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POINT / COUNTERPOINT

PUBLIC FUNDING AND DEMOCRATIC ELECTIONS

RICHARD BRIFFAULT[†]

Our existing federal campaign finance system—the product of Watergate Era legislation¹ and the Supreme Court's 1976 decision in *Buckley v. Valeo*²—is in a state of disarray. The system is no longer capable of accomplishing the goals pursued by Congress and embraced by the Court a quarter-century ago: full disclosure of the sources of campaign money; limitations on large contributions by individuals; prohibitions on the use of corporate and union treasury funds; and voluntary, partial public funding, with spending limits, in the Presidential election. Indeed, the current law may actually have negative consequences, with unindexed contribution limits encouraging evasion, driving up the burdens of fundraising, providing a major role for organized interest groups and bundlers, and placing a premium on the personal wealth of candidates.

More fundamentally, our system fails to take seriously the concerns that ought to be central to the campaign finance system of a democratic society. These include: (i) fair and vigorous competition among candidates; (ii) equality of voter influence on electoral outcomes; and (iii) recognition that the campaign finance system can affect the integrity of the political process. Instead, many of our elections are uncompetitive, with one candidate—typically the incumbent—wildly outspending the others. A tiny number of very wealthy individuals have enormous influence over the financing of

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¹ See Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-455 (1994); Presidential Campaign Fund Act, 26 U.S.C. §§ 9001-9012 (1994); Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042 (1994).

² 424 U.S. 1 (1976).

election campaigns, and, ultimately, on the elections themselves. Large campaign donations and candidates' dependence on those donations for the funds necessary to fuel their campaigns provide major donors with opportunities for special access to elected officials. The campaign finance system, thus, raises troubling questions about the integrity of the government that makes and enforces our laws.

With the campaign finance system produced by the Federal Election Campaign Act³ ("FECA") and *Buckley* on the verge of collapse, what direction should campaign finance law take? One school of thought, championed by Justice Clarence Thomas⁴ and a diverse and growing group of legal scholars,⁵ would say "go back," that is, deregulate. They would scrap FECA's prohibitions, restrictions, and contribution limitations, and preserve only some reporting and disclosure requirements. Deregulation would certainly have some benefits. It would eliminate the evasions, the end-run tactics, and the fine legal distinctions that make a mockery of the current campaign finance laws. By enabling candidates to obtain large contributions directly from wealthy individuals, deregulation would also ameliorate the burdens of the fundraising process, if only for those candidates favored by wealthy donors. Deregulation, however, would do nothing to promote competitive election contests; it would preserve, if not expand, the influence of large donors on election campaigns; and it would effectively ratify the influence of large donations over the political process.

A second approach, epitomized by the Shays-Meehan Bipartisan Campaign Reform bill which has now twice passed the House of Representatives,⁶ would attempt to renew FECA by using the traditional techniques of contribution restrictions and disclosure to plug the holes created by soft money and so-called issue advocacy expendi-

³ 2 U.S.C. §§ 431-455.

⁴ See *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 641-44 (1996) (Thomas, J., concurring in judgment, dissenting in part).

⁵ See, e.g., Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996) (arguing that campaign finance is undemocratic); Joel M. Gora, *Campaign Finance Reform: Still Searching Today for a Better Way*, 6 J.L. & POL'Y 137 (1997) (arguing against any restrictions on the use of campaign money); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999) (arguing that current campaign finance reforms may make politics less accountable to democratic control); Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311 (1998) (proposing First Amendment reasons to deregulate contributions).

⁶ Shays-Meehan Bipartisan Campaign Reform Act of 1999, H.R. 417, 106th Cong. (1999).

tures. Such a reform might be able to check special interest influence, but it would do nothing to provide challengers with the resources they need to conduct competitive campaigns and do little to promote political equality within the electoral process.⁷

A third approach is to go forward, build on the presidential public funding law and the growing experience with public funding in many states and localities, and create a system in which public funds are available for candidates for all federal elective offices. Public funding would do a better job than purely private funding in promoting competitive elections, mitigating the impact of inequalities of wealth on the electoral process, and reducing the influence of large campaign contributors on government. Better than reforms which are based solely on restricting campaign spending and are thereby subject to attack as limits on political speech, public funding provides new resources for electoral communications and, thus, actually promotes First Amendment values.⁸ Public funding would also ameliorate the burden of fundraising that presses so hard on contemporary candidates.⁹ Public funding is not a panacea for all the ills of our political life. Nevertheless, public funding would make the financing of election campaigns more consistent with our political values, and it would enhance the ability of elections to serve their crucial role in our system of democratic self-governance.

Part I provides a brief description of public funding. Part II makes a case for public funding in terms of the basic principles of democratic elections. Part III considers the most serious objection to public funding—that, whatever its appeal in theory, it is not workable in practice. Given the tight space restrictions that apply to these paired Articles, and the editors' desire that they focus on the basic

⁷ Extending regulation to soft money and issue advocacy would also raise serious constitutional questions. Compare Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179 (1998) (banning most forms of soft money would be unconstitutional), with Daniel M. Yarmish, Note, *The Constitutional Basis for a Ban on Soft Money*, 67 FORDHAM L. REV. 1257 (1998) (banning soft money is constitutional). See also Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1777-80 (1999) (discussing constitutional values implicated by the regulation of so-called issue advocacy expenditures).

⁸ Moreover, the Supreme Court has held that public funding is a constitutionally valid mode of campaign finance reform. See *Buckley v. Valeo*, 424 U.S. 1, 85-108 (1976).

⁹ On the significance of the burdens of fundraising in appraising a campaign finance system, see Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994).

principles at stake, I am not going to present a specific plan. Instead, I will suggest that public funding can be made to work if we take seriously the lessons from our experience with public funding so far, particularly the need to provide candidates with sufficient resources for their campaigns and to design a system that minimizes the regulatory burdens for participating candidates and enforcement agencies.

I. PUBLIC FUNDING: IN BRIEF

As Professor Smith notes, "public financing" is a term with potentially multiple meanings.¹⁰ It could encompass the abuse of the franking privilege by incumbent officeholders, tax breaks for donations to campaigns, requirements that broadcasters provide free air time to election candidates, or grants of public funds to candidates or political parties. By public funding, I mean a campaign finance system in which candidates or political parties receive cash grants for campaign purposes from the public treasury.¹¹

Although the dominant form of campaign finance in the United States is private funding—that is, the money for campaigns comes from private donors, such as individuals, private organizations, or the candidates themselves—public funding in the form of cash grants to candidates or parties has been used in presidential elections since 1976, and there are currently public funding systems in at least two dozen states and cities around the country. In these systems candidates qualify either by raising a threshold amount of money from a requisite minimum of donors, or by winning a party nomination. Candidates then receive either matching grants that reflect their ability to obtain small private donations, or, in the case of the presidential nominees, flat grants that are based on the electoral strength of the parties that nominated them. Most of these systems are quite limited in scale, either covering just a handful of offices—a number of state

¹⁰ See Bradley A. Smith, *Some Problems with Taxpayer-Funded Political Campaigns*, 148 U. PA. L. REV. 591, 592 (1999).

¹¹ A number of academics have proposed public funding plans in which the government would give vouchers to voters who could then use them to make political donations. See, e.g., Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, 13 AM. PROSPECT 71 (1993) (proposing that vouchers issued to voters would be the only money that could be used in political campaigns); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996) (proposing that voters receive vouchers that could be contributed to candidates or interest groups as their exclusive funding source for federal election campaigns).

systems fund elections for governor only—or providing only a small fraction of the funds needed to finance a campaign.¹² Public funding is also widely used in foreign democracies, although in those countries funds are usually provided to political parties rather than candidates.¹³

But public funding has supplied a significant portion of the funds available to candidates in the last six presidential elections, to candidates for both statewide and legislative office in Minnesota and Wisconsin, and to both executive and legislative candidates in New York City and Los Angeles. In the 1996 and 1998 elections, referendum voters in Arizona, Maine, and Massachusetts approved ballot propositions which would make most elections in those states substantially financed by publicly provided dollars.¹⁴

Although there are many fully privately funded systems—such as the system for the election of members of Congress—there are not and probably cannot be any fully publicly funded systems. No candidate can be prohibited from using private funds, so a publicly funded candidate may have a privately funded opponent. Even if all candidates in a particular race do accept public funds, noncandidates—such as individuals, political committees, or others interested in the outcome of the election—are free to use private funds for election-related spending. Even candidates who receive public funds are unlikely to be fully publicly funded. As noted, most public funding systems require candidates to raise a threshold amount of private funds to begin with, and then use matching formulas to link the amount of public money a candidate receives to his or her ability to raise private funds. Public funding, thus, involves supplementing, not supplanting, the private funding system.¹⁵

¹² See generally MICHAEL J. MALBIN & THOMAS L. GAIS, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* 51-75 (1998) (reviewing details of state public funding systems).

¹³ See *COMPARATIVE POLITICAL FINANCE AMONG THE DEMOCRACIES* 29-40, 97-144 (Herbert E. Alexander & Rei Shiratori eds., 1994) (collecting essays reviewing experiences with public funding in Australia, Spain, Sweden, the Netherlands, and the former West Germany).

¹⁴ The Arizona, Maine, and Massachusetts voter-initiated measures adopted so-called “clean elections acts.” The Arizona measure, adopted in November 1998, is codified at ARIZ. REV. STAT. ANN. §§ 16-940 to -961 (West 1999). The Maine measure, adopted in 1996, applies to state election campaigns beginning in 1999. See ME. REV. STAT. ANN. tit. 21A, §§ 1121-1128 (West 1998). The Massachusetts Clean Elections Act, adopted in 1998, applies to state executive and legislative elections starting with the 2002 election. See MASS. ANN. LAWS ch. 55A (Law Co-op. 1998) (creating public funding system and setting spending limits).

¹⁵ The so-called “clean money” campaign finance reforms recently adopted by voter initiatives in Arizona, Maine, and Massachusetts do attempt to fully publicly fund

All existing systems for providing public funds to candidates require those who accept public funds to agree to accept limits on their campaign spending. For many critics of the existing campaign finance system, spending limits are part of the appeal of public funding. As a matter of constitutional doctrine, public funding is essential for spending limits. But spending limits are not essential to public funding, and many of the benefits of public funding in promoting competitive elections and reducing the role of private wealth could be secured without spending limits.¹⁶ Nevertheless, public funding is in practice intertwined with spending limits. Any public funding plan likely to be adopted is also likely to provide for spending limits. So the case for public funding ought to assume that public funding will be conditioned on the acceptance of spending limits.

II. PUBLIC FUNDING AND THE BASIC PRINCIPLES OF DEMOCRATIC ELECTIONS

Public funding is more consistent than either the current FECA system, a deregulated system, or the FECA system with some loopholes plugged by Shays-Meehan, with three basic principles of our democratic system: that elections be open, fair, informed, and vigorously contested; that all adult citizens have equal opportunity to influence the electoral process; and that the purpose of our elections is to elect a representative government that pursues the public interest when it makes and enforces the laws that bind the polity.

A. *Competitive Elections*

Elections are about giving voters choices. A fair election is one in which voters are able to choose among a number of contenders for the same position, and in which the competing contenders are able to make their cases to the voters. Two factors can limit the ability of candidates to compete: legal constraints, such as restrictions on the

participating candidates, but even these systems cannot compel candidates to participate or limit campaign spending by noncandidates.

¹⁶ Spending limits pose complex questions. They promote spending parity and ameliorate the "arms race" mentality among candidates. With limits in place, a candidate knows how much her opponent can raise and spend, and that can reduce the candidate's own need to devote time and effort to fundraising. On the other hand, spending limits raise the danger that the limits will be set too low, and thus cripple the ability of challengers to offset the superior name recognition that incumbents enjoy. Spending limits can also interfere with the ability of a candidate to respond to late-breaking developments, create incentives for evasion, and require additional public resources for enforcement.

amount or type of campaigning, and resource constraints, that is, whether candidates have the funds to pay the costs of campaigning. If one candidate is well-funded, but her opponents lack resources, the voters are likely to hear far more information and arguments from the first candidate than from the others. If, in a campaign marked by grossly unequal resources or by the inability of some candidates to raise enough money to effectively communicate with the electorate, the big spender wins, that casts a shadow over the fairness of the contest and the legitimacy of the outcome.

The concern about fair competition is particularly focused on the ability to challenge incumbents. As Joseph Schumpeter noted, "electorates normally do not control their political leaders in any way except by refusing to reelect them."¹⁷ Elections are not simply about giving voters the power to determine who holds public office. The opportunity to oust officeholders from office, and the possibility that in any given election, the people may exercise that authority, is the ultimate security of popular control over government. The value of fair electoral competition is, therefore, especially significant when the incumbent officeholder is seeking reelection. The incumbent typically starts with many built-in advantages, ranging from the free media attention he gets during his term in office, to the opportunity to use the office to provide constituency service, to the fact that the incumbent was popular enough to win the last election. These advantages contribute to, and are typically reinforced by, the incumbent's superior ability to raise campaign money. An important goal for a campaign finance system is to assure that challengers have sufficient funds to mount effective challenges to incumbent officeholders. This will make it more likely that incumbents will actually be challenged, and that the incumbent-challenger election is a real contest.

Funding parity is not essential for fair elections. Challengers can do well so long as they have a critical mass of funds.¹⁸ Nor is it necessary for challengers actually to defeat incumbents or for there to be frequent turnovers in office. Rather, voters need to know they have a real alternative to the incumbent, and incumbents need to know there is a real possibility they may lose. This requires credible challengers, and credible challengers require adequate financing.

¹⁷ JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 272 (3d ed. 1950).

¹⁸ See GARY C. JACOBSON, *MONEY IN CONGRESSIONAL ELECTIONS* 136-62 (1980) (noting that the sufficiency of challenger spending is the critical variable in determining whether an election is competitive).

A great weakness of our private campaign finance system is its failure to provide challengers with adequate funding. According to a recent study of congressional elections by the Committee for Economic Development, "[t]he majority of House challengers now raise and spend so little that they cannot wage a viable campaign."¹⁹ In 1998, the average House incumbent spent \$657,000 and the average House challenger spent \$265,000, or just 40% of what the average incumbent spent. More importantly, approximately half of all House challengers raised less than \$100,000, and only one-third raised as much as \$200,000. As a result, "most House elections were financially uncompetitive."²⁰ Indeed, 60% of House incumbents "either had no significant opposition or outspent their opponents by a margin of ten to one or more."²¹

If an election is financially uncompetitive, it is usually politically uncompetitive too. The House challengers who spent less than \$200,000 generally received less than 40% of the two-party vote.²² Conversely, politically competitive elections are marked by financially competitive challengers. The relatively small number of House challengers who managed to obtain as much as 40% of the major party vote spent an average of \$639,000, or approximately the median level of spending by all House incumbents.²³ In the Senate, incumbent financial dominance was less pronounced. Nevertheless, challengers, on average, spent just two-thirds of what incumbents were able to spend.²⁴

In most races, it is not simply that incumbents in privately funded elections have more financial resources than do challengers—they have *a lot more* money. An incumbent can carry forward excess funds

¹⁹ RESEARCH AND POLICY COMM., COMM. FOR ECON. DEV., INVESTING IN THE PEOPLE'S BUSINESS: A BUSINESS PROPOSAL FOR CAMPAIGN FINANCE REFORM 17 (1999) [hereinafter CED REPORT] (reporting electoral spending trends of House incumbents and challengers).

²⁰ *Id.* The challenger/incumbent spending ratio is comparably lopsided at the state legislative level. In a survey of spending in the late 1980s and early 1990s, challengers spent less than 25% of what incumbents spent in a substantial majority of races in California, Illinois, New Jersey, and Pennsylvania. See William E. Cassie & David A. Breaux, *Expenditures and Election Results*, in CAMPAIGN FINANCE IN STATE LEGISLATIVE ELECTIONS 99, 105 (Joel A. Gora & Gary F. Mancrief eds., 1998) (analyzing the relationship between incumbent and challenger spending in the 1992 election).

²¹ CED REPORT, *supra* note 19, at 17.

²² See *id.* at 17-18 (noting how uncompetitive underfunded challengers were).

²³ See *id.* at 18 tbl.4 (reporting that the average expenditures by incumbents in 1998 was \$657,000). These unusually well-financed challengers, however, faced incumbents who spent an average of almost \$1,000,000. See *id.* at 17.

²⁴ See *id.* at 18 tbl.4.

from his last election, and is well-positioned to collect funds during his term in office. The statistical likelihood that the incumbent will be reelected increases his ability to collect funds from donors who want to have "access" to the winner. Thus, incumbents usually start out well ahead in the financial arms race. In contrast, the challenger usually starts out less well-known, and with less campaign money. Saddled with the presumption of incumbent reelection, the challenger is likely to experience greater difficulty raising funds throughout the campaign. Political action committee ("PAC") contributions heavily favor incumbents over challengers. Individual donors also tend to give more to incumbents than to challengers, albeit their incumbent preference is less lopsided than that of PACs. Parties give more of their money to promising challengers, but they tend to concentrate their funds on a small number of close races and are unavailable to help most challengers.²⁵ The difficulty of raising money may not just limit challenger finances, it may discourage challengers from participating altogether, thereby limiting the range of choices available to voters. As Frank Sorauf has noted, "the campaign finance system offers challengers no weapons with which to overcome the advantages of incumbency. The challengers lack money because incumbents' reelection prospects are so strong as to discourage both the emergence of appealing challengers and the willingness of potential contributors to invest in politics."²⁶

Public funding promotes electoral competitiveness. Challengers—and political newcomers in open seat races—are simply much better able to mount campaigns when their privately raised funds are supplemented by public funds. Indeed, public funding makes it much more likely that there will be challengers in the first place, and thus, that incumbents will be forced to defend their records and engage in a public dialogue over their votes and policy preferences. Public funding substantially contributed to the presidential campaigns of Jimmy Carter in 1976, George Bush in 1980, Gary Hart in 1984, Jesse Jackson in 1984 and 1988, and Pat Buchanan, Jerry Brown and Bill Clinton in 1992.²⁷ Public funding provided opportunities to challengers, political newcomers, and outsider candidates in the prima-

²⁵ See MICHAEL J. MALBIN & THOMAS L. GAIS, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* 138-58 (1998).

²⁶ FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE* 178 (1992).

²⁷ See ANTHONY CORRADO, *PAYING FOR PRESIDENTS: PUBLIC FINANCING IN NATIONAL ELECTIONS* 39-45 (1993) (reviewing the record of presidential public funding and noting that the "primary beneficiaries" are "the lesser known aspirants who enter the presidential sweepstakes without a large base of donors").

ries, and offset the built-in edge of incumbents in the general election. Indeed, in three of the five presidential elections conducted with public funding that involved challenger-incumbent contests, the challenger defeated the incumbent.

In New York City, which has run its last three mayoral elections under public funding, challengers twice defeated incumbents. In Minnesota, the only state that provides ample public funding for legislative elections (and the only state with a high level of candidate participation in the program), public funds have made legislative elections more competitive.²⁸ Indeed, Minnesota is the rare state in which virtually all incumbents actually had real challengers and, thus, conducted state legislative elections that were real contests. In many states that do not use public funding, half or more of all incumbents ran unopposed.²⁹

Minnesota is also the home of perhaps the most famous beneficiary of public funding, Jesse Ventura. Although outspent by his major party opponents in the open-seat race for the Minnesota governorship in 1998, public financing provided him with the money necessary for his television ads and, thus, was essential to his success.³⁰

Private funding systems—whether the current FECA system, FECA enhanced by new restrictions, or deregulation accompanied by disclosure—do nothing to promote financially and politically competitive elections. Expenditure limitations without public funding would do nothing to put funds into the campaigns of currently underfunded candidates. New controls on party soft money might curtail special interest influence but they could also make it harder for challengers to raise sufficient funds since, as noted, the parties are the only major source of campaign funds that devote a significant fraction of their funds to challengers. Deregulation would certainly make it easier for some candidates to obtain more funding, but it is unlikely to benefit the challengers and political outsiders who are most disadvantaged by

²⁸ See Patrick D. Donnay & Graham P. Ramsden, *Public Financing of Legislative Elections: Lessons from Minnesota*, 20 LEGAL. STUD. Q. 351 (1995) (finding that Minnesota public funding system made state legislative elections more competitive even though the system directed a disproportionate amount of public funds to incumbents).

²⁹ See MALBIN & GAIS, *supra* note 25, at 137 (noting that in five states without public funding between 21% and 58% of state legislative incumbents were in uncontested races, while in Minnesota only 10% of incumbents ran unopposed).

³⁰ See Conference, *Life from the Ground Up: Local Lessons for National Reform*, 27 FORDHAM URB. L.J. 201, 234 (1999) (statement of Kathleen Czar, Executive Director of the Minnesota Democratic-Farmer-Labor-Party) (attributing Ventura's success to public financing).

the current system. Incumbents currently garner the lion's share of large contributions from individuals and political action committees. There is no reason to think that would change if limits on contributions were removed. Most likely, in most elections the financial imbalances would grow. Only public funding provides a mechanism to promote financially and politically competitive elections.

B. Voter Equality

Voter equality is a central premise of our democratic system. Over the course of our history, the electorate has been expanded to include all adult citizens. Recent developments like the one person, one vote doctrine³¹ and the vote dilution doctrine³² have sought to assure not simply that each adult citizen has a right to vote, but that each voter has an equally weighted vote, and, thus, an equal opportunity to affect the outcome of the election. Our laws most emphatically deny a special place for wealth in voting. Most states long ago scrapped wealth or tax-payment requirements for voting, and the Supreme Court has made the elimination of wealth and tax-payment tests a constitutional mandate. Wealth may not be a criterion for the right to cast a vote³³ or be a candidate,³⁴ nor may the wealth of the voter be a factor in determining how much weight a particular vote will be given.³⁵

The role of voter equality in our electoral system has implications beyond the actual casting and counting of ballots. For the election to serve as a mechanism of democratic decision making, there must be a considerable amount of election-related activity before balloting can

³¹ See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that state legislatures are required to be apportioned on a one person, one vote basis); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (requiring congressional districts to be apportioned on a one person, one vote basis).

³² See, e.g., *Rogers v. Lodge*, 458 U.S. 613 (1982) (finding that at-large voting systems may be used to dilute the voting strength of minorities); *White v. Regester*, 412 U.S. 755 (1973) (finding that multimember districts can be used to dilute the voting strength of minority groups).

³³ See *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) (invalidating law limiting franchise in bond issue election to taxpayers); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966) (invalidating poll tax on grounds that wealth is "not germane" to the right to vote).

³⁴ See *Lubin v. Panish*, 415 U.S. 709 (1974) (invalidating law requiring candidate to pay filing fee in order to have name placed on ballot); *Bullock v. Carter*, 405 U.S. 134 (1972) (same).

³⁵ See *Hill v. Stone*, 421 U.S. 289 (1975) (invalidating law requiring that bond issue obtain approval of concurrent majorities of all voters and of tax-paying voters).

occur. Candidates, parties, interest groups, and interested individuals need to be able to attempt to persuade voters how to cast their ballots. The election campaign is an integral part of the process of structured choice and democratic deliberation that constitutes an election.

As a matter of legal doctrine, the Supreme Court has often defined an election broadly to include pre-Election Day activities, or has deferred to statutes that regulate pre-Election Day activities as part of the electoral process. In *Terry v. Adams*, for example, the Court treated private political activity that preceded an election, and informally but effectively supplanted that election, as a part of the election.³⁶ The Court has indicated that Congress can treat party nominating convention procedures as part of an election,³⁷ and that Congress can use the notion of a pre-election campaign season to define the obligations of broadcasters.³⁸

Campaign finances are a critical part of the election campaign. Money, in particular, is a unique campaign resource. "It buys goods, and it also buys human energy, skills, and services. . . . [I]t is the common denominator in the shaping of many of the factors comprising political power because it buys what is or cannot be volunteered."³⁹ Money buys all the things crucial for a modern election campaign: broadcast and radio air time; the printing and mailing of campaign literature; transportation costs; the services of campaign professionals for crafting the campaign message, conducting polls, and producing campaign advertisements; the salaries of campaign workers; the rent for campaign offices; the costs of data processing equipment and

³⁶ 345 U.S. 461, 466 (1953).

³⁷ See *Morse v. Republican Party*, 517 U.S. 186, 218 n.31 (1996).

³⁸ See *CBS, Inc. v. FCC*, 453 U.S. 367, 368-88, 397 (1981).

³⁹ HERBERT E. ALEXANDER, *FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM* 3 (4th ed. 1994). Even in the pre-primary phase of a presidential election campaign:

Money buys things that can generate popular support. Money for example, buys advertising in important markets. . . . Money buys chartered plane flights, hotel rooms, food, balloons, and bunting, all of which are necessary for the candidate to make speeches, shake hands, kiss babies, and milk cows with great fanfare from state to state. Money pays for the salaries of campaign staff and the facilities and materials necessary to establish a national organization, which can then raise even more money. Money can also buy favorable free media coverage. The amount of money the campaigns have raised in the pre-delegate-selection period is one of the few concrete facts available to journalists to help them handicap the race.

David Dudenhoff & Ken Goldstein, *Resources, Racehorses, and Rules: Nominations in the 1990s*, in L. SANDY MAISEL, *THE PARTIES RESPOND: CHANGES IN AMERICAN PARTIES AND CAMPAIGNS* 183 (3d ed. 1998).

computer time; even the expenses incurred in raising the funds necessary to pay for the other campaign expenditures. These services are unlikely to be provided by volunteers. They require money.

In a society that ranges from billionaires and multibillion dollar corporations to the desperately poor, money is also far more unevenly distributed than other campaign resources. This is illustrated by the actual practice in our current system, in which a small number of large donors currently play an enormous role. In the 1995-1996 election cycle, large donors—that is, donors of \$1000 or more—supplied one-third of all the privately provided money in federal election campaigns.⁴⁰ These large donations were contributed by just 235,000 people, or one-tenth of 1% of the total population. In 1998, individuals who made donations of \$500 or more accounted for 68% of all contributions to Senate candidates and 56% of all contributions to candidates for the House of Representatives.⁴¹ These figures probably understate the role of large donors since they count only donations directly to candidates and not donations to political parties or political action committees which, in turn, make donations to or expenditures in support of candidates.

Large donors are not a politically or demographically representative sample of the general population. A recent study of large donors—defined as those who gave only \$200 or more to one or more congressional candidates—found that the affluent, men, whites, and people engaged in high-status occupations make up a far higher portion of the large donor group than of society as a whole. Large donors are also more conservative in political orientation and more Republican in party affiliation than the general population.⁴²

The reliance on private funding in a society marked by substantial inequalities of wealth poses a sharp challenge to the principle of voter equality. Those who make large campaign contributions have the op-

⁴⁰ The balance of the approximately \$2.2 billion spent in 1995-1996 was provided by smaller donors, corporate and union treasury contributions to party soft money accounts, and candidates' own funds. See Center for Responsive Politics, *The Big Picture: Where the Money Came from in the 1996 Elections* (visited Oct. 27, 1999) <<http://www.opensecrets.org/pubs/bigpicture/default.htm>>.

⁴¹ See CED REPORT, *supra* note 19, at 14-15 (noting the growth in the percentage of money received from large contributors).

⁴² See Center for Responsive Politics, *Individual Congressional Campaign Contributors: Wealthy, Conservative and Reform-Minded* (last modified June 9, 1998) <<http://www.opensecrets.org/pubs/donors/donors.htm>> (summarizing a comprehensive survey of individuals who donated at least \$200 to a congressional campaign in 1996). The "reform-minded" in the title of the study refers to the contributors' views on campaign finance regulation.

portunity to have a much greater impact on the outcome of the election than small donors and nondonors. Although elections are not always won by the biggest spender, the big spender does win in the vast majority of cases.⁴³ Scholars have been unable to determine whether the big spender wins because he is the big spender, or whether the winner is the big spender because he is also usually the biggest recipient of campaign contributions and the same factors that lead voters to vote for a candidate independently lead donors to donate to that candidate. Yet campaign spending surely has some impact on most campaigns. Campaign finance reform critics tacitly acknowledge this when they fault contribution and expenditure limitations for imposing burdens on challengers.⁴⁴ If, as deregulation proponents charge, laws that restrict the ability of challengers to raise and spend campaign funds impair the ability of challengers to win votes, then campaign funds have an effect on election results.

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. Private funding in a setting of extremely unequal levels of contributions—which reflect underlying differences in the distribution of wealth—is in sharp tension with the norm of voter equality.

Even the Supreme Court has acknowledged that voter equality is a factor in appraising the campaign finance system. Although *Buckley v. Valeo* emphatically and famously rejected the idea that equality can justify limitations on campaign communications,⁴⁵ the Court has relied

⁴³ In 1998, the biggest spender won in 93.9% of Senate races and in 94.9% of House of Representatives races. See Center for Responsive Politics, *Money and Incumbency Win Big on Election Day* (visited Sept. 15, 1999) <http://crp.org/pressreleases/nov04_98.htm>. In a survey of legislative elections in 18 states over three election cycles, in 11 of those 18 states, the bigger spender won more than 80% of the legislative elections, and in four more states, the bigger spender won more than 70% of the elections. In every state, the bigger spender won more than 60% of legislative races. See Cassie & Breaux, *supra* note 20, at 101-02 (showing that the bigger spenders won in most of the elections in all the states surveyed).

⁴⁴ See, e.g., Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1069-78 (1985) (arguing against judicial deference to campaign finance reform legislation because incumbent legislators use the laws to protect themselves from challengers); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1072-75 (1996) (arguing that contribution limits especially burden challengers); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 685-86 (1997) (same).

⁴⁵ *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may

on a concern about voter equality in validating federal and state restrictions on campaign expenditures by corporations. As *Austin v. Michigan State Chamber of Commerce* explained, corporate campaign spending can "unfairly influence elections" because a corporation's campaign funds "have little or no correlation to the public's support for [its] ideas."⁴⁶ Prohibiting corporations from using their treasury funds to finance campaign expenditures "ensures that expenditures reflect actual public support for the political ideas espoused by corporations."⁴⁷ In other words, campaign spending that reflects the corporate spender's wealth rather than the extent of popular support for its message gives the corporate spender an undue influence on the electoral outcome. That is the voter equality point in a nutshell.⁴⁸

To be sure, participation in and influence over an election campaign are not the same as voting.⁴⁹ Voting is a discrete act. It is relatively easy to measure votes and to assure that no person casts more votes than any other. Participation and influence take many different forms, vary widely in intensity, and are difficult to measure. It is virtually impossible to quantify the impact of a particular dollar in a particular race, nor would it be possible to quantify other modes of participation and influence—the "free media" value of a celebrity endorsement, the intensity of commitment of volunteers, the superior organization of a particular interest group—that can affect a campaign. It is not possible to truly equalize influence over elections. In-

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.").

⁴⁶ *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 660 (1990); see also *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 207 (1982) (upholding law intended "to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should be not converted into political 'war chests'").

⁴⁷ *Austin*, 494 U.S. at 660.

⁴⁸ The Court has sought to hold together its inconsistent views about the connection between voter equality and campaign finance regulation by asserting that corporations pose special problems because they enjoy a "unique state-conferred corporate structure" which is said to give them special advantages in amassing funds. *Id.* at 659-60. It is hard to see why this is relevant, or even that it is right. As Justice Scalia pointed out in his *Austin* dissent, corporations are not alone in receiving special advantages from the state. See *id.* at 680 (noting that other organizations receive government support through contracts or tax subsidies).

⁴⁹ Professor Bradley Smith is, of course, correct in noting that "[e]lections are won by counting ballots, rather than the aggregated wealth of the voters on each side." Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 97 (1997); see also Sullivan, *supra* note 44, at 672 (arguing that campaign finance "more resembles political speech than voting"). But, as their attacks on contribution and expenditure restrictions tacitly acknowledge, spending can influence how ballots are cast. See *supra* note 44 and accompanying text.

deed, given the value of robust and uninhibited political participation and the extensive regulation it would take to assure total equality, assuring absolutely equal influence over elections is not even desirable. Nevertheless, dramatically unequal campaign spending that reflects underlying inequalities of wealth is 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. In privately funded systems, donors and independent spenders can have a bigger impact on the election than those who neither contribute nor spend, and big donors and spenders can have a bigger impact than smaller financial participants. Contribution and expenditure caps could ameliorate this, but at the cost of cutting into the ability of candidates to campaign effectively and possibly reinforcing the advantages of incumbents. Public funding can break the tie between private wealth and electoral influence while simultaneously supplementing campaign resources. Money from the public fisc comes from everyone and, thus, from no one in particular. No one gains influence over the election through public funding. The more the funds for election campaigns come from the public treasury, the more evenly is financial influence over election outcomes spread across the populace.

Moreover, public funding promotes equality without limiting participation. Resistance to treating voter equality as a campaign finance norm has been sharpest when voter equality is used to justify the imposition of limits on private campaign spending. Public funding, however, increases voter equality while providing new funds for campaign communications. This is clearly the case under the "floors without ceilings" approach, in which candidates would be provided with public funds without being required to accept a spending limit.⁵⁰ But even where public funding is accompanied by spending limits, public funding is unlikely to curtail electoral communications. A candidate's acceptance of public funding with a spending limit must be voluntary. Thus, each candidate has the opportunity to decide whether, on balance, public funding with limits would help or hinder her campaign and may opt in or out accordingly. Further, the availability of public funding for candidates has no effect on the ability of other organizations to raise and spend money in connection with the

⁵⁰ For arguments for the "floors without ceilings" approach, see HERBERT E. ALEXANDER & MONICA BAUER, *FINANCING THE 1988 ELECTION* 45, 138-39 (1991), and Joel L. Fleishman & Pope McCorkle, *Level-Up Rather than Level-Down: Toward a New Theory of Campaign Finance Reform*, 1 J.L. & POL. 211 (1984).

election independently of the candidates.⁵¹ This limits the ability of public funding to promote voter equality, but it assures that even with spending limits public funding is unlikely to reduce campaign communications.

C. *The Impact of Campaign Finance on Government*

We hold elections to select the officials who enact and execute our laws.⁵² The campaign finance system can have its own impact on the behavior of government after, or, more accurately, between elections. Where candidates depend on private contributions for their election campaigns, the donors who provide the necessary support can have a special relationship with elected officials. Large donors and prospective donors may be able to obtain special access to those officeholders, and their views may carry extra weight in governmental decision making.

Concern about the undue influence of large donors and prospective donors on the operations of government has been a driving force in campaign finance regulation since the beginning of the twentieth century.⁵³ The impact of the campaign finance system on the operations of government has been a central concern of the Supreme Court as well. *Buckley* held that large campaign contributions may be limited because they raise the danger of a "political *quid pro quo* from current and potential office holders" to donors and potential donors, and that such a relationship threatens "the integrity of our system of representative democracy."⁵⁴

To be sure, political scientists who have studied the relationship between campaign contributions and legislative behavior have reached conflicting results concerning the extent to which campaign

⁵¹ See *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 500-01 (1985) (holding unconstitutional a provision of presidential public funding law that would have limited the expenditures of independent committees with respect to the campaign of a presidential candidate who has accepted public funding and spending limits).

⁵² See, e.g., SCHUMPETER, *supra* note 17, at 272 ("[T]he primary function of the electorate [is] to produce a government").

⁵³ See, e.g., ROBERT E. MUTCH, *CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 1-52* (1988) (discussing the history of campaign finance regulation).

⁵⁴ *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976); see also *California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 197-98 (1981) (upholding limits on the amount of money a person may contribute to a multicandidate political committee in order to prevent circumvention of the limits on individual donations to candidates that were sustained in *Buckley*).

contributions actually affect legislative votes.⁵⁵ There is, however, a scholarly consensus that contributions do have an impact on voting when "the issues under deliberation [tend] to be low-visibility, non-partisan ones on which other voting cues [are] lacking."⁵⁶ Such votes "have very real results for particular special interests" and "constitute a significant portion of what occurs on Capitol Hill."⁵⁷

The real impact of campaign donations appears to be far more subtle than the direct exchange of contributions for the votes of elected officials. Donors emphasize, and officeholders agree, that what contributions produce is "access"—"the required entry ticket for getting something done."⁵⁸ A large donor obtains a better opportunity than a nondonor or a small donor to make her case to an elected official. This may not affect a roll call vote on a highly publicized issue, but it can have an impact on the thousand-and-one decisions that determine whether and what exactly will be voted on: the precise wording of a bill or an amendment; the decisions of a legislator when a bill is being marked up in committee to move or withdraw an amendment, or to accept or oppose a modification; whether to press for one bill or amendment rather than another, especially when time for action is drawing to a close; the voting procedure used in consideration of the measure; or, simply, how vigorously to push or resist a proposal. Without deciding how legislators vote, campaign contributions can affect what matters become law.⁵⁹

⁵⁵ See, e.g., DAVID B. MAGLEBY & CANDICE J. NELSON, *THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 77-78* (1990) (reviewing and summarizing the relevant literature).

⁵⁶ *Id.* at 78.

⁵⁷ *Id.* at 79; see also SORAUF, *supra* note 26, at 170 ("[T]he influence of PAC contributions tends to be strongest on the narrower, less visible issues before the Congress.").

⁵⁸ ELIZABETH DREW, *POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION* 77 (1983); see also MAGLEBY & NELSON, *supra* note 55, at 79 ("[A]s nearly everyone agrees, contributions ease access to congressional policymakers.").

⁵⁹ The significance of non-roll call action is nicely illustrated by the successful effort of Senator Kay Bailey Hutchison to block the Department of the Interior from requiring oil companies that drill on federal lands to pay royalties based on the market price for oil rather than on the oil price the companies set for themselves. For four years, Senator Hutchison blocked the Interior Department regulation not through a measure subject to a Senate roll call vote, but by placing amendments and riders into annual spending bills. "The Senate has never actually voted on Senator Hutchison's measure. It has been inserted into must-pass spending bills that provide a perfect vehicle for controversial measures that might attract public notice if they were openly debated." Tim Weiner, *Battle Waged in the Senate Over Royalties by Oil Firms*, N.Y. TIMES, Sept. 21, 1999, at A20. Senator Hutchison has received \$1.2 million in contributions from oil companies in the past five years. See *id.*

As Professor Sorauf notes, summarizing the literature on the impact of campaign contributions, "the nature of influence in a legislative body involves much more than final roll-call votes" because "[t]he kinds of policy refinements and strategic maneuvers crafted in committee may be important for specific interests even though they do not involve great issues of policy."⁶⁰ Such influence is likely to be difficult to detect, measure, or police. But political scientists who have studied the legislative process believe it exists. Certainly, it is hard to explain the hundreds of millions of dollars that organized interest groups regularly pour into congressional campaigns unless such politically sophisticated donors have good reason to believe they are getting something for their money.

Some critics of campaign finance reform have questioned whether there is anything troubling about that. In our pluralist political system, we assume that interest groups will attempt to influence government action, and that it is appropriate for government to respond to such efforts. We do not expect our legislators to be pure Burkean representatives, deciding matters based on an idealized sense of the merits.⁶¹ Nor do we expect our legislative process to be a "transparent vehicle for plebiscitary democracy, for the transmission of polling data into policy."⁶² Thus, if legislators may attend to the preferences of their constituents, supporters, or party leaders, why is it problematic for them to follow the wishes of their large donors?⁶³

The short answer is that concern about the impact of campaign donations on government derives not from academic theories of democracy, but from strongly held and deeply rooted popular beliefs. From the enactment of the first Federal Corrupt Practices Act in 1910 until today, the American people have thought there is something "corrupt" about the influence of large campaign donations. The American public may not have a fully developed theory of democracy that reconciles the conflicting imperatives of public interest decision making and pluralist interest group representation. The popular conception of democracy, however, is offended by legislative decision

⁶⁰ SORAUF, *supra* note 26, at 168-70.

⁶¹ *But cf.* Sullivan, *supra* note 44, at 681-82 (suggesting that campaign finance reformers might justify restrictions on speech in the form of campaign contributions in order to protect a Burkean detachment appropriate to legislators).

⁶² *Id.* at 681.

⁶³ *See, e.g.*, Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 115-16 (questioning why the personal gain a candidate receives from a campaign contribution is any worse than the candidate's personal gain from reelection or career advancement).

making that is driven by the pursuit of campaign contributions.

Moreover, contribution-influenced decisions are inconsistent with the value of deliberation that is central to our representative democracy. Elected officials attentive to public opinion surveys, to the preferences of groups that have supported them in the past, or to their party's platform can acknowledge the competing influences over them and "even deliberate publicly about how . . . [these] can be reconciled."⁶⁴ But, as Professor Burke has suggested, "contributor-influenced representatives are unlikely to be candid about the motivation for their actions; the last thing they want is an open examination of the quality of their reasons and their process of deliberation."⁶⁵ Professor Lowenstein makes a similar point when he contends that a legislator might seek to justify a particular controversial vote by arguing that the vote served the public interest, reflected majority sentiment in her district, or followed her party's line, but that the assertion that a vote was justified because it served the interests of the legislator's principal contributors would be treated as "scandalous."⁶⁶ Almost certainly no legislator would ever advance such a justification for his vote publicly.⁶⁷

The potential for undue influence over policy-making that results from large campaign donations and from officeholders' dependence on future donations for subsequent campaigns has long rankled the voters. The uncertain relationship between campaign contributions and the official actions of elected officials constantly generates questions about the motivations that drive government decision making. The nexus between special interests and elected officials that results from the predominant role of large private campaign contributions undermines the very legitimacy of government action.

Public funding reduces the role of large private donors and, thus, their potential for leverage over the decisions of elected officials. The more campaign funds come from the public fisc, the less elected offi-

⁶⁴ Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENTARY 127, 148 (1997).

⁶⁵ *Id.*

⁶⁶ Daniel Hays Lowenstein, *Campaign Contributions and Corruption: Comments on Strauss and Cain*, 1995 U. CHI. LEGAL F. 163, 170-72.

⁶⁷ This can be seen in the public response to the fundraising scandals that rocked the Clinton-Gore campaign in 1996. When the public learned of the private meetings between the President and large donors to the Democratic Party, there was a natural apprehension that the President may have made certain decisions based on the donors' interests rather than his own conception of the public interest. As Lowenstein suggests, that was viewed as scandalous.

cials need to be sensitive to the views of large private donors, and the more they can act on their view of what the public interest requires. There may be some debate over what exactly campaign contributions buy, but whatever they buy, they will buy less of it when candidate dependence on them is reduced by public campaign funds.

In short, public funding is superior to purely private funded election campaigns—whether under FECA, FECA supplemented by controls on soft money, or a deregulated system—in promoting the fundamental values of a democratic electoral system: competitive elections, political equality, and government decision making in the public interest. Only public funding offers the potential to make our system more open and competitive by providing the resources necessary to draw more candidates into legislative contests, and to enable them to compete effectively. Public funding can reduce the time and effort that all but independently wealthy candidates must currently devote to fundraising, thus enabling candidates to focus more on the voters and less on donors. Only public funding can reduce the dissonance inherent in a system that is nominally committed to political equality but that grants an enormous role to a small number of large donors in structuring our election campaigns. Only public funding can reduce the role that campaign contributions play in providing special interest groups with special access to and influence in the political process. Further, by relying on a mechanism that puts resources in the hands of candidates, public funding promotes the free speech values at the core of the First Amendment.

It has been suggested that public funding would inappropriately involve government in the electoral process, but the conduct and consequences of an election campaign are matters of great public concern. Election results affect our entire society. Public funding involves the use of tax dollars, but it is just as appropriate to use tax dollars to cover the costs of an election campaign as it is to use tax dollars to pay for preparing and producing ballots and collecting and tabulating the results. The Supreme Court acknowledged this in *Buckley* when it vindicated the use of public funding for presidential elections. Public funding, said the Court, is an effort “to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.”⁶⁸

⁶⁸ *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976).

III. DESIGNING A WORKABLE PUBLIC FUNDING SYSTEM

The most serious objections to public funding are practical. It has been argued that because incumbent legislators write the laws,⁶⁹ public funding—whatever the case for it in theory—will be pro-incumbent in operation, impossible to administer, and as subject to evasion as the campaign system created by FECA. These are important and legitimate objections. The limited experience we have had with public funding, however, suggests that these objections are overstated. Further, the lessons of that experience can provide assistance in designing a workable public funding system.

Public funding in practice has not demonstrated a pro-incumbent bias. Certainly public funding has not been more pro-incumbent than private funding. Challengers Jimmy Carter, Ronald Reagan, and Bill Clinton all defeated incumbents in publicly funded campaign systems. It may be difficult to prove that any of these candidates won because of public funding, but it certainly does not appear that they were harmed. As I have already noted, public funding has contributed to greater electoral competition in the two subnational jurisdictions—Minnesota and New York City—in which it is widely used. Jesse Ventura benefited enormously from public funding in his challenge to the Republican and Democratic gubernatorial nominees in Minnesota; candidate David Dinkins benefited from public funding in his successful primary challenge to New York City Mayor Ed Koch; and challenger Rudy Giuliani in turn benefited from public funding in his successful campaign to oust incumbent Mayor Dinkins.

Moreover, so long as it is voluntary, challengers or outsider candidates who believe they will be handicapped by spending restrictions can always opt out. As presidential public funding demonstrates, voluntary public funding systems really are voluntary. Although there was a very high rate of participation by the major candidates in the first four publicly funded presidential elections, and possibly some political pressure to participate, those major candidates who saw themselves as better off outside the system—Ross Perot in 1992, Steve Forbes in 1996, and Forbes and George W. Bush in their 2000 primary campaigns—have demonstrated no compunctions about opting out. It is difficult to conclude that the existence of public funding has made these candidates worse off or hampered their campaigns.

⁶⁹ The concern that incumbents will manipulate the terms of a public funding law to protect themselves seems less relevant when, as is the case in several states, the public funding law was adopted as a result of a voter initiative measure.

In addition, legislatures do not write laws in a vacuum. Campaign finance reform is a product of public concern about the existing system, and campaign finance reform legislation reflects public demands for change. The public, not incumbent legislators, has been the driving force behind reform. If public funding ever gets a serious place on the congressional agenda, it will be due to extraordinary public pressure. Such public pressure will play a role in shaping the terms of the public funding law as well. Nor have the courts been reluctant to strictly scrutinize and invalidate campaign finance legislation. Thus, restrictions that unduly favor major party candidates or incumbents will certainly be subjected to constitutional attack.

Can public funding work? Public funding requires administrators to determine who qualifies for public funds, to disburse the funds, and to enforce whatever restrictions accompany the funds. Can public administrators handle the job? In fact, administrators have successfully handled the qualification of candidates and disbursement of public funds in presidential elections.⁷⁰ The real question is whether they can enforce the rules—particularly the spending limits—that are likely to accompany public funding. The Federal Election Commission's enforcement record has been unimpressive. Penalties have tended to be minimal and imposed, if at all, long after the election. The New York City Campaign Finance Board, however, has demonstrated that effective enforcement is possible during real time, that is, during the election campaign itself.⁷¹ Public funding rules can be enforced if regulators are given the necessary funds and the legal authority to do the job, and if the agency itself is structured to be independent and nonpartisan, rather than bipartisan. But enforcement is a potentially serious Achilles' heel for any campaign finance reform. If public funding is adopted, the administration of the system will require close public scrutiny.⁷²

⁷⁰ One critical evaluation of the Federal Election Commission acknowledged that it "has been more than competent in its handling of hundreds of millions of dollars in subsidies to presidential candidates and political party nominating conventions." BROOKS JACKSON, *BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED* 62 (1990).

⁷¹ See NEW YORK CITY CAMPAIGN FIN. BD., *PARTY FAVORS* (Jan. 1995) (reviewing an incident in the 1993 mayoral campaign in which Board investigation led to the New York State Democratic Party dropping its advertising campaign for the Democratic Mayor, and to the Mayor's publicly funded campaign committee reimbursing the Democratic Party for its expenses, thus keeping the program under the public funding ceiling).

⁷² The best study of the shortcomings of campaign finance law enforcement is MALBIN & GAIS, *supra* note 25.

Beyond the question of outright rules violations are the issues of rules evasion and system avoidance. At the presidential level, the spending limits accompanying public funding have been effectively nullified by soft money and issue advocacy. The decisions of Republican candidates George W. Bush and Steve Forbes not to participate in presidential primary public funding in 1999-2000 have further reduced the significance of public funding in the presidential campaigns. Can it be said that public funding works if, notwithstanding the availability of public funding, a growing number of major candidates prefer to rely on private funds? This objection gets at an important point. Public funding will not operate in a vacuum. It will have to co-exist with private funding. Turning to private donors will remain an option for candidates, and large donors can find ways of participating in campaigns even if the combination of public funding and spending limits reduces the opportunity for direct donations to candidates. The drafters of a public funding plan will have to think carefully about the relationship between public funding and private funding. This relationship has implications for the resources provided to the public funding system, the incentives for and restrictions imposed on candidates as conditions for their participation in public funding, and the enforcement responsibilities of administrators.

Resources are crucial. Presidential public funding is in trouble because public funds are provided at inadequate levels. The general election grant provided to the major party nominees in 1996 was \$61,900,000—or approximately what Richard Nixon spent on his reelection campaign a quarter-century earlier. The public grant is plainly insufficient given significantly increased campaign costs. The combination of public funds and soft money in 1996 basically provided the major party candidates with the equivalent in inflation-adjusted dollars of what their predecessors had in 1972. Candidates began to cultivate soft money and to decline public funding when the public grant became insufficient to fund an effective campaign. Public funding can only work if funding levels are based on the costs of competitive contemporary election campaigns.⁷³

Similarly, both the attractiveness of public funding to candidates and the ability of the system to advance its goals will be related to the

⁷³ This is one of the problems with the clean money reforms adopted in Arizona, Maine, and Massachusetts. They appear to set the public grant way too low. If that is the case, then widespread evasion via soft money, issue advocacy, independent expenditures, and other, not-yet-invented devices is sure to be the result.

level of the spending limit, if a spending limit is used.⁷⁴ To assure that spending limits neither interfere with competitive elections nor discourage competitive candidates from participating in the public funding program, "need" spending limits must be set at levels consistent with the spending actually incurred in recent elections by competitive candidates—defined, for example, as candidates who received 45% of the vote—and then indexed to rise with inflation. Lower limits could very well have the pro-incumbent bias that critics fear. Moreover, low limits are likely to discourage participation, promote evasion, and increase the burdens of enforcement.⁷⁵ Certainly, limits unnecessary to

⁷⁴ Whether public funds should be provided by flat grant—like the presidential general election funding of major party nominees, or like the "clean money" proposals recently adopted in several states—or by matching funds is beyond the scope of this Article. Each approach has advantages and disadvantages. Flat grants can be more equalizing because they are not tied to a candidate's success in raising private donations. They are more likely to promote competitive elections because they place candidates on an equal footing. The flat grant can be made at the start of a campaign or after a candidate has established eligibility to participate in the program, whereas matching grants are paid over the course of the campaign. Early money is generally more valuable to candidates, especially challengers. Moreover, one flat payment facilitates administration more than a system that requires a review of and a response to a candidate's fundraising throughout the campaign period.

On the other hand, if all candidates actually received an equal grant, that would raise the danger that public funding would artificially pump up weak candidates. As a result, some flat grant systems, like the presidential general election system, tie the size of the grant to the percentage of the vote won by the candidate's party in the last election. That provides parity for the major party candidates, proportionally less to minor party candidates, and nothing before the election to independents and candidates of new parties. Moreover, such a flat grant system cannot work in the primaries. Matching grants make more sense in primaries, and, by providing some reflection of the candidate's current level of support, could benefit new parties and independents in general elections. Matching grants may have the benefit of avoiding the twin evils of pumping up weak candidates while failing to fund popular newcomers. Whatever the nature of the payment system, the basic electoral value of fair and open competition requires that public grants ought to be available to independents and new parties that cross some threshold of support in the context of the current election. The provision of the presidential general election public funding law that conditions eligibility for public funding (and not just the amount of public support) on performance in a prior election unfairly burdens new parties.

⁷⁵ The significance of the level of the spending limit for candidate participation in a public funding plan is best illustrated by Wisconsin's experience. In 1986, the public funding spending limits, which had initially been indexed to the rate of inflation, were frozen. Thereafter, according to the Governor's Blue-Ribbon Commission on Campaign Finance Reform, participation in the program began to drop. By 1996, the participation rate was much below that of neighboring Minnesota, which had indexed its spending limit. In its 1997 Report, the Wisconsin Governor's Commission recommended strengthening the state's public funding system by increasing both the amount of funds provided to candidates and the level of the spending limit to take into account the actual costs of campaigns. See 1 *Governor's Blue-Ribbon Commission on*

the broader goals of competitiveness, equality, and government integrity should not be adopted.⁷⁶

Dealing with the continued availability of private funding may require hard choices between encouraging participation in public funding and an administratively workable program. One set of issues involves what to do when a candidate who accepts public funding with spending limits is faced with an opponent who can spend above the limits, or is the target of an independent spending campaign. Although in some elections public funding alone would be enough to make the candidate more competitive than she would have been had she been forced to rely entirely on private funds, it may be necessary to "avert a powerful disincentive for participation in [a] public financing scheme: namely a concern of being grossly outspent by a privately financed opponent with no expenditure limit."⁷⁷ Making public funding more attractive to potential participants by taking steps to offset the impact of spending by nonparticipants above the spending limit would promote public funding goals of reducing the role of large private donors in campaigns, and, ultimately, in governance. But requiring election officials to keep close track of the spending of candidates and groups not participating in the public funding program and to take action in the heat of a campaign could make public funding more difficult to administer. It would certainly entail the commitment of additional fiscal resources to the program, as well as the legal authority to track contribution and spending by all participants in the campaign process during the election.⁷⁸

Campaign Finance Reform, Report of the Commission (visited Oct. 30, 1999) <<http://www.lafollette.wisc.edu/reform/final.htm>>.

⁷⁶ The leading example of such an unnecessary regulation is the state-specific limits the presidential public funding law applies to the primaries. These limits, which are based on state population, fail to consider the strategic significance of relatively low population states like Iowa and New Hampshire in the presidential nomination campaign. The limits are frequently evaded, create unnecessary work for administrators, and serve little purpose. See CORRADO, *supra* note 27, at 57-58 (noting that "candidates who have wanted to [evade the limits] have found numerous ways to do so"). The FEC has liberalized them by rule and has sought their repeal. See FEDERAL ELECTION COMMISSION, *THE PRESIDENTIAL PUBLIC FUNDING PROGRAM* 14 (1993).

⁷⁷ *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1551 (8th Cir. 1996).

⁷⁸ Providing that the campaign finance activities of nonparticipating candidates or independent organizations can trigger benefits for the candidate participating in public funding also raises constitutional questions. State public funding laws that release a publicly funded candidate from the spending limit if a nonparticipating opponent spends above the spending limit or receives contributions sufficient to pay for spending above the limit have been repeatedly upheld. See *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998); *Rosenstiel*, 101 F.3d at 1551; *Wilkinson v. Jones*, 876 F. Supp. 916, 928 (W.D. Ky. 1995). Simply releasing the publicly funded candidate from the spending

Attention to resources and administration will be particularly important for the success of public funding after any public funding law is enacted. The history of campaign finance regulation over the last quarter century demonstrates that candidates and other campaign participants have responded to new campaign laws in ways not foreseen by reform proponents. There will need to be a close review of the law in operation and a willingness to make changes after seeing how candidates and interest groups adapt to the law. Adoption of public funding is a vital first step towards a campaign finance system that is more in line with our basic political values, but it is only a first step and its success will require ongoing monitoring and revision in light of evolving campaign practices and evidence of how the law actually works.

Public funding of candidates' campaigns would be an important reform, likely to be far more beneficial to our political process than deregulation, curbs on soft money without the provision of public funds to candidates, or simply staggering forward with the tattered FECA system. But it is also important to recognize that public funding—or campaign finance reform generally—cannot by itself fully achieve any of the goals that justify its adoption. Not just campaign finance, but ballot access rules, the single-member district system, gerrymandering, and the territorially uneven distribution of voters of different partisan affiliations all affect the competitiveness of congressional elections. So, too, the heavy concentration and frontloading of the presidential primaries into a few weeks in the winter and early spring of an election year makes it much more difficult to create a level playing field. Nor can campaign finance reform assure that all voters will have an equal impact on the election. Differences in interest group organization, intensity of commitment, and interest in and

limit is also the administratively easiest benefit to provide. Going one step further, a public funding law could provide the publicly funded candidate with additional public funds when a nonpublicly funded opponent spends above the spending limit for publicly funded candidates. See *Gable*, 142 F.3d at 949; *Daggett v. Webster*, No. 98-223-B-H, 1999 WL 1034520, at *1 (D. Me. Nov. 5, 1999). More constitutionally questionable, and also more difficult to administer, would be making the action of an independent group the trigger for an additional benefit to the publicly funded candidate. In *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), the court invalidated a provision of Minnesota's public funding law that would have provided publicly funded candidates a subsidy if an independent group engages in expenditures against that candidate or for her opponent. In its very recent decision validating Maine's Clean Election Act, however, a federal district court in Maine rejected *Day's* approach and upheld the portion of the Maine law that counts independent expenditures as part of the monies attributable to a privately funded candidate in determining whether private spending would trigger the provision of additional public funds. See *Daggett*, 1999 WL 1034520, at *7.

time for political activity will remain and may grow more salient. Some inequality in the electoral process reflecting differences in political engagement is probably inevitable. Nor can campaign reform eliminate the role of money or of special interests in government (even if that goal were wholly desirable). Interest group organization, variations in concern with government action, differences in funds available for lobbying, and other activities aimed at influencing legislative and regulatory decision making will all continue to bear on government action.

Public funding is not a panacea whose adoption will usher in the promised land of competitive and egalitarian elections and special-interest-free government. Those who believe it will are bound to be disappointed. But public funding would be an improvement over the status quo. Public funding would make the electoral process more competitive, even if not perfectly competitive. It would give voters, regardless of wealth, a more equal influence over electoral outcomes, even if not a perfectly equal influence. And by reducing officeholders' dependence on large private donors, public funding would remove one source of special interest influence, a source particularly tied to the wealth of the donors rather than to the size of organizational membership or the intensity of political commitment. With adequate resources for candidates and for enforcement, and a commitment to monitor and revise the law in light of future developments, public funding can work. Public funding would not produce a perfect politics but it would be a real step towards a more democratic politics.