post-serious, post-literate generation,"³⁹ appeared particularly disenchanted and apathetic.⁴⁰

Reviewing the subsequent 2001 election, Electoral Commission chairman Sam Younger confirmed that democratic politics was not engaging the general public. According to Younger, "An accelerating trend away from participation in the institutions of democracy contrasts with what seems a growing tendency for people to make their voice heard through forms of direct action rather than through the ballot box."⁴¹ Membership of British political parties and public esteem for politicians are both at an all-time low.⁴² One week before Election Day 2001, 52 percent of viewers had seen very little election

coverage.⁴³ Data from the 1997 and 2001 British Election Study post-election surveys reveal that the percentage of voters paying “a great deal” or “quite a lot” of attention to politics fell from just 32 percent to only 29 percent.⁴⁴

Interest in television election coverage sank to a record low: 70 percent of viewers were uninterested in coverage of the campaign.⁴⁵ According to the 2001 British Election Study rolling survey, interest in the election actually declined during the course of the campaign.⁴⁶ Television audiences for election results programs fell by 61 percent from 1992 to 2001. On election night 2001, 40 percent of British television viewers switched channels to avoid the election coverage.⁴⁷

A post-election survey found that only 55 percent of voters had seen any of the parties’ PEBs.⁴⁸ According to British journalist Gaby Hinsliff, these political broadcasts “only prompt viewers to switch channels.”⁴⁹ The current regulations produce “turn-off TV,” according to Steve Anderson, ITV’s controller of news and current affairs.⁵⁰ Labor Party strategists believe that PEBs fail to entertain and are uninteresting to viewers, and that the pre-broadcast announcement signals viewers to change channels.⁵¹

Journalist David Walker describes the free airtime political broadcasts as “a sorry hybrid of commercial technique and old-fashioned civic paternalism.”⁵² This is a status quo system based on current political representation that reinforces the advantages of the party in power. As the *Economist* observes, “Any formula based on current political representation will . . . reward the parties and candidates voters chose in the past, rather than the ones they may wish to support in the future.”⁵³

In practice, it perpetuates a vicious circle for smaller parties that cannot receive equal airtime because they have fewer (or no) legislators and cannot advertise their platforms and candidates because they have little (or no) airtime. New editorial guidelines for party political broadcasts even forbid the use of revenue-generating telephone numbers. The parties do not possess the authority to request placement of their broadcasts at a particular time of the day or night. Broadcasts can be shown only between 5:30 and 11:30 p.m.⁵⁴

The short British campaign (usually 30 days) frequently constrains the opposition from effectively challenging the governing party’s blemished record, as does the ban on paid broadcast advertising. The one-time nature of the PEBs severely limits their potential effectiveness, while the length guarantees an inattentive audience. The

opposition parties' only recourse is paid advertising in the national newspapers and on roadside billboards, relatively ineffective tools in the age of the Internet and digital and satellite TV. Less than one in four voters is influenced by newspaper advertisements.⁵⁵ Billboard advertising is an even more inefficient advertising mode than print advertising. Only 14 percent of voters find billboards influential in deciding their vote.⁵⁶ However, for the nongoverning parties, there are no other media baskets in which to place their advertising eggs.

The proposition that free airtime produces positive, policy-filled political advertising is not confirmed by the British experience. In 2001, what did the British electorate receive in return for a more heavily regulated, more heavily subsidized campaign? A highly uncompetitive race (Labor again won 63 percent of the seats), bathed in a sea of substance-free sound bites and highly negative, personal attacks on the party leaders.

Declining Voter Turnout

In practice, Britain's current system of government funding merely protects existing parties and candidates. Rather than encourage political participation, the system serves to discourage it. Clarke and others recount that "In the 15 general elections between 1945 and 1997 turnout averaged slightly over 76 percent."⁵⁷ That is why political scientists describe Labor's 2001 victory as an "apathetic landslide."⁵⁸

Voter apathy was so high that turnout fell to 59.5 percent, the lowest level since 1918.⁵⁹ Turnout was especially low among ethnic minorities and younger Britons.⁶⁰ Hence, the golden age of British participatory democracy is not today. Rather, it occurred in the middle of the 20th century. In the 1950 election, turnout peaked at 84 percent, long before the introduction of direct government funding.⁶¹

The failure of British-style free airtime either to inform or to interest the electorate is demonstrated by the Electoral Commission's acknowledgement that "There is considerable support among parties for greater flexibility in broadcast length, especially to provide the possibility for shorter and more frequent broadcasts."⁶² In other words, the introduction of American-style political advertising might solve some of the British system's problems. Legal scholar Eric Barendt, an expert on broadcasting law and freedom of speech issues,⁶³ informed a parliamentary committee that "reasonable rules can be formulated to allow some [paid] political advertising."⁶⁴

Importantly, the introduction of paid broadcast advertising would lead to increased voter engagement.

The Freedom versus Regulation Tradeoff

Within the rubric of government-funded politics lies the vital, yet largely ignored, issue of the right to freely express one's political views. Barendt argues that, in the British context, a blanket ban on paid political advertising is simply incompatible with freedom of speech.⁶⁵ Specifically, the current ban is incompatible with the right to freedom of expression guaranteed by the UK's *Human Rights Act* of 1998 and by the European Convention on Human Rights. Barendt argues that, in practice, the ban clearly discriminates between commercial and political expression and between speech in the print and broadcast media.⁶⁶

Barendt's view was borne out in a June 2001 ECHR decision.⁶⁷ The decision demonstrated that the ECHR applies to political advertising. A commercial was banned from Swiss broadcast media because it was clearly political in nature, but the European Court of Human Rights found that the ban could not be considered "necessary in a democratic society."⁶⁸ As the ban applied only to radio and television, and not to newspapers and magazines, the court found that a ban on political advertising that applied only to certain media did not serve a particularly pressing need. The court further observed that the plaintiff's only means of communicating with the entire Swiss public was through national television advertising. The court applied the legal principle that political speech should be treated differently from commercial speech. The court's judgment stated that freedom of speech protects speech that "offends, shocks or disturbs."

The Blair government had no choice but to confirm that the UK's current ban on paid political advertising contravenes the court's decision.⁶⁹ A direct challenge to existing British law is expected and the government plans to defend the ban in court if necessary. In the meantime, the government's policy is to maintain the ban despite another significant legal defeat for the political speech regulators.

In May 2001, the ProLife Alliance brought a case against the BBC over the latter's refusal to broadcast the ProLife Alliance's four-and-a-half minute PEB that included scenes of aborted fetuses. The BBC refused to permit the material to be broadcast on grounds of taste

and decency. Barendt termed the ban "a bad day for free speech."⁷⁰ As Anthony Lester, a leading media lawyer, recounts, "The case was about the censorship of political speech at election time. There was nothing gratuitous or sensational or untrue about the intended broadcast of graphic images of abortion and aborted fetuses."⁷¹ The British Court of Appeal later judged in favor of the ProLife Alliance. A unanimous court held that the decision involved an unjustified prior restraint on freedom of political expression.⁷²

Therefore, the allocation of free or subsidized time on television and radio stations for political broadcasts begs the question, who, if not the marketplace, decides which political views should be aired? Pinto-Duschinsky suggests some highly relevant questions for American policymakers considering the establishment and the regulation of subsidized airtime. Should broadcasters be obliged to provide subsidized time? How should opportunities for subsidized political broadcasting be allocated between rival candidates and parties? What are the principles on which such decisions should be based?⁷³ According to the Electoral Commission,

While some parties are content with present allocation arrangements, many consider them unsatisfactory. . . . There is a range of opinion on allocation criteria, some arguing that the same number of broadcasts should be given to all qualifying parties, others arguing for a lowering of the threshold of one-sixth of contested seats, and others for a raising of this threshold. Some argue for greater account of devolved strength to be taken when determining allocations while others argue that only party strength at the previous comparable election should be considered.⁷⁴

The history of the behind-the-scenes decisionmaking for Britain's political broadcasts does not make encouraging reading for American policymakers. Since its inception after World War II, the All Party Committee on Broadcasting, which represents the major British parties and the private and government broadcasters, but is dominated by the former, has allocated broadcast time far more generously to the three represented parties than to the unrepresented parties. Distressingly, but unsurprisingly, the existing legislation is currently under review only to ensure that its reach is sufficiently wide to block any attempts to evade the political advertising ban on television and radio by new modes of communication.

Pro-Government Taxpayer-Funded Advertising

Paid political advertising does exist in the British system but takes place under the guise of taxpayer-funded public service campaigns. According to Culture Secretary Tessa Jowell, the ban on political advertising paid for by the parties prevents the political debate being hijacked by “powerful interests.”⁷⁵ In fact, it does not since a partisan government surely qualifies as the nation’s most powerful interest group.

British governments increasingly use taxpayer money to enhance the governing party’s electoral prospects. The government of the day, be it Labor or Conservative, spends large sums disseminating partisan propaganda masked as factual information. For example, in 2000–2001 the Blair government minimized the likelihood that any opposition advertising would dent its large opinion poll lead by spending enormous sums of taxpayer money propagating the message that the UK was performing very well under New Labor’s enlightened stewardship.

The Blair government tripled the annual amount spent on advertising that integrates public service messages with partisan propaganda. Today, the British government is the country’s biggest advertiser. The government spent £192 (\$359) million (70 percent more than the previous year) on “public information” campaigns related to health, education, smoking, and crime prevention in the year leading up to the 2001 general election.⁷⁶ In all of these campaigns, the slick advertising trumpeted government policy initiatives in an attempt to portray the government as active and engaged in solving the alleged problems. Most important from an electoral standpoint, the government sought to convince the audience that it had improved the performance of the state-run National Health Service, the most significant issue to most voters.

In the three months immediately preceding the general election campaign, government advertising cost £97 (\$181) million, an amount equivalent to that spent during the whole of the previous year. The £49 (\$92) million spent in March 2001, alone, constituted a single-month record.⁷⁷ Revealingly, the year following the general election saw a significant drop in government advertising expenditure.

It is increasingly clear that British taxpayers pay for party propaganda disseminated under the guise of public information campaigns. According to Sir Michael Partridge, former Permanent Secretary of the Department of Social Security, “It’s an improper use of

taxpayers' money."⁷⁸ Millions of pounds of British taxpayers' money are used to fund partisan propaganda that ought to be paid for by the governing party. According to Lord Armstrong, a former head of the Home Civil Service, "there are very strict rules about election expenses and this could be a way in which . . . the party in government could be spending more on purposes related to the campaign than the law allows."⁷⁹ Elaine Abbot, a Labor city councilor in northern England, says, "I don't see why I should go out to work, pay taxes, for any political party to try and gain votes. It's not what I go to work for, not what I pay my taxes for."⁸⁰

Cheap British Campaigns Come at a Price

In democratic politics, more money is usually better than less. This is a basic truth that is lost on America's political regulators. Gillian Peele, a leading British political scientist, recently offered the insightful reminder that "The rules governing campaign spending are crucial to the integrity of any democratic system . . . if the rules are too strict or inappropriate, they may hinder the effective operation of the parties or impede freedom of communication and may weaken rather than strengthen the democratic process."⁸¹

Political scientists accept that there cannot be democracy without money.⁸² If political parties and candidates are going to organize, campaign, and communicate effectively, they require funds to achieve these goals. Money is a proxy for political speech, enabling political information to be widely disseminated and increasing the probability of competitive elections.

Paltry British campaign spending ensures that the electorate receives only snippets of information from their candidates and parties. Many voters and potential voters complain that they never hear from candidates or parties, even during an election campaign.⁸³ In this vein, Pinto-Duschinsky reminds us that "Democratic politics cannot proceed without financial resources. Political parties would be unable to organize themselves, politicians could not communicate with the public, and election campaigns could not be held if money was not collected. Therefore, political funding is not only indispensable, it is also desirable."⁸⁴

The electoral process, like everything else, has to be paid for in some way. Elections need to stimulate argument and interest, to

enthus and mobilize the electorate. However, one cannot simultaneously complain about low voter turnout while complaining about the candidates' and parties' respective efforts to raise and spend funds to disseminate their campaign messages.

In 1963, political scientist Arnold Heidenheimer estimated the per capita costs of party activities for "a nine-month election year time span" circa 1960.⁸⁵ He found British campaigns cost just £0.19 (\$0.36), while American campaigns cost \$2.53, comparable data to that reported by Alexander Heard three years earlier.⁸⁶ In 1970, Heidenheimer produced an index of campaign spending based on the average hourly wage. This index placed British campaigning in the lower cost stratum; American campaigning was found to be twice as costly.⁸⁷

Nassmacher calculated that in the late 1970s the cost per voter of British national politics for a full four-year election cycle was five-eighths of the cost of American politics.⁸⁸ Consequently, Nassmacher labeled both Britain and the United States as "moderate expenditure countries." Comparable data that are more recent indicate that Britain still belongs in the moderate campaign spending category. The United States is now found among the "medium expenditure countries," like Germany and France, both largely government-funded political systems.⁸⁹

The most recent British general election campaign, for example, was an imprudently inexpensive affair. As mentioned earlier, this was the first campaign in which the parties had to comply with strict spending limits. Spending per party was capped at £15.4 (\$28) million, or 76 percent less than the two major parties, Labor and Conservative, spent on their respective 1997 campaigns. During the 1997 campaign, the Labor and Conservative Parties spent £26 (\$49) million and £28.3 (\$53) million, respectively.⁹⁰ In 2001, the two major parties and their candidates collectively spent just £1.18 (\$2.21) per eligible voter. That compares with the \$13.50 (itself too low) spent per eligible voter by Democratic and Republican Parties in the 2000 American election.⁹¹

Across the UK, 36 parties collectively spent £26.7 (\$50) million contesting the election.⁹² As shown in Table 12.3, no party exceeded the national spending limit imposed by the new regulations.

Separate regulations govern what individual candidates, as opposed to national parties, can spend campaigning. The limit on

Table 12.3
UK CAMPAIGN SPENDING, 2001

Party	Spending (£ millions)
Labor	10.95
Conservative	12.75
Liberal Democrat	1.36
UK Independence	0.69
Scottish Nationalist	0.27
Welsh Nationalist	0.09
Green	0.04
Socialist Alliance	0.03
British National	0.02

SOURCE: *Election 2001: Campaign Spending*, Electoral Commission, November 2002, Table 2, p. 17.

candidate spending varies by district. The district spending limits are calculated by a formula that incorporates the size of the electorate and the nature of each district. In 2001, the average district size was 67,000 electors.⁹³ The district spending limits ranged from £6,846 to £11,957 (\$12,802 to \$22,356).⁹⁴

The average amount spent by parliamentary candidates was £3,581 (\$6,696). A total of 3,319 candidates running in 659 districts collectively spent £11.9 (\$22.2) million in total, compared with £12.9 (\$24.1) million on the 1997 general election. In real terms, spending decreased 16 percent between the two elections.⁹⁵ Table 12.4 provides a chronological presentation of the fairly gentle rise in candidate spending since the end of World War II.

The spending limits on both individual candidates and the national parties further the cause of incumbency protection. For the average challenger, overcoming the inherent advantages of incumbency (name recognition, subsidized office staff, constituency service, mailings, and travel) usually requires outspending the incumbent during the campaign. Spending limits contributed to the fact that the major parties' respective political fortunes barely fluctuated in the opinion polls during the 2001 campaign. As 63 percent of British incumbents were Labor members of parliament (and 98 percent of Labor MPs were reelected), spending restrictions that hurt challengers clearly suited Prime Minister Blair's electoral purposes.

Table 12.4
BRITISH CANDIDATES' TOTAL ELECTION SPENDING, 1945–2001

Election	Spending (£ millions)
1945	1.00
1950	1.10
1951	0.90
1955	0.85
1959	1.00
1964	1.20
1966	1.10
1970	1.40
1974 (Feb)	2.00
1974 (Oct)	2.20
1979	3.60
1983	6.10
1987	8.00
1992	10.40
1997	12.90
2001	11.90

SOURCE: Adapted by the author from *Election 2001: Campaign Spending*, Electoral Commission, November 2002, Table 7, p. 33.

Spending more money on campaign information would lead to more competitive district elections, and, consequently, more competitive national elections than is the norm. For example, an analysis of 2001 election data finds that of the total amount spent by British parliamentary candidates in 2001, 85 percent—10.1 (\$18.9) million—was spent on publicity, including advertising, printing, publishing, and postage.⁹⁶ The election saw a high correlation between such spending and electoral success. For example, of the 659 elected candidates, 412 (63 percent) spent more than 80 percent of the legal maximum, and 269 (41 percent) spent more than 90 percent. Just 51 winning candidates (8 percent) spent less than half of the permitted amount. No successful candidate spent less than 30 percent of the maximum amount.⁹⁷

In 26 of the 29 seats that changed hands at the election, the successful candidate spent more than 80 percent of the maximum permitted amount. In only one of the seats that changed hands did the successful candidate spend less than 50 percent of the legal maximum.

Candidates contesting marginal districts were more likely to spend close to the legally permitted maximum. In 9 of the Conservative Party's top 10 target marginal seats, its candidates spent more than 90 percent of the maximum amount, and none spent less than 85 percent of the maximum amount. The candidates defending those seats spent between 79 percent and 99 percent of the legal maximum.⁹⁸

Government Funding Leads to Government Control

The British political experience reveals that government funding inevitably leads to further restrictions on how campaign funds can be spent and a loss of autonomy by the recipient organizations. Under a system of government funding whereby the size of the subsidy is linked to a party's past and current levels of electoral support, there is a great risk of institutionalizing the recipient organizations. This is especially true if the parties have declining memberships. The government funding may serve merely to preserve any or all of those parties past their respective political sell-by dates.

Government funding of political parties makes it difficult for those previously private organizations to remain independent bodies. In a lengthy treatment of political finance, the *Economist* concluded that "the greater the taxpayer subsidy, the greater the risk that parties will become institutions of the state rather than voluntary associations of their members."⁹⁹ The principal cause of this change is the government's desire to regulate the use of the new funds.

Governments usually seek to ensure the "proper use" of such funds. For example, parties can become subject to government auditing and informal financial control by the government bureaucracy. This was the principal danger acknowledged by the Houghton Committee's 1976 report advocating the introduction of direct government funding of British parties. The report predicted that direct government funding would encourage the government to "interfere" in party matters. After all, "if the state helps to pay the piper, the state may want to call some part of the tune."¹⁰⁰

In this vein, government funding poses a serious threat to party independence and any tradition of freedom of association. From his research, Scott Bennett finds that "such fears were justified." For example,

The carrot of public funding has been used . . . to alter the place of parties in the Australian constitutional system . . . the

introduction of public funding produced legislative changes which began to see parliamentary "interference" in their [the parties'] operations. This mirrored what had occurred in Western Europe, where parties in countries like Belgium and Norway have become obliged to account for what has been done with money received from the state. . . . A great deal of party organization and activity is influenced by regulations imposed by state bodies as a consequence of the introduction of public funding of parties.¹⁰¹

Party experts Richard S. Katz and Peter Mair find that the synthesis of party and government has been achieved through cooperation between the major parties, most notably through the introduction and expansion of government funding of their own organizations and activities. In effect, Katz and Mair argue, the subsidized major parties now serve as a self-referential political class determining their own infrastructure and operating as a *de facto* party cartel that excludes new and smaller parties.¹⁰²

In advocating direct government funding of parties, Charter 88, a leading UK political reform organization, does not hide its preference for coerced party activity. According to Charter 88, government funding enhances the parties' democratic functions. In specific terms, "State funding could enable the state to oblige parties to concentrate more of their expenditure on their civic functions of policy research, political education and encouraging diversity of representation, rather than on political advertising."¹⁰³ In Ireland, for example, government funding requires that the parties spend money on the promotion of female and young persons' participation in politics. The uncomfortable reality is that government funding facilitates government intervention in the parties' internal affairs to a degree incompatible with traditional notions of representative democracy.

Further, government funding frequently constitutes the coercive provision of a taxpayer subsidy for unpopular parties and candidates. Taxpayers should not be compelled to support parties and candidates with whose views they may not agree. As the *Daily Telegraph* noted in an editorial comment, "It is much more desirable that party-political activity should be funded voluntarily than that taxpayers should be made to foot the bill for campaigns in which many of them do not believe."¹⁰⁴ British government funding permitted the extreme right-wing British National Party to broadcast a

5-minute PEB during the 1997 campaign courtesy of the British taxpayer. In 1970, the Communist Party was allocated a 5-minute PEB and, in 1974, the fascist National Front, the forerunner of the BNP, also broadcast a 5-minute PEB.

The coercive use of their money to support unpopular causes is just one reason why only 26 percent of surveyed Britons think that party funding should come mainly from taxes.¹⁰⁵ It is also true that the use of taxpayers' money to enhance the parties' respective financial positions is not a high priority for most taxpayers.

The British Were Warned

While the Houghton Committee recommended a system of government funding for political parties, four members of the committee did not consider that the case for direct government funding had been made and expressed their dissent in a minority report. The minority report observed that the parties are only "one among the several pillars which support our parliamentary democracy. . . . It is the commitment of the British electorate to parliamentary democracy, and its willingness to work it, which ultimately sustains the system; the parties are part of the expression of that commitment and that willingness."¹⁰⁶

The dissenting report saw the injection of government funding as a threat to a voluntary system of party politics. The minority report's principal arguments against government funding were the following:

- Direct government funding breaches the established constitutional practice that party organization is a strictly voluntary activity,
- There is no guarantee that government funding will of itself improve the parties or politics in general,
- Government funding will weaken the links between parties and their traditional sources of support,
- The injection of government funds will lead to direct demands on party organizations for a quid pro quo in the form of radical changes in their rules and practices,
- Direct subsidies to parties' national headquarters will greatly strengthen the center at the expense of the rank-and-file membership, and

- Politicians voting their parties substantial sums of taxpayer money will deepen the public's cynicism about politics and politicians.

As detailed throughout this chapter, three decades later the available evidence illustrates how prescient were the Houghton Committee dissenters in anticipating the negative, unintended consequences of government-funded politics in the UK.

Conclusion

All campaign finance systems reflect philosophical and practical tradeoffs. The material presented in this chapter concurs with the conclusion of the *Economist* that, at a minimum, in practice, "State funding . . . is just as problematic as private funding."¹⁰⁷ Ironically, there is evidence that government funding actually increases the momentum behind the search for more private donations.¹⁰⁸ Further, government funding does not eliminate political corruption. The evidence from other systems that feature even more government funding than the UK clearly indicates that government funding is no panacea.

Extensive government funding of political parties, as well as free airtime, has not prevented well-documented political corruption in Germany,¹⁰⁹ France,¹¹⁰ and Italy.¹¹¹ In 1992, Germany's constitutional court ruled that government funding for parties should be reduced, such was the concern that the parties were becoming unhealthily dependent on the taxpayer. In an April 1993 referendum, 90 percent of Italian voters cast their ballots against government funding after they concluded that political corruption had been stimulated, rather than eliminated, by public subsidy.¹¹²

Clearly, taxpayers should not be forced to subsidize partisan propaganda campaigns that the parties cannot afford, or do not want, to pay for themselves. Government-funded politics constitutes yet another drain on the taxpayer's already over-stretched wallet. As in the British context, there is no evidence that American voters want to contribute their tax dollars toward partisan campaigns. The American tradition is for political activity to be a voluntary affair. Every effort should be made to ensure that it remains so. Viscount Cranborne, the former Conservative Leader in the House of Lords, argues persuasively that

Raising money for parties and devoting time to political parties is an activity of civic virtue and one that is to be encouraged in a state whose government is based on representative principles [S]uch activity . . . demands great enthusiasm for the cause Should that enthusiasm flag, it seems curious and perhaps socialistic to argue that the state should make up for the deficiency by public subsidy.¹¹³

Before the American political system travels any farther down the path of government-funded politics, we should not lose sight of the fact that, as Nassmacher countenances, "Political finance is a 'restless' topic. One item, however, withstands the whirlwind of change: once introduced, government subsidies are never subsequently abolished."¹¹⁴ Government-funded campaigns are no different from any other taxpayer subsidy. Upon the subsidy's introduction, a political constituency is spawned that reaps a tangible benefit from the subsidy. The beneficiaries fight long and hard to ensure the subsidy is preserved, even enlarged, over time.

While American campaign reformers, with eyes wide shut, glance enviously across the Atlantic, the rest of us should not expect to discover a real campaign Fantasy Island on foreign shores. Severe constraints upon freedom of speech, harmful effects upon the public's respect for the political system, and a taxpayer's burden that only ratchets upward ensure that, for those with eyes wide open, government-funded politics is merely a mirage. The British experience illustrates how government funding, in tandem with overregulated campaign spending and advertising, serves only to rob us of our liberties without solving any of our alleged problems. In all its seductive guises, government-funded politics is a siren song to be avoided.

Notes

1. See, for example, Jon Pierre, Lars Svasand, and Anders Widfeldt, "State Subsidies to Political Parties: Confronting Rhetoric with Reality," *West European Politics* 23 (2000): 1–24.

2. Scott Bennett, "Australia's Political Parties: More Regulation?" Parliament of Australia, Parliamentary Library, Research Paper no. 21 2001–2002, June 25, 2002, available at www.aph.gov.au/library/pubs/re/2001-02/02rp21.htm.

3. Of course, partial government funding does exist in the U.S. federal government. Finding began in 1971 when Congress introduced the income tax "checkoff" whereby individuals can divert \$3 from their income tax return to the Presidential Election Campaign Fund. The money from this fund is distributed between general election

grants that cover all of the expenses incurred by the Democratic and Republican presidential candidates. The money also helps defray much of the cost of the respective parties' presidential nomination conventions, as well as matching primary payments that double the first \$250 of a donation by any individual to a candidate in a presidential primary.

4. Julian Glover, "Explained: Political Donations," *Guardian*, January 29, 2002, available at <http://politics.guardian.co.uk/0,3858,4345340,00.html>.

5. Harold D. Clarke, David Sanders, Marianne C. Stewart, and Paul F. Whiteley, "Britain (Not) at the Polls, 2001," *Politics and Society* 36 (2003): 59.

6. See, for example, Woodrow Wilson, *Congressional Government* (New York: World Meridian Books, 1956); E. E. Schattschneider, *Party Government* (New York: Holt, Rinehart, & Winston, 1942); Austin Ranney, *The Doctrine of Responsible Party Government* (Urbana, IL: University of Illinois Press, 1954); and Gabriel Almond and Sidney Verba, *The Civic Culture* (Princeton NJ: Princeton University Press, 1963).

7. During the 20th century, the responsible party model was the norm throughout the democratic world, with the important exceptions of the United States, Germany, Italy, and, arguably, France.

8. See Wilson, *Congressional Government*.

9. See Schattschneider, *Party Government*. In the United States, the publication of *Party Government* marked the revival of the debate over the role of parties. In 1950, the American Political Science Association's Committee on Political Parties, under Schattschneider's chairmanship, published "Toward a More Responsible Two-Party System" an appeal for strengthening the national parties that, nevertheless, was ignored in the United States. See American Political Science Association Committee on Political Parties, "Toward a More Responsible Two-Party System," *American Political Science Review* 44 (1950).

10. Vernon Bogdanor, ed., *Parties and Democracy in Britain and America* (New York: Praeger, 1984), p. xvii. For an overview of the Westminster model of responsible party government, see Pippa Norris, *Electoral Change in Britain since 1945* (London: Blackwell, 1997), pp. 4–9.

11. Barrie Axford and Richard Huggins, "Is Forza Italia a Party-Political Trope?: Postmodern Populism and the Reconfiguration of Italian Politics," Paper, International Conference on Political Marketing, Cambridge University, March 27, 1996, p. 3.

12. Karl-Heinz Nassmacher, "The Funding of Political Parties in the Anglo-Saxon Orbit," in *Funding of Political Parties and Election Campaigns*, ed. Reginald Austin and Maja Tjernström (Stockholm: International IDEA, 2003), pp. 33–53.

13. Michael Pinto-Duschinsky, "On the Financing System in Great Britain," presentation to the International Seminar on Money and Politics, June 7, 2001, available at www.ife.org.mx/wwwcai/elecme5/financing_system.html.

14. Matthew Tempest, "Explained: State Funding of Parties," *Guardian*, April 16, 2002, available at <http://politics.guardian.co.uk/0,3858,4395314,00.html>.

15. Melanie Phillips, "How Corporate Man Came to Take Over Our Government Life," *Sunday Times*, January 28, 2001, available at www.melaniephillips.com/articles.

16. For a fuller discussion of 19th century British campaign finance regulation, see Michael Pinto-Duschinsky, *British Political Finance 1830–1980* (Washington, DC: American Enterprise Institute, 1981).

17. United Kingdom, Committee on Standards in Government Life, *Fifth Report: The Funding of Political Parties in the UK* (London: Stationery Office, 1998).

18. Jack Straw, Foreword by the Home Secretary, United Kingdom, Home Office, *The Funding of Political Parties in the UK: the Government's Proposals for Legislation in Response to the Fifth Report of the Committee on Standards in Government Life* (London: Stationery Office, 1999), available at www.archive.official-documents.co.uk/document/cm44/4413/4413.htm.

19. The limit is calculated on the basis of £30,000 per contested district. The limits in a general election for parties that contest fewer than 600 seats are lower and based on a formula that takes account of the number of seats the parties are contesting. The limits apply to the period of 365 days before Election Day and cover all campaign spending incurred by a party during that period. The parties are also required to disclose the source of all national donations more than £5,000 and all local donations more than £1,000 and cannot receive donations of more than £200 from foreigners. At the district level, campaign spending by an individual candidate cannot exceed a fixed amount of £5,483 plus 6.2 pence per elector in a rural district or 4.6 pence per elector in an urban district. A national limit on campaign spending by "third parties" was set at a paltry 5 percent of the maximum limit for any political party.

20. Named after Edward Short, the then Leader of the House of Commons.

21. *The Funding of Political Parties in the UK: The Government's Proposals for Legislation in Response to the Fifth Report of the Committee on Standards in Government Life* (London: Stationery Office, 1999), ch. 6, p. 2, available at www.archive.official-documents.co.uk/document/cm44/4413/4413.htm.

22. *Ibid.*, ch. 6, pp. 2–3.

23. For a breakdown of the distribution of the grant among the parties and their respective uses for these monies, see Julian Glover, "Labour and Tories Keep Quiet over Cash," *Guardian*, March 27, 2002, available at <http://politics.guardian.co.uk/0,3858,4382915,00.html>.

24. Michael Pinto-Duschinsky, "On the Financing System in Great Britain."

25. Karl-Heinz Nassmacher, "The Funding of Political Parties in the Anglo-Saxon Orbit," pp. 33–53.

26. Cited in Michael White, "Sainsbury Gives Labour Record £2.5m," *Guardian*, April 1, 2003, available at www.guardian.co.uk/0,3858,437828,00.html.

27. Cited in Patrick Wintour and Lucy Ward, "Parties to Push for More State Funding," *Guardian*, June 13, 2002, available at <http://politics.guardian.co.uk/0,3858,4432555,00.html>.

28. Cited in David Hencke, "State Aids Tory Party to Tune of £1m," *Guardian*, August 7, 2002, available at <http://politics.guardian.co.uk/0,3858,4476777,00.html>.

29. Figure extrapolated from data provided in Martin Linton, MP, "Let's Grab This Opportunity for a Cross-Party Deal on Party Funding," October 15, 2003, available at www.martinlinton.org.uk/story.asp?NID=64.

30. *Guardian*, editorial, "The Price of Politics," October 15, 2002, available at <http://politics.guardian.co.uk/0,3858,4524343,00.html>.

31. ICM opinion poll commissioned by BBC Radio 4's *Today* program, available at www.bbc.co.uk/radio4/today/reports/archive/politics/party_funding.shtml; and NOP opinion poll commissioned by ITV's *Powerhouse* program. See, also, Noreena Hertz, "It's Not About Apathy," *Guardian*, June 10, 2001, available at <http://observer.guardian.co.uk/secondterm/story10,,504615,00.html>.

32. Ben Marshall and Mark Williams, *Turnout, Attitudes to Voting and the 2003 Elections* (London: Electoral Commission, 2003), p. 14.

33. Martin Boon and John Curtice, *Scottish Elections Research 2003* (London: ICM, 2003), p. 5.
34. Ben Marshall and Mark Williams, *Turnout, Attitudes to Voting and the 2003 Election*, p. 18.
35. See the MORI poll reported in David Smith, "'Thatcher's Children' to Boycott Polling Booths," *Sunday Times*, March 23, 1997, p. 12.
36. Only 3 percent of voters attended a political meeting addressed by a candidate. Number from: MORI exit poll data.
37. BBC television's flagship "Nine O'clock News" was extended to an hour (from 25 minutes) for the final month of the campaign and, consequently, saw its audience decline by 35 percent.
38. Andrew Cuff, "TV Turn-Off," *Guardian*, May 1, 1997, p. 15. British television's highest rated regularly scheduled political program, "Question Time," averaged only 3.2 million viewers.
39. Brian MacArthur, "New Readers, New Times," *The Times*, February 5, 1997, p. 21.
40. See, for example, John Bynner's analysis of the British Cohort Survey of first-time voters born in 1970, in David Smith, "'Thatcher's Children' to Boycott Polling Booths," p. 12.
41. Quoted in Patrick Wintour, "US Style Election Ads to Counter Low Turnouts," *Guardian*, July 24, 2001, available at <http://media.guardian.co.uk/generalelection/story/0,7521,526612,00.html>.
42. New Politics Network, *Party Political Funding*, available at www.new-politics.net/Party.html; Gillian Peele, "Towards New Conservatives?: Organisational Reform and the Conservative Party," *Political Quarterly* 69 (1998): 141–47; and Susan E. Scarrow, *Parties and Their Members: Organizing for Victory in Britain and Germany* (Oxford: Oxford University Press, 1996), p. 75.
43. Independent Television Commission report, cited in Julia Day, "Election Audiences Plunge to New Low," *Guardian*, October 1, 2001, available at <http://media.guardian.co.uk/generalelection/story/0,7521,559902,00.html>.
44. Cited in Harold D. Clarke, David Sanders, Marianne C. Stewart, and Paul F. Whiteley, "Britain (Not) at the Polls, 2001," pp. 61–62.
45. Independent Television Commission report, cited in Julia Day, "Election Audiences Plunge to New Low."
46. Cited in Harold D. Clarke, David Sanders, Marianne C. Stewart, and Paul F. Whiteley, "Britain (Not) at the Polls, 2001," p. 62.
47. Independent Television Commission report, cited in Julia Day, "Election Audiences Plunge to New Low."
48. MORI survey cited in Matthew Tempest, "Party Broadcasts May Get US-Style Makeover," *Guardian*, August 31, 2001, available <http://media.guardian.co.uk/generalelection/story/0,7521,545032,00.html>.
49. Gaby Hinsliff, "£12m Ceiling on Election Cash Planned," *Observer*, August 18, 2002, available at <http://politics.guardian.co.uk/0,3858,4483905,00.html>.
50. Quoted in Jason Deane, "Call to Ditch Party Broadcasts," *Guardian*, June 19, 2001, available at <http://media.guardian.co.uk/generalelection/story/0,7521,509312,00.html>.
51. Ashley Davies, "Labour Pushes for Party Political Ads," *Guardian*, June 22, 2001, available at <http://media.guardian.co.uk/0,3858,4209051,00.html>.
52. David Walker, "Party Poopers," *Guardian*, March 13, 2002, available at www.guardian.co.uk/Archive/Article/0,4273,4373197,00.html.

53. "You Pays Your Money . . ." *Economist*, July 29, 1999, available at http://www.economist.com/displaystory.cfm?story_id=323783.

54. See *Consultation Paper on the Reform of Party Political Broadcasting*, issued jointly by the Independent Television Commission, BBC, S4C (the Welsh language channel), and the Radio Authority, January 1998, and Independent Television Commission Note No. 19: Party Political Broadcasting, December 1998.

55. BMRB market research, reported in Claire Cozens, "Poster Adverts Don't Work Say Voters," *Guardian*, June 4, 2001, available at <http://media.guardian.co.uk/print/0,3858,4197808-108117,00.html>.

56. *Ibid.*

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Despite the achievement of the nation's Founders, today virtually no aspect of life is free from government encroachment. A pervasive intolerance for individual rights is shown by government's arbitrary intrusions into private economic transactions and its disregard for civil liberties.

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WELFARE for POLITICIANS?

TAXPAYER FINANCING OF CAMPAIGNS

edited by John Samples

Public concern about corruption is a hallmark of American politics. Critics regularly decry the influence of “special interests,” who are said to buy legislatures and elections with “big money.” Others call for taxpayer financing of political campaigns as a way to exclude private interests from politics. Almost half the states have some form of public funding for campaigns, and taxpayers continue to subsidize presidential campaigns. How has public funding worked? Has it protected the integrity of the political process or simply provided “welfare for politicians” unable or unwilling to raise campaign funds voluntarily? This volume examines taxpayer financing of campaigns from various perspectives.

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