Full Public Funding: An Effective and Legally Viable Model for Campaign Finance Reform in the States

Jason B. Frasco

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FULL PUBLIC FUNDING: AN EFFECTIVE AND LEGALLY Viable MODEL FOR CAMPAIGN FINANCE REFORM IN THE STATES

Jason B. Frasco†

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INTRODUCTION

During the mid-1990s, voters in Maine and Arizona1 approved two of the most comprehensive and ambitious attempts at campaign finance reform in American history—voluntary systems of full public

funding of election campaigns for state offices, coupled with lowered campaign contribution limits for those who opt not to participate in the public funding system—termed "Clean Elections." In addition, in 2002, the North Carolina state legislature passed a full public funding system for the state’s appellate and supreme court judges' elections. Although these systems remain relatively new, the initial results are promising.

Other states and the United States Congress have taken notice. Based on the initial effectiveness of the Maine, Arizona, and North Carolina models, advocates of campaign finance reform in dozens of other states, including California, Hawaii, Idaho, Minnesota, New Jersey, New York, and Wisconsin, are actively working to implement their own variations of full public funding systems. In fact, on December 7, 2005, Connecticut's Governor M. Jodi Rell signed into law a comprehensive system of campaign finance reforms that includes public financing for state elected offices. Additionally, Congress commissioned the General Accounting Office to study the early results of the Clean Elections systems in Maine and Arizona with an eye toward potentially developing a full public funding system at the national level.

Will the old saying "as goes Maine, so goes the nation" prove correct? The answer to this question depends in large part on the constitutionality and general legal viability of full public funding systems. One of the main reasons that regulating campaign finance has proven so difficult is the constant presence of First Amendment free speech concerns and the resulting constitutional challenges to the public funding systems. These concerns are further amplified in the context of full public funding systems, where the government directly disburses funds to candidates for campaigns, raising an additional set of complex First Amendment issues.

Opponents of full public funding systems have brought various legal challenges to the systems in Maine, Arizona, North Carolina, and Connecticut. The potentially high cost of implementing a system that
courts may later invalidate is likely one of the main reasons that other states have been hesitant to adopt these ambitious systems of reform. Therefore, both advocates and opponents of reform alike have closely watched the results of these challenges to the existing systems. By and large, the courts have upheld the constitutionality of the basic principle underlying full public funding systems. However, judicial treatment varies with respect to any given full public funding system depending on the specific aspects and operation of that system. This Note explores these systems and some of the attendant legal challenges with the goal of developing a legally viable and effective full public funding model for the states and potentially for the nation as a whole.

Part I of this Note provides an introduction to campaign finance reform and the concept of public financing. Part II examines the full public funding systems implemented in Maine, Arizona, and North Carolina and addresses the effectiveness of and several legal challenges to these systems. Part II also examines the full public-funding systems approved, but not fully implemented, in Connecticut, Massachusetts, and Vermont as well as several of the legal challenges to these three systems. Finally, Part III proposes a full public funding model that is most likely to maximize effectiveness and legal viability.

I

CAMPAIGN FINANCE REFORM AND PUBLIC FUNDING

A. The Need for Reform

It is appropriate to begin with Democratic politician Jesse Unruh's oft-quoted line, "Money is the mother's milk of politics." Since the beginning of the Republic, money has played a dominant role in the American political system by facilitating access to public officials and leading to the "buying" of influence over policy and regulation. Scandals involving direct bribery have plagued the nation since its inception. More indirectly, the high costs of campaigns have led all but the wealthiest candidates to depend heavily on the contributions of private parties to fund their campaigns, often leading to direct conflicts of interest once a candidate obtains or maintains elected office.

Elected officials often receive campaign contributions from the same entities that the officials must regulate or contract with in the officials' capacities as members of the legislative or executive branches

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7 See, e.g., Now is the Time for All Good Men, TIME, Jan. 5, 1968, at 44 (quoting Democratic boss Jesse Unruh's characterization of the political process).
8 At the national level, notable campaign financing scandals include the Teapot Dome Scandal, Tongsun Park (Koreagate), Abscam, and more recently, the Michael Scannlon and Jack Abramoff Indian tribe scandal. For more examples of recent public corruption investigations, see Timothy J. Burger, The FBI Gets Tough, TIME, Jan. 23, 2006, at 15–16.
of government. These officials become "beholden to financial constituencies that contribute to them, and candidates must give them special attention because the contributors will pay for their campaigns." Additionally, constituents and elected officials alike are concerned that politicians spend too much time fundraising and too little time serving their constituents. Lastly, the often-prohibitive cost of campaigning for elected office limits electoral competition. The high cost of campaigns limits the ability of many individuals, especially those who are traditionally without access to established fundraising networks, to run for and win elected office. Particularly at risk are challengers to incumbents, women, racial and ethnic minorities, and minor- and third-party candidates.

B. The Watergate Era

Although political scandals have always lurked in the background, the scandals of the Watergate era, including many state-level scandals, brought the potential corruption inherent in campaign financing to the forefront of American politics. In 1974, Congress responded by amending the 1971 Federal Election Campaign Act (FECA), to implement contribution limits and expenditure limits for congressional and presidential races, complete the partial public financing system for presidential elections, and establish the Federal Election Commission (FEC) as an independent agency to police election practices. State legislatures also responded and many adopted some version of campaign finance laws during the 1970s. Some

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10 See, e.g., ARIZ. REV. STAT. ANN. § 16-940(B)(8) (2006) ("The people of Arizona find that our current election-financing system . . . [r]equires that elected officials spend too much of their time raising funds rather than representing the public.").
11 See, e.g., id. § 16-940(B)(7) ("The people of Arizona find that our current election-financing system . . . [d]rives up the cost of running for state office, discouraging otherwise qualified candidates who lack personal wealth or access to special-interest funding.").
12 See id.
states enacted disclosure laws\textsuperscript{17} while others went further and enacted campaign contribution limits similar to FECA.\textsuperscript{18} Seventeen states combined disclosure requirements and contribution limits with systems of partial public financing similar to FECA's presidential matching fund system.\textsuperscript{19}

Partial public funding systems were a bold and unique approach to addressing some of the main impetuses for campaign finance reform. Instead of merely limiting campaign contributions or expenditures, partial public funding systems provided grants of public funds to candidates who met certain requirements in order to assist with the often substantial cost of political campaigns. At the time FECA's presidential matching fund system and the states' matching fund systems were enacted, publicly subsidizing political campaigns was a revolutionary idea in American politics.\textsuperscript{20} The rationale underlying public funding is that an increase in public funding will lessen the influence of private money in politics, decrease the amount of time that candidates spend fundraising, and expand political access for groups who traditionally have not had access to well-established fundraising networks.\textsuperscript{21}

C. Landmark Campaign Finance Case: Buckley v. Valeo

In 1976, the Supreme Court ruled on a challenge to the amended FECA in the landmark campaign finance case of Buckley v. Valeo.\textsuperscript{22} Although the Court in Buckley struck down FECA's expenditure limits as an unconstitutional restriction on a candidate's freedom of speech,\textsuperscript{23} the Court upheld the majority of FECA and explicitly held that providing public matching funds to presidential candidates was constitutional.\textsuperscript{24}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{17} See Alexander & Frutig, supra note 16, at 39–42 (Idaho), 49–54 (Iowa), 227–35 (Rhode Island), 241–48 (Utah).
\item \textsuperscript{18} See id. at 25–31 (Hawaii), 59–63 (Kentucky), 69–72 (Maine), 77–84 (Maryland), 91–99 (Massachusetts), 105–13 (Michigan), 121–35 (Minnesota), 145–51 (Montana), 159–70 (New Jersey), 179–90 (North Carolina), 197–205 (Oklahoma), 211–19 (Oregon), 255–68 (Wisconsin).
\item \textsuperscript{19} The complete list of states that created some variant of public financing includes California, Hawaii, Idaho, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, North Carolina, Oklahoma, Oregon, Rhode Island, Utah, and Wisconsin. See id. at 5–13. Some of these state programs lapsed or were repealed following their enactment. See id. at 5. For more information on these post-Watergate systems, see generally id.
\item \textsuperscript{21} See, e.g., ARiz. REV. STAT. ANN. § 16-940(B) (2006) (enumerating the goals of Arizona’s public funding system).
\item \textsuperscript{22} 424 U.S. 1 (1976) (per curiam).
\item \textsuperscript{23} Id. at 59–59.
\item \textsuperscript{24} Id. at 85–109.
\end{enumerate}
\end{footnotesize}
The plaintiffs in *Buckley* argued that Congress's creation of a presidential public financing system violated the General Welfare Clause of the United States Constitution. The Court held, however, that the General Welfare Clause was not a limitation on congressional power, but rather, when correctly interpreted in conjunction with the Necessary and Proper Clause, was a grant of congressional power. The Court concluded that "Congress has power to regulate Presidential elections and primaries, and public financing of Presidential elections as a means to reform the electoral process was clearly a choice within the granted power."

The Court also upheld the check-off provision of the presidential public financing system as constitutional. The check-off permitted taxpayers to designate one or two dollars (depending on their marital status) of their tax burden (therefore, not increasing their tax liability) to the presidential public financing fund. The Court rejected the claim that Congress was required to permit taxpayers to designate which candidates or parties would receive their money, reasoning that the appropriation from the check-offs was akin to any other congressional appropriation. Therefore, because "every appropriation made by Congress uses public money in a manner to which some taxpayers object," the check-off provision was valid.

The Court also held that the presidential public financing system did not violate the First Amendment because it was 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." The Court concluded that the public financing system "furthers, not abridges, pertinent First Amendment values."

Additionally, the Court held that the presidential public financing system did not violate the Equal Protection Clause of the Fifth Amendment because "denial of public financing to some Presidential candidates is not restrictive of voters’ rights and less restrictive of candidates."

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25 The presidential public financing system was challenged as "contrary to the 'general welfare'" under U.S. Const. art. I, § 8, cl. 2. Id. at 90.
26 See id.
27 Id. (citations omitted).
28 See id. at 91–92.
29 See id. at 91.
30 See id.
31 Id. at 92.
32 Id. at 92–93 (emphasis added).
33 Id. at 93 (emphasis added).
34 See id. at 93–96.
35 Id. at 94.
The Court concluded that "Congress [had] enacted [the presidential public financing system] in furtherance of sufficiently important governmental interests and ha[d] not unfairly or unnecessarily burdened the political opportunity of any party or candidate." These important governmental interests included "eliminating the improper influence of large private contributions" and providing "an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions."

Lastly, the eligibility requirements for public funding programs were valid because "Congress' interest in not funding hopeless candidacies with large sums of public money necessarily justifies the withholding of public assistance from candidates without significant public support." In addition (and especially relevant to this Note), the Court noted that "[t]he States have also been held to have important interests in limiting places on the ballot to those candidates who demonstrate substantial popular support." Therefore, the eligibility requirements for public funding programs were reasonable and lawful.

Although the Supreme Court later decided several important campaign finance cases, those cases focused primarily on the constitutionality of contribution limits and none addressed public financing programs.

D. The Scope of this Note's Analysis

The analysis in this Note focuses on evaluating legal challenges to full public funding systems with an eye toward developing an effective and financially viable full public funding model that will withstand judicial scrutiny. Any model of effective campaign finance reform must include public financing as the central, if not dominant, compo-

36 See id.
37 Id. at 95–96.
38 Id. at 96.
39 An individual qualifies as a "candidate" for purposes of the presidential public financing program if he or she is the presidential or vice presidential nominee of a major party, or if he or she has qualified to have his name on the election ballot as a presidential or vice presidential candidate of a political party in ten or more states. See 26 U.S.C. § 9002(2) (2000).
40 Buckley, 424 U.S. at 96 (internal citations omitted).
nent of the model. In view of the *Buckley* decision and the current composition of the Supreme Court, however, it is fair to assume that public financing programs will continue to be voluntary to pass constitutional muster. Therefore, any effective system of campaign finance reform must also address limitations on contributions and expenditures on candidates who choose not to participate in public funding systems. These restrictions and their constitutionality, however, are beyond the scope of this Note because they have little bearing on the operation of the public funding aspects of these reforms. Accordingly, the Court’s plurality opinions in *Randall v. Sorrell*, for example, as well as the other cases that address the constitutionality of expenditure limitations and low contribution limits do not affect this analysis. Nonetheless, the *Randall* case is important insofar as it demonstrates the continuing validity of the *Buckley* decision.

E. The Court Reaffirms Important Aspects of *Buckley* in *Randall v. Sorrell*

In 1997, the Vermont legislature passed an aggressive reform to the state’s campaign finance laws. The newly amended law provided a voluntary full public funding system for the offices of governor and lieutenant governor; lowered contribution limits for individuals, political action committees (PACs), political parties, and corporations to the lowest level in the country; and imposed expenditure limits on candidates who chose not to participate in the system. The system’s expenditure limits clearly violated the Court’s holding in *Buckley* that expenditure limits were unconstitutional restrictions on free speech rights, resulting in an immediate challenge to the law by a group of former candidates, voters, political parties, and committees. The district court upheld the constitutionality of the lowered contribution limits on individual, corporate, and PAC contributions but invalidated the contribution limits on political parties and corporations as constitutionally low. The district court also held, unsurprisingly, that the expenditure limits were unconstitutional. The Second Circuit affirmed the district court’s ruling that the expenditure limits were unconstitutional but upheld all of the contribution limits, including

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43 See infra Part I.E.
45 See id. § 2 (amending tit. 17, §§ 2854–2856).
46 See id. § 1(a)(8)–(9).
47 See id. § 7 (amending tit. 17, § 2805a).
49 See id. at 463–64.
50 See id.
the limits on political parties and corporations that the district court declared unconstitutional.51

A plurality of the Supreme Court reversed, holding that both the expenditure limits and the contribution limits violated the First Amendment.52 First, with respect to the expenditure limits, the plurality emphasized the continuing vitality of the Buckley decision, noting that "[o]ver the last 30 years, in considering the constitutionality of a host of different campaign-finance statutes, this Court has repeatedly adhered to Buckley's constraints, including those on expenditure limits."53 Relying on the principles established in Buckley, the plurality held that the Vermont expenditure limits violated the First Amendment.54 The plaintiffs' arguments that the assumptions underlying the Buckley decision no longer applied and that the current case was distinguishable from Buckley ultimately failed to persuade the Court.55

Second, with respect to the contribution limits, the plurality again found the principles in Buckley to be controlling.56 Although Buckley permitted contribution limits that were '‘closely drawn’ to match a 'sufficiently important interest,'”57 the contribution limits in the Vermont system were, “from a constitutional perspective, . . . too restrictive.”58 The limits themselves were extremely low, and the plurality was also concerned about the “statute's effect on political parties and on volunteer activity in Vermont elections.”59

Although the opinion did not address the public financing aspect of the system, the plurality’s reaffirmation of the other main aspects of Buckley tacitly reflects that the public financing principles of Buckley remain valid.

F. The Failure of Matching Fund Systems

After the thirty years that most state matching funds systems have been in place, the consensus of the limited number of studies in this area is that the systems are ineffective.60 However, the studies do re-

52 See Randall, 126 S. Ct. at 2485 (plurality opinion).
54 See id. at 2487-91.
55 See id. at 2489-91.
56 See id. at 2491-92.
57 Id. at 2491 (citing Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam)).
58 Id. at 2495.
59 Id.
veal that “money—whatever the source—clearly does help” because it helps slightly to narrow the incumbent-challenger monetary gap.61

Although a matching fund system certainly can assist a candidate’s campaign, these systems present several problems. First, even if a candidate can meet the threshold fundraising level necessary to trigger matching funds, the matching funds are typically far from sufficient to compete viably in a contested election.62 This creates a disincentive for individuals to run in the first place.63 Second, matching funds do nothing to enable segments of the population that traditionally have not had full access to fundraising networks, including challengers to incumbents, women, third parties, and minorities, to enter races for elected office because the candidates still need to meet a threshold fundraising level to qualify for matching funds. Lastly, these “[p]rograms have to be sustained in an atmosphere quite different from the one that prevailed when they were adopted,”64 thus creating an uphill political battle for their continued operation and enforcement.

Many supporters of campaign finance reform have long asserted that full public funding is the only reform that will effectively limit the influence of money in politics and the only reform that will actually enhance electoral competition by “leveling the playing field.”65 The apparent failures of the partial matching fund systems helped validate this conclusion.

II
STATE SYSTEMS AND LEGAL CHALLENGES

A. Maine

1. Maine Clean Elections Act

In 1996, voters in Maine approved the Maine Clean Elections Act (MCEA) by ballot initiative.66 The MCEA created the Maine Commission on Governmental Ethics and Election Practices (Ethics Commission), an appointed body that administers Maine’s campaign finance laws, including MCEA.67 The MCEA takes a two-part approach to reform, using (1) a voluntary full public funding system for campaigns

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61 See id.
62 See id. at 164.
63 See id.
64 Id.
65 E.g., Richard Briffault, Reforming Campaign Finance Reform: A Review of Voting with Dollars, 91 CAL. L. REV. 643, 683 (2003) (explaining that one of the goals of public funding is to “level the playing field”).
66 See An Act to Reform Campaign Finance, 1996 Me. Legis. Serv. Initiated Bill Ch. 5 (West) (codified at scattered sections of Me. REV. STAT. ANN. tit. 21-A, §§ 1121–1128 (Supp. 2006)).
67 See id. § 1 (amending tit. 1, § 1002).
for the state legislature and governor's office,\textsuperscript{68} and (2) a system of lower contribution limits for all state offices ($500 for gubernatorial candidates and $250 for all other offices).\textsuperscript{69}

To run for elected office, all candidates must first register their candidacies and receive a certain number of signatures from their districts.\textsuperscript{70} These requirements are standard for running for elected office in the United States.

If a candidate chooses to engage in traditional private fundraising and not to participate in the public funding system, he or she may proceed to raise an unlimited amount of private funds provided that the contributions comply with the contribution ceilings imposed by the MCEA.\textsuperscript{71} Additionally, in compliance with \textit{Buckley}, a nonparticipating candidate may also contribute an unlimited amount of personal wealth toward the campaign.\textsuperscript{72}

Alternatively, a candidate may choose to participate in the full public funding system. Importantly, to comply with \textit{Buckley}, participation in the program must be \textit{entirely voluntary}. At the campaign's outset, a "participating candidate"\textsuperscript{73} may accept limited private contributions denoted as "seed money contributions"\textsuperscript{74} to assist the candidate with the next step of the process, "qualifying contributions."\textsuperscript{75} Candidates may only collect their seed money contributions from individuals; seed money contributions may not exceed $100 per contributor (including the candidate and the candidate's family); and the total amount of seed money is limited to $500 for state house candidates, $1,500 for state senate candidates, and $50,000 for gubernatorial candidates.\textsuperscript{76}

Then, to qualify for public funds, a candidate must "demonstrate a threshold amount of community support"\textsuperscript{77} by gathering donations in the form of "qualifying contributions." The MCEA defines qualifying contributions as $5 checks or money orders made payable to the Maine Clean Election Fund by "registered voter[s] within the electoral division for the office a candidate is seeking[,] made during the

\begin{itemize}
\item \textsuperscript{68} See id. § 17 (amending tit. 21-A, § 1122(2)).
\item \textsuperscript{69} See id. § 11. Again, this Note will not evaluate the lowered contribution limits prong of MCEA, tit. 21-A, § 1005.
\item \textsuperscript{70} See ME. DEP'T OF THE SEC'Y OF STATE, A CANDIDATE'S GUIDE TO RUNNING FOR OFFICE IN MAINE 6 (2004) (on file with author). The number of signatures required varies based on the office sought. See id.
\item \textsuperscript{71} See tit. 21-A, § 1005, 1122(5).
\item \textsuperscript{72} See id.
\item \textsuperscript{73} Id. § 1122(6).
\item \textsuperscript{74} Id. § 1122(9).
\item \textsuperscript{75} Id. § 1122(7).
\item \textsuperscript{76} See id. §§ 1122(9), 1125(2).
\end{itemize}
designated qualifying period and obtained with the knowledge and approval of the candidate."\(^7\) State house candidates must collect a minimum of 50 of these "qualifying contributions,"\(^7\) state senate candidates must collect a minimum of 150,\(^8\) and gubernatorial candidates must collect a minimum of 2,500.\(^9\) The collections must be made during the "qualifying period," which is typically from November (for a gubernatorial participating candidate) or January (for state senate or state house participating candidates) through mid-March of the election year.\(^2\)

Once a candidate collects the requisite number of qualifying contributions, submits a request for public funds, and receives certification from the Ethics Commission for his or her public funding participation, the participating candidate must comply with certain requirements.\(^3\) First, the candidate must not accept any additional contributions, including any private contributions, in-kind contributions, or contributions from the candidate himself or herself.\(^4\) Second, all of the candidate's future campaign expenditures must come from public funds.\(^5\)

The Ethics Commission initially distributes funds based on several factors: (1) the "average amount of campaign expenditures made by each candidate during all . . . primary election races for the immediately preceding [two] primary elections," (2) whether the election is a primary or general election, and (3) whether the race is contested or uncontested.\(^6\) The chart below reflects the initial public funds distributions during the 2006 elections.

**Table 1. Initial Public Funds Distributions for Maine State Offices**

<table>
<thead>
<tr>
<th>Office</th>
<th>Primary Election Contested Seat</th>
<th>Primary Election Uncontested Seat</th>
<th>General Election Contested Seat</th>
<th>General Election Uncontested Seat</th>
</tr>
</thead>
<tbody>
<tr>
<td>Governor</td>
<td>$200,000</td>
<td>$200,000</td>
<td>$400,000</td>
<td>$400,000</td>
</tr>
<tr>
<td>State Representative</td>
<td>$1,504</td>
<td>$512</td>
<td>$4,362</td>
<td>$1,745</td>
</tr>
<tr>
<td>State Senator</td>
<td>$7,746</td>
<td>$1,927</td>
<td>$20,082</td>
<td>$8,033</td>
</tr>
</tbody>
</table>


\(^7\) Tit. 21-A, § 1122(7).  
\(^7\) *Id.* § 1125(3)(C).  
\(^8\) *Id.* § 1125(3)(B).  
\(^9\) *Id.* § 1125(3)(A).  
\(^2\) See *id.* § 1122(8).  
\(^3\) See *id.* § 1125.  
\(^6\) Tit. 21-A, § 1125(8).
Furthermore, as a response to the concern that participating candidates would be disadvantaged if they run against nonparticipating candidates, "[p]articipating Clean Elections candidates are also eligible for additional matching funds on a dollar-for-dollar basis if they are outspent by privately funded opponents or are the target of independent expenditures . . ."\(^87\) This matching fund system operates on a disclosure trigger: if a nonparticipating candidate is running against a participating candidate, the nonparticipating candidate must report within forty-eight hours any amount that he or she receives or spends exceeding 1% above the participating candidate's initial public funds distribution.\(^88\) For example, if a candidate in a state senate primary receives $6,000 and the nonparticipating candidate raises or spends over $6,060 (1% more than $6,000), the nonparticipating candidate must report this to the Ethics Commission within forty-eight hours of surpassing the limit.\(^89\) If the nonparticipating candidate were to raise $8,000, the commission would then provide $2,000 worth of matching funds to the participating candidate.\(^90\) Similarly, if an organization were to spend $3,000 on an independent television expenditure attacking a participating candidate, the expenditure would have to be disclosed and the participating candidate would receive $3,000 in matching funds.\(^91\) Ultimately, however, the MCEA limits the matching funds that will be disbursed to a participating candidate equal to twice the initial distribution to the participating candidate.\(^92\)

Three main sources and several additional minor sources combine to fund the Maine program. First, the qualifying contributions that candidates collect go directly into the Maine Clean Election Fund.\(^93\) Second, the state allocates $2 million of tax revenues to the fund each year.\(^94\) Third, each resident may allocate $3 of his or her state tax burden to the fund via a tax check-off program.\(^95\) In addition to the main sources of funding, any unspent seed money contributions, unspent public funds, voluntary donations, and fines for

\(^87\) MARC BRESLOW ET AL., REVITALIZING DEMOCRACY: CLEAN ELECTION REFORM SHOWS THE WAY FORWARD 14 (2002), http://www.neaction.org/revitalizingdemocracy.pdf. Independent expenditures are expenditures that individuals and organizations that are at least theoretically uncoordinated with any candidate's campaign make in support of or in opposition to a candidate.

\(^88\) See tit. 21-A, § 1017.

\(^89\) See id.; ME. CANDIDATE'S GUIDE, supra note 84, at 16.

\(^90\) See ME. CANDIDATE'S GUIDE, supra note 84, at 16.

\(^91\) See id.

\(^92\) See tit. 21-A, § 1125(9).

\(^93\) Indeed, the checks are written directly to the Maine Clean Election Fund. See tit. 21-A, § 1124 (2)(A).

\(^94\) See id. § 1124(2)(B).

\(^95\) See id. § 1124(2)(C).
campaign finance law violations may provide revenue for the program.\textsuperscript{96}

2. \textit{Maine Results}

The initial results of the MCEA are promising. Participation in the public funding system is extremely high; in the 2004 general election, 78\% of candidates participated in the program.\textsuperscript{97} Such involvement, coupled with the new $250 maximum contribution limit, has significantly decreased aggregate levels of direct-to-candidate private contributions, one of the most powerful avenues of monetary influence in the political system.\textsuperscript{98} For example, between the 1998 and 2002 elections, direct contributions of private funds to Maine Senate candidates declined by about 60\%, and direct contributions to Maine House of Representatives candidates dropped by 55\%.\textsuperscript{99}

Additionally, public funding has helped reduce Maine's elected officials' dependence on large campaign donors, resulting in a more effective and unencumbered democracy. Currently, over 75\% of the Maine Senate and over 50\% of the Maine House of Representatives were elected relying on public funds.\textsuperscript{100} As a result, candidates and elected officials report that they are now able to spend significantly more time reaching a larger number of constituents instead of focusing on potential large donors. For example, State Senator Susan Longley commented, "After a few months of doing [public funding], I was realizing how it was wonderfully shifting my focus more completely back to my constituency."\textsuperscript{101} Other legislators have echoed this sentiment.\textsuperscript{102}

Furthermore, if challengers choose to participate in the system and qualify for public funds, the system effectively eliminates the incumbent-challenger fundraising gap that has resulted in astronomically high incumbent reelection rates for many years (98\% in some instances).\textsuperscript{103}

Finally, by providing campaign funds to individuals who traditionally have not had open access to fundraising networks, the system is

\textsuperscript{96} See id. § 1124(2)(D)--(H).
\textsuperscript{98} See Frasco, supra note 20, at 139.
\textsuperscript{99} See id.
\textsuperscript{101} PUBLIC CAMPAIGN, THE ROAD TO CLEAN ELECTIONS 3 (2001).
\textsuperscript{102} See id.
\textsuperscript{103} See Frasco, supra note 20, at 140–41.
better enabling candidates from more diverse backgrounds to run for political office.\textsuperscript{104}

\section*{3. Notable Legal Challenges to the Maine System}

\subsection*{a. Daggett v. Commission on Governmental Ethics \& Election Practices}

In \textit{Daggett v. Commission on Governmental Ethics \& Election Practices}, legislative candidates, campaign contributors, PACs, and the Maine Libertarian Party challenged the public funding system, asserting that the system unconstitutionally coerced candidates to participate.\textsuperscript{105} The district court held that the public funding system was constitutional.\textsuperscript{106} After evaluating the MCEA under the principles announced in \textit{Buckley}, the First Circuit affirmed.\textsuperscript{107}

Specifically, the \textit{Daggett} plaintiffs asserted that the matching fund provision for independent expenditures violates the First Amendment political speech and associational rights of nonparticipating candidates and of noncandidates who wanted to make independent expenditures.\textsuperscript{108} The court noted that the plaintiffs' argument "boil[ed] down to a claim of a First Amendment right to outraise and outspend an opponent, a right that they complain is burdened by the matching funds clause."\textsuperscript{109} The plaintiffs also contended that independent expenditures should not qualify as campaign contributions because independent expenditures traditionally enjoy greater First Amendment protection.\textsuperscript{110} Finally, the plaintiffs argued that the matching fund provision infringed on their freedom of association rights because it "force[d] them to be associated with candidates they oppose[d] by in effect facilitating their speech."\textsuperscript{111}

The court first noted that direct limitations on independent expenditures were unconstitutional under \textit{Buckley}, but that such cases were of "limited application . . . because they involve[d] direct mone-

\begin{flushleft}
\textsuperscript{104} See id. at 141.
\textsuperscript{105} See 205 F.3d 445, 450 (1st Cir. 2000). The plaintiffs also challenged the constitutionality of the new contribution limits for nonparticipating candidates. Because this Note focuses on the public funding systems, it will not address the challenges to the contribution limits. For a discussion of the constitutionality of the contribution limits, see Theodore Lazarus, \textit{The Maine Clean Election Act: Cleansing Public Institutions of Private Money}, 34 Colum. J.L. \& Soc. Probs. 79, 117–21 (2000).
\textsuperscript{106} Daggett, 205 F.3d at 450.
\textsuperscript{107} See id. The court noted that the \textit{Buckley} principles were affirmed in \textit{Nixon v. Shrink Missouri Government PAC}, 528 U.S. 377 (2000). See id. Other than this affirmation, \textit{Nixon} is beyond the scope of this Note because it addresses the constitutionality of contribution limitations.
\textsuperscript{108} See id. at 463–64.
\textsuperscript{109} Id. at 464.
\textsuperscript{110} See id.
\textsuperscript{111} Id.
\end{flushleft}
The court then held that the matching fund provisions did not indirectly burden a donor's speech or associational rights, reasoning that the plaintiffs "have no right to speak free from response—the purpose of the First Amendment is 'to secure the widest possible dissemination of information from diverse and antagonistic sources.'" The court concluded that "[t]he public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures."

Lastly, the court held that "merely because the Fund provide[d] funds to match both campaign donations and independent expenditures made on behalf of the candidate d[id] not mean that the statute equate[d] the two." The court further noted that the plaintiffs' "freedom of association [was] not burdened because their names and messages [were] not associated—in any way indicative of support—with the candidate they oppose[d]."

The court then evaluated the plaintiffs' First Amendment argument that the MCEA's reporting requirement for independent expenditures aggregating over $50 was overly burdensome and would have a chilling effect on independent speakers. The court noted that in Buckley, the Supreme Court upheld a reporting requirement for independent expenditures exceeding $100 in a calendar year. Accordingly, the court was unconvinced that $50 was unreasonable for elections in Maine.

The court then evaluated the general argument against the public funding system itself—that the system was impermissibly coercive because it "provide[d] so many incentives to participate and so many detriments to foregoing participating that it leaves a candidate with no reasonable alternative but to seek qualification as a publicly

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112 Id.
113 Id. (quoting Buckley v. Valeo, 424 U.S. 1, 49 (1976) (per curiam)). The plaintiffs had relied on Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994), a case in which the Eighth Circuit held that a campaign finance provision that increased a participating candidate's expenditure limits based on independent expenditures, or in some circumstances matched those expenditures, was unconstitutional. Id. The court in Daggert rejected the reasoning in Day because it "equate[d] responsive speech with an impairment to the initial speaker" and therefore conflicted with its conclusion in the instant case. See id. at 465.
114 Id. at 464.
115 Id. at 465.
116 Id.
117 See id.
118 See id. at 466.
funded candidate." The court noted that although the Supreme Court upheld voluntary public financing systems in *Buckley*, it also made clear that a public financing system could be unconstitutional if it "'burdens the exercise of political speech' but is not 'narrowly tailored to serve a compelling state interest.'" The court noted that although the Supreme Court upheld voluntary public financing systems in *Buckley*, it also made clear that a public financing system could be unconstitutional if it "‘burdens the exercise of political speech’ but is not ‘narrowly tailored to serve a compelling state interest.’" The first question was whether the public funding system allowed candidates to make a "voluntary" choice about whether to participate in the public funding system. The court noted that a state could create incentives to participate in exchange for the candidate’s agreement not to rely on private fundraising. The test for whether the system is "voluntary," however, is whether the system achieves "a rough proportionality between the advantages available to complying candidates . . . and the restrictions that such candidates must accept to receive those advantages." In other words, the test asks whether "the state exact[ed] a fair price from complying candidates in exchange for the receipt of the challenged benefits." Finally, the court observed the Supreme Court’s holding that candidates and supporters’ First Amendment rights are not violated “[a]s long as the candidate remains free to engage in unlimited private funding and spending, instead of limited public funding . . . .”

The plaintiffs argued, inter alia, that the public financing system was not actually voluntary because, in addition to depriving “non-participants of the benefits of participation,” the system “penalizes them for not participating.” They argued that because the benefits of participating in the public funding program are so high, there was actually “no meaningful choice” available to a candidate but to participate in the program. Some of the alleged excessive benefits were the matching fund mechanism and the labeling of participating candidates as “clean.”

The First Circuit rejected each of these arguments and in doing so provided important guidelines for future public financing systems to follow. First, the court upheld the MCEA’s matching fund provision. The court noted that matching funds did not “create an ex-
ceational benefit to the participating candidate” because they were capped at only twice the initial disbursement.\(^{131}\) This limit, the court observed, enabled a nonparticipating candidate to “outspend [his or] participating opponent with abandon after the limit is reached.”\(^{132}\) The court also sought guidance from two other circuits.\(^{133}\) The First Circuit agreed with the views expressed in these decisions and held that the matching fund provision did not rise to the level of “impermissible coercion.”\(^{134}\) The court further noted that eliminating the matching fund mechanism would open the door for independent expenditures that could defeat “the state’s goal of distributing roughly proportionate funding, albeit with a limit, to publicly funded candidates.”\(^{135}\)

Second, the court addressed the plaintiffs’ concern that the use of the term “clean” to describe participating candidates disparages nonparticipants.\(^{136}\) The court noted that the Ethics Commission did not label participating candidates as “clean” but instead used the term “participating.”\(^{137}\) The court also noted that because “such labeling is not required or sanctioned by the statute nor within the authority of the statute to control[,] . . . any labeling performed by the Commission will not serve as a substantial benefit to participating candidates.”\(^{138}\)

Third, the court held that the cumulative effect of the entire system—and not just the matching fund mechanism—was not coercive.\(^{139}\) The court observed that “a ‘state need not be completely neutral on the matter of public financing of elections’ and that a public funding scheme need not achieve an ‘exact balance’ between benefits and detriments.”\(^{140}\) Furthermore, the court concluded that to be viable, a voluntary public financing system must offer incentives to encourage candidates to participate in the system in the first place.\(^{141}\)

\(^{131}\) Id. at 468.

\(^{132}\) Id.

\(^{133}\) See id. at 469 (discussing Gable v. Patton, 142 F.3d 940 (6th Cir. 1998) and Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996)). In Gable, the Sixth Circuit upheld a public financing matching fund provision that was far more beneficial than the MCEA’s provision. The Sixth Circuit held that although the matching fund mechanism provided a “substantial advantage” for participating candidates, it did not rise to the forbidden level of coercion. In Rosenstiel, the Eighth Circuit held that a matching fund provision was not coercive because a nonparticipating candidate, in effect, controls his or her participating opponent’s funding.

\(^{134}\) See id.

\(^{135}\) Id. at 469–70.

\(^{136}\) Id. at 470.

\(^{137}\) Id.

\(^{138}\) Id.

\(^{139}\) See id. at 472.

\(^{140}\) Id. at 470 (quoting Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 39 (1st Cir. 1993)).

\(^{141}\) See id.
With respect to the MCEA, the court noted that the benefits of participating "are accompanied by significant burdens," among them the inability to fundraise privately, the need to collect seed money and qualifying contributions, the limits on the amount of public funding a candidate may receive, an unknown amount and timing for distribution of matching funds, and a limit on matching funds. Accordingly, the court concluded that "the incentives for a Maine candidate [to participate] . . . are hardly overwhelming," and that furthermore, there are "significant encumbrances on participating candidates." The court held that when combined, there was a "roughly proportionate mix of benefits and detriments to candidates seeking public funding, such that it does not burden the First Amendment rights of candidates or contributors."

b. National Right to Life Political Action Committee State Fund v. Devine

In *National Right to Life Political Action Committee State Fund v. Devine*, the plaintiffs challenged the constitutionality of a MCEA provision. The challenged provision doubled lobbyist registration fees from $200 to $400 for lobbyists and from $100 to $200 for lobbyist associates, and provided that half of the revenue would go to the Ethics Commission and the other half to the Maine General Fund. Two organizations that engage in lobbying, the Maine Campowners Association (MECOA) and the Maine Civil Liberties Union (MCLU), contended that the registration fees constituted "an unlawful tax on the First Amendment activities of MECOA, MCLU, and other employers of lobbyists to the extent the fees are excessive and are used for purposes other than to defray the administrative costs of lobbyist registration and regulation."

The defendants argued that the Tax Injunction Act (TIA) precluded the challenge. The TIA is a federal statute that prohibits district courts from "enjoin[ing], suspend[ing], or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such

142 See id. at 471.
143 Id. at 472.
144 Id.
148 See id.
Although the district court ultimately concluded that the registration fee is a tax, and that the court therefore lacked jurisdiction to resolve the dispute, the court’s discussion of why the registration fee is a tax is relevant to the broader issue of funding public funding systems.

The court first noted that because the charge is termed a “registration fee” and applies only to lobbyists, a relatively small and distinct group of people, it is unlike a tax. However, the court then noted that the fee was imposed by the legislature after a ballot initiative—not by an administrative agency—and that half of the fee is paid to the Maine General Fund. Because the Maine General Fund benefits the entire state, the charge is more like a tax. The court also noted the absence of evidence indicating that the fee serves the regulatory purpose of discouraging lobbying, and that “[e]ven the money that goes to the Commission is broadly used for more than regulation of lobbyists.”

The court referenced MCEA, which indicated that lobbyists' fees contribute to “support[ing] enhanced monitoring [and enforcement of election practices] and computerizing data collection [to track campaign, election, and lobbying information under the Commission’s jurisdiction].”

The plaintiffs conceded that if the registration fee represented a charge for regulatory expenses alone, the fee would be constitutional. Therefore, the court concluded that the plaintiff's challenge was restricted to the amounts over a “reasonable levy,” which in this case was half the revenue from the fees that went to the Maine General Fund. Because the revenues went to the Maine General Fund, the fee constituted a tax measure, and the TIA precluded the federal court from granting jurisdiction to the claim. State courts, therefore, were the appropriate forum in which to challenge the tax.

c. Lessons from the Maine Cases

The MCEA survived the Daggett court with all of its provisions intact, thereby establishing the first major, legally viable system of full public funding. In doing so, Daggett provides several important guide-

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151 See id.

152 Id. at *4–5.

153 Id. at *5 (quoting ME. REV. STAT. ANN. tit. 1, § 1008(6) (Supp. 2006)).

154 See id. at *6.

155 Id.

156 See id. at *6–7.

157 See id. at *7.
lines for future public funding systems. First, a matching fund system should have limits to prevent a participating candidate from procuring a disproportionate advantage that may cause the matching fund mechanism to rise to the level of impermissible coercion. Second, although supporters of public funding systems may extol the virtues of public funding and encourage candidate participation in such systems, the enacting statute and the government body responsible for administering the program should refrain from labeling participating candidates as “clean” candidates. Likewise, the government body and any of its members should avoid characterizing participating candidates as better or more “clean” than nonparticipating candidates. Otherwise, such labeling may create a substantial benefit to participating candidates, which, in turn, can rise to the level of impermissible coercion. Lastly, a full public funding system must carefully balance the incentives and benefits of participation in the system with the meaningful deterrents and burdens of participation in the system. As the Daggett court made clear, a failure to do so may threaten the First Amendment rights of nonparticipating candidates and contributors.

In addition, National Right to Life teaches two critical lessons. First, any mandatory registration fees that are used to help fund full public financing systems should be designated for regulatory enforcement rather than for general funding of the system. If a fee does not reflect regulatory expenses alone, the fee will lose its presumption of constitutionality. Second, if any portion of the mandatory fees charged to lobbyists or other individuals or organizations involved in the political system is used to help fund a public funding system and is allocated toward the state’s general coffers, the relevant provisions should comply with state—not federal—law and precedent on permissible taxation.

B. Arizona

1. Arizona Citizens Clean Elections Act

In 1998, Arizona voters implemented a full public funding system when they approved the Arizona Citizens Clean Elections Act (CCEA).\textsuperscript{158} Similar to Maine’s MCEA, the CCEA combines a voluntary full public funding system with lowered contribution limits for individuals who choose not to participate in the program.\textsuperscript{159} Like the MCEA, the CCEA authorized the creation of a commission, the Citizens Clean Election Commission (CCEC), to administer the pro-


\textsuperscript{159} See Ariz. Rev. Stat. Ann. §§ 16-901.01, -940 to -961 (2006); see also Breslow et al., supra note 87, at 17 (noting that CCEA reduces by 20% the amount that an individual may contribute to a candidate’s campaign).
gram. The coverage of Arizona’s program, however, is broader in scope than Maine’s program. In addition to covering the office of the governor and the state legislature, Arizona’s program covers the secretary of state, the attorney general, the state treasurer, the superintendent of public instruction, the corporation commission, and the mine inspector. The Arizona law follows MCEA’s lead by permitting candidates to raise a limited amount of seed money to assist with the collection of qualifying contributions. The seed money must come from individuals; cannot exceed $100 per person; and is capped at $40,000 for governor, $20,000 for attorney general and secretary of state, $10,000 for the corporation commission, and $2,500 for the state legislature. Like candidates in Maine, Arizona candidates must collect a certain number of qualifying contributions during a specified period to qualify for the program.

**Table 2. Qualifying Contributions Required for Selected Arizona State Offices**

<table>
<thead>
<tr>
<th>Office</th>
<th>Qualifying Contributions Required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Governor</td>
<td>4,000</td>
</tr>
<tr>
<td>Secretary of State</td>
<td></td>
</tr>
<tr>
<td>Attorney General</td>
<td>2,500</td>
</tr>
<tr>
<td>Treasurer</td>
<td></td>
</tr>
<tr>
<td>Corporation Commission</td>
<td>1,500</td>
</tr>
<tr>
<td>Superintendent of Public Instruction</td>
<td></td>
</tr>
<tr>
<td>State Senate and State House</td>
<td>200</td>
</tr>
</tbody>
</table>


Like Maine’s system, once a candidate receives approval for public funding participation, he or she must agree to not accept any additional contributions, including private contributions, in-kind contributions, or any contributions from the candidate personally. The candidate must further agree that all campaign expenditures come from public funds.

The CCEC initially distributes funds based on several factors: party status, whether the election is a primary or general election, and

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161 See id. § 16-950(D).
162 See id. § 16-945.
163 See id.
164 See id. § 16-950(D).
165 See id. §§ 16-941, 16-947(B)(3), 16-950(A).
166 See id. § 16-948.
whether the race is contested or uncontested. The initial public funds distributions for the 2006 elections appear in the chart below.

**Table 3. Initial Public Funds Distributions for Arizona Party Candidates (Selected Offices)**

<table>
<thead>
<tr>
<th>Office</th>
<th>Primary Election Contested</th>
<th>Primary Election Uncontested</th>
<th>General Election Contested</th>
<th>General Election Uncontested</th>
</tr>
</thead>
<tbody>
<tr>
<td>Governor</td>
<td>$453,849</td>
<td>$5 Qualifying Contributions Only</td>
<td>$680,774</td>
<td>$5 Qualifying Contributions Only</td>
</tr>
<tr>
<td>Secretary of State Attorney General</td>
<td>$95,550</td>
<td>$5 Qualifying Contributions Only</td>
<td>$167,213</td>
<td>$5 Qualifying Contributions Only</td>
</tr>
<tr>
<td>Treasurer Corporation Commission</td>
<td>$47,770</td>
<td>$5 Qualifying Contributions Only</td>
<td>$83,598</td>
<td>$5 Qualifying Contributions Only</td>
</tr>
<tr>
<td>Superintendent of Public Instruction</td>
<td>$11,945</td>
<td>$5 Qualifying Contributions Only</td>
<td>$20,904</td>
<td>$5 Qualifying Contributions Only</td>
</tr>
</tbody>
</table>


As the chart below indicates, independent candidates receive 70% of the sum of the original primary election spending limit and the original general election spending limit instead of two separate distributions.

**Table 4. Initial Public Funds Distributions for Arizona Independent Candidates (Selected Offices)**

<table>
<thead>
<tr>
<th>Office</th>
<th>Contested Seat</th>
<th>Uncontested Seat</th>
</tr>
</thead>
<tbody>
<tr>
<td>Governor</td>
<td>$794,306</td>
<td>$5 Qualifying Contributions Only</td>
</tr>
<tr>
<td>Secretary of State Attorney General</td>
<td>$167,213</td>
<td>$5 Qualifying Contributions Only</td>
</tr>
<tr>
<td>Treasurer Corporation Commission</td>
<td>$ 83,598</td>
<td>$5 Qualifying Contributions Only</td>
</tr>
<tr>
<td>Superintendent of Public Instruction</td>
<td>$ 20,904</td>
<td>$5 Qualifying Contributions Only</td>
</tr>
</tbody>
</table>


Again, as in Maine, in the event that participating candidates are "outspent by privately funded opponents or are the target of independent expenditures" after they have received their initial distributions.

167 See *id.*, § 16-951(A). There are also special provisions for candidates who are members of the dominant party in a one-party-dominant district. These types of candidates have the option to shift funds from the general election to the primary election. See State of Ariz. Citizens Clean Elections Comm'n, Participating Candidate Guide: 2005-2006 Election Cycle 45 (2005), http://www.azcleanelections.gov/cceweb/ccecays/docs/2006ParticipatingCandidateGuide.pdf.

of public funds, they are eligible for matching funds. The matching funds are triggered by a required disclosure of the opponent’s fundraising or expenditures above the initial distribution or by a disclosure of an independent expenditure attacking the candidate or supporting the candidate’s opponent. In Arizona, the limit on matching funds is three times—compared to Maine’s limit of two times—the initial distribution to the participating candidate.

Lastly, the funding sources for Arizona’s program differ from the funding sources for Maine’s program. Although Arizona, like Maine, employs a tax check-off ($5 instead of $3), uses the funds collected from the qualifying contributions, and uses fines collected for campaign finance law violations, Arizona additionally finances the system through a dollar-for-dollar tax credit on its state income tax form, a 10% surcharge on all civil penalties and criminal fines, and fees charged to lobbyists.

2. Arizona Results

Like the results in Maine, the results in Arizona have been promising. In 2002, more than 57% of all candidates participated in the public funding system. Public funds comprised over 50% of the total money in 2002 Arizona legislative campaigns. In the same year, seven out of nine statewide officers, including the governor, as well as twenty-seven Arizona state house members and five Arizona state senate members (in total, 36% of the legislature) won election using public funds. In 2004, ten out of eleven statewide officers, again including the governor, won election using public funds, as did thirty-five Arizona state house members and seven Arizona state senate members (in total, 47% of the legislature). In 2006, these numbers remained relatively stable, with publicly funded candidates

169 BRESLOW ET AL., supra note 87, at 17.
171 See id. § 16-952(E).
172 See id. § 16-954(A).
173 See id. § 16-946(A).
174 See id. § 16-942(D)-(E).
175 See id. § 16-954(B).
176 See id. § 16-954(C).
177 See id. § 16-944.
180 See CLEAN ELECTIONS INST., supra note 178.
winning nine out of eleven statewide offices (again, including the governor), twenty-nine Arizona state house seats, and nine Arizona state senate seats (in total, 42% of the legislature).\textsuperscript{182}

Additionally, as in Maine, participating candidates and subsequently elected officials in Arizona praised the program's success on several fronts. Some candidates felt that Arizona's public funding system "'expands opportunities and enhances democracy.'"\textsuperscript{183} The system also encouraged some candidates who would not have otherwise run for office, particularly women,\textsuperscript{184} to run.\textsuperscript{185} Lastly, as was the case in Maine, participating candidates in Arizona reported being able to spend more time with voters and less time fundraising.\textsuperscript{186} On this same point, Leah Landrum, a Democrat and the Arizona House Minority Whip, called the public funding program "successful" and "a good opportunity for individuals to get out there, talk to more of their constituents, [and] do more of an effort to reach more individuals . . . ."\textsuperscript{187}


\textsuperscript{183} Breslow et al., supra note 87, at 33 (quoting Marc Spitzer, an Arizona Republican who won election as Corporation Commissioner in 2000 using public funds). As Spitzer recounted,

\begin{quote}
I am not a novice campaigner, having run for office successfully four times under traditional private financing and in 2000 under Arizona's Clean Elections law. The comparison is stark. Clean Elections empowers the constituency, gives voices to thousands of voters, expands opportunities and enhances democracy. Clean Elections is about bringing back grassroots, one-to-one politics, the way it used to be, instead of high-dollar media campaigns financed by huge contributions from the well-heeled. Clean Elections is about the restoration of democracy.
\end{quote} \textsuperscript{Id.}

\textsuperscript{184} Id. (stating that of the women who accepted public funding in 2000, 87% said they would not have run without the public funding option). Another representative, Leah Landrum Taylor, said, "Anytime I have an opportunity to speak to a group of women, I encourage them to run for office, and tell them that it is possible using Clean Elections." Northeast Action, Money & Politics: Electoral Reform and the Crisis of American Democracy, http://www.neaction.org/issuemoney.htm (last visited Feb. 16, 2007) (quotation omitted).

\textsuperscript{185} See, e.g., Breslow et al., supra note 87, at 24 (citing Meg Burton, an Arizona House of Representatives candidate in 2000, who used public funds). As Burton recounted, "'Without the Clean Elections option, I would not have run for office and subsequently defeated a powerful incumbent and the future Speaker of the House.'" \textsuperscript{Id.}

\textsuperscript{186} See, e.g., id. at 8 (citing David Peterson, an Arizona Republican incumbent). As Peterson recounted,

\begin{quote}
The previous campaigns, I would say at least a half or a third of the campaign time was spent raising the dollars. In this campaign, the time I spent raising the dollars was actually in front of my constituents, because as I went door to door . . . . it gave me the opportunity to work more with my constituents and let them see me and talk to me about some of the issues. . . .
\end{quote} \textsuperscript{Id.}

\textsuperscript{187} Id. at 26.
Recently, however, participating candidates expressed concern that the system's public fund disbursements were too low and that the contribution limits were too restrictive. In order to address this problem, several state representatives introduced House Bill 2690, which, among other things, increases public fund disbursements across the board and raises contribution limits. The state house passed House Bill 2690 unanimously, and as this Note goes to press, the bill was pending before the state senate.

## 3. Notable Legal Challenges to the Arizona System

As in Maine, a multitude of individuals and organizations challenged the Arizona public funding system in court.

### a. Citizens Clean Elections Commission v. Myers

*Citizens Clean Elections Commission v. Myers* was one of the first legal challenges to the CCEA and was unique in that it challenged CCEA not on federal grounds but under the Arizona state constitution. In *Myers*, the plaintiffs challenged the appointment and removal procedures for members of the Citizens Clean Elections Commission (CCEC). In the original CCEA, statewide officials were responsible for appointing members of CCEC members from a list of nominees assembled by the state's Commission on Appellate Court Appointments, which is the body responsible for screening and nominating individuals for appellate judgeships. The chief justice of the Arizona Supreme Court serves as chair of the Commission on Appellate Court Appointments. The original CCEA vested power in the governor to remove individuals from the CCEC but only with the consent of the Arizona Senate. The plaintiffs challenged this appointment and removal process as a violation of the Arizona constitution.

The local superior court first heard the case and held that the Arizona constitution permitted the involvement of the Arizona Supreme Court with the Commission on Appellate Court Appointments.

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189 See H.R. 2690, 48th Leg., 1st Sess. (Ariz. 2007).
191 See id.
192 1 P.3d 706 (Ariz. 2000).
193 See id. at 708.
194 See id. at 708–09.
195 See id.
196 See id. at 708.
197 See id.
in selecting members of the CCEC. However, the court held that the state senate's involvement in removing members from the CCEC violated the separation of powers doctrine, and that the power of the Commission on Appellate Court Appointments to nominate candidates for the CCEC violated the Arizona constitution. Although the removal provision was severable, the nomination provision was not. Consequently, the entire CCEA was invalid.

Upon a request for expedited review by the CCEC and Arizonans for Clean Elections, which was the committee that had initially promoted the Clean Elections ballot measure, the Supreme Court of Arizona exercised special jurisdiction and directly heard the appeal. On appeal, the court first held that expanding the duties of the Commission on Appellate Court Appointments to include nominating members of the CCEC was unconstitutional because the nominating function was "wholly alien to its constitutional charter." However, the court deemed this provision severable because it was not essential for the CCEA to function, and such a conclusion comported with the CCEA's severability clause.

Second, the court reversed the court below and held that requiring the state senate's concurrence in removing members of the CCEC did not violate the separation of powers doctrine. The court explained that "[t]he power being exercised, concurrence, unlike removal, is not an executive power. The degree of control is minimal. The purpose is cooperative. There has, as yet, been no consequence."

Third, because the court found the Commission on Appellate Court Appointments' involvement in the CCEC unconstitutional, the court did not need to address the plaintiffs' argument that the involvement of the chief justice of the Arizona Supreme Court with the

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198 See id. at 709.
199 See id.
200 See id.
201 See id.
202 See id.
203 See id. at 708.
204 Id. at 712.
205 See id. at 712-13.
206 CCEA’s severability provision provides:
   If a provision of this act or its application to any person or circumstance held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable in any court challenge to the validity of this article. The commission and Arizonans for clean elections shall have standing to intervene.

207 See Myers, 1 P.3d at 714.
208 Id.
Commission on Appellate Court Appointments itself violated the separation of powers doctrine.  

Finally, the court held that the Arizona Supreme Court’s involvement in the appointment process for the CCEC was unconstitutional and based its holding on three considerations. First, the power to appoint was a power of the executive, not the judiciary. Second, the CCEC performed “functions wholly unrelated to the judicial power vested” in the Supreme Court of Arizona. Third, the court noted that “whether a particular member of this court makes an appointment is a direct function of that member’s political party affiliation, which is directly contrary [to the requirement in the Arizona constitution] that the members of this court do not sit as Republicans, Democrats or anything else in their capacity as justices.” However, since this amounted to “a small and insignificant part of the Act,” the provision was severable. Accordingly, the court severed the unconstitutional provisions, and the vast majority of the CCEA survived intact.

b. Lavis v. Bayless

In Lavis v. Bayless, which could be considered Arizona’s counterpart to Maine’s National Right to Life, two registered lobbyists subject to the CCEA’s fee requirements and two individuals who received traffic fines and were thus subject to the CCEA’s 10% surcharge on criminal and civil fines filed suit in federal court asserting that the CCEA violated the First and Fourteenth Amendments by compelling citizens to make political contributions. The plaintiffs sued the Arizona secretary of state, who is the official charged with collecting the lobbyist fees, and the state treasurer, who is the CCEA’s principal administrator. The CCEC and Arizonans for Clean Elections also intervened as defendants. The CCEC moved to dismiss on the ground that the TIA precludes subject matter jurisdiction because the complaint involves a state tax. The court noted that because

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209 See id.
210 See id.
211 See id.
212 Id.
213 Id.
214 Id.
216 Both cases involve lobbyist challenges to provisions of the public funding statutes that levy fees on lobbyists to help finance the public funding systems.
217 See Lavis, 233 F. Supp. 2d at 1218.
218 See id.
219 See id.
221 See Lavis, 233 F. Supp. 2d at 1218.
the TIA aims to restrict the federal courts from interfering with how states collect their revenue,222 "[t]he TIA has its roots in fundamental principles of federalism."223

The first question confronting the court was whether the lobbyist fees and the 10% civil and criminal fine surcharges constituted a tax or a fee.224 In deciding the issue, three factors guided the court's determination: "(1) the entity which imposes the tax; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the tax is imposed."225 The court noted that whether the imposing body calls an assessment a tax or a fee is irrelevant.226

The court began by examining the first factor, the entity that imposed the tax, and emphasized that a citizen initiative imposed the tax.227 The court noted that citizen initiatives "have the same force and effect as acts passed by the [l]egislature," and that because an assessment imposed by a legislature is more likely to be a tax than an assessment imposed by a government agency, the first factor "weighs in favor of finding that these assessments are a tax."228

With respect to the second factor, the parties upon whom the assessment is imposed, the court noted that the broader the class of parties burdened, the more likely the assessment is a tax.229 The court observed, however, that in certain situations, even an assessment against a narrower class of parties could still constitute a tax.230 In the case at hand, the court found that the fine surcharges applied to a broad class of parties, which weighed in favor of finding the assessment to be a tax.231 On the other hand, the court recognized that the lobbyist assessments appeared to be imposed on a narrower class of parties, which weighed in favor of finding that the assessment was a fee and therefore not precluded by the TIA.232

With respect to the third factor, the ultimate use of the assessment, the court noted that an assessment "treated as general reve-
nue[ ] and paid into the state’s general fund [is a] tax[ ],” and that “[a]n assessment placed in a special fund and used for a special purpose is less likely to be [a] tax.”

However, “even assessments that are segregated from general revenues are ‘taxes’ under the TIA if expended to provide a general benefit to the public.”

Here, the state deposited assessments into a separate fund established by the CCEA for the special purpose of providing public monies to political campaigns, thus making the assessments less likely to be taxes. However, the CCEA limited the use of the assessments by requiring that only up to 10% may be spent on voter education and only up to 10% may be spent on administrative and enforcement costs. Additionally, under the CCEA, any excess funds must be returned to the state’s general fund.

The court also determined that the assessments, through their use in the public funding program, provided a general benefit to the public. This benefit took the form of the mission of the CCEA: to “improve the integrity of Arizona government by reducing the influence of special interest money,” to “encourage citizen participation in the political process,” and to “promote freedom of speech under the U.S. and Arizona Constitutions.” In addition, the court pointed to the eight specific problems enumerated in the statute that the CCEA sought to alleviate, including the high cost of running for office and the resultant disincentive to participate, the excessive time spent fundraising, and the “cost to taxpayers as a result of subsidies and special privileges given to campaign contributors.” Furthermore, the court expressly referenced Buckley’s holding that “public funding of political campaigns furthers an important and significant government interest” and noted that “[t]here is no serious question about the legitimacy of the government interests in regulating the financing of campaigns to prevent corruption and the appearance of corruption.”

In evaluating the third factor, the court concluded that the assessments contributed to the welfare of Arizona citizens and served an important public purpose. Furthermore, even though the funds were segregated and earmarked for a special purpose, they either ben-

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233 Id.
234 Id.
235 See id.
236 See id. (citing Ariz. Rev. Stat. Ann. § 16-949(B), (C) (2006)).
237 See id. (citing id. § 16-954(D)).
238 See id. at 1221–22.
240 Id. at 1222 (citing id. § 16-940(B)).
241 Id. (citing Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam)).
242 Id. (citing Nixon v. Shrink Missouri Gov’t PAC, 528 U.S. 377 (2000)).
243 See id.
efted the public generally or were returned to Arizona’s general fund.244

After considering all three factors, the court concluded that the 10% surcharge on criminal and civil fines qualified as a tax for purposes of the TIA.245 The lobbyist charges, although imposed on a narrower class, also constituted a tax because the purpose of the charges was to raise revenue for the benefit of the public.246 Additionally, the court held that it “must broadly construe the TIA to prevent even indirect interference with a state’s revenue flow.”247 Therefore, because both charges qualified as taxes, the district court acknowledged that it lacked subject matter jurisdiction to decide the dispute and granted the defendants’ motion to dismiss.248

c. May v. McNally

May v. McNally represents one of the most important legal challenges to the CCEA.249 In 2001, Steve May, then an Arizona state legislator, received a $27 parking ticket and a CCEA-mandated 10% surcharge of $2.70.250 May refused to pay the $2.70 surcharge, asserting that paying the mandatory surcharge would violate his free speech rights because the state could use the surcharge to provide public funds to a candidate whose views he did not support.251 This claim was particularly threatening to the CCEA's viability because the 10% surcharges on civil and criminal fines generated about two-thirds of the Arizona system’s funding.252 May also challenged the fees imposed on registered lobbyists.253

May filed suit in federal court, but the court dismissed the suit for lack of subject matter jurisdiction based on the TIA.254 May then filed suit in Arizona state court and challenged the constitutionality of the CCEA.255 Arizonans for Clean Elections intervened, along with the CCEC, arguing for CCEA's constitutionality.256 The trial court held

244 See id.
245 See id.
246 See id.
247 Id.
248 See id. at 1222–23.
250 See id. at 770.
251 See id.
253 See May, 55 P.3d at 770.
256 See id.
that the civil and criminal surcharges were constitutional but held that the lobbyist fees were unconstitutional.\textsuperscript{257} The Arizona Court of Appeals reversed, holding that the surcharges were unconstitutional.\textsuperscript{258}

Following the court of appeals decision, the Arizona Supreme Court granted review. The Arizona Supreme Court reversed the court of appeals and upheld the surcharge's constitutionality.\textsuperscript{259} The court began by noting that \textit{Buckley} supports the "proposition that public financing of political candidates, in and of itself, does not violate the First Amendment, even though the funding may be used to further speech to which the contributor objects."\textsuperscript{260}

However, May argued that three post-\textit{Buckley} cases—\textit{Abood v. Detroit Board of Education},\textsuperscript{261} \textit{Keller v. State Bar of California},\textsuperscript{262} and \textit{United States v. United Foods, Inc.}\textsuperscript{263}—held otherwise.\textsuperscript{264} The Arizona Supreme Court distinguished the three post-\textit{Buckley} cases on several grounds. First, the court noted that "[t]he opportunity to commit a crime or park illegally is not deserving of the same protection as is the opportunity to participate in a lawful activity," such as teaching in \textit{Abood} or the practice of law in \textit{Keller}.\textsuperscript{265} Second, \textit{Abood}, \textit{Keller}, and \textit{United Foods} each involved an association, which was not the case in the instant controversy.\textsuperscript{266} The court noted that "[a]t best, the group [of surcharge payers] consists of tens of thousands of otherwise unrelated individuals who, at one time or another, paid a civil or criminal fine."\textsuperscript{267} Third, the speech in \textit{Abood}, \textit{Keller}, and \textit{United Foods} was "viewpoint driven," whereas the CCEA "allocates money to all qualifying candidates, regardless of party, position, or message[,] . . . and thus

\textsuperscript{257} See id. The appellants did not appeal the trial court's finding that the lobbyist fee was unconstitutional.


\textsuperscript{259} See May v. McNally, 55 P.3d 768, 774 (Ariz. 2002) (en banc).

\textsuperscript{260} Id. at 771.

\textsuperscript{261} 431 U.S. 209, 235-236 (1977) (holding that although "unions could spend union dues to support political candidates and causes," the unions "could use only such expenditures . . . from charges, dues or assessments paid by employees who [did] not object to advancing those ideas . . .").

\textsuperscript{262} 496 U.S. 1, 13 (1990) (establishing the "germane" test and holding that "an organization such as a bar association, in which membership is a condition of employment, may use funds generated from mandatory membership fees for activities 'germane' to the organization, but that it could not use those funds to advocate or support ideological viewpoints not 'germane' to the purpose for which compelled association was justified" (quotation omitted)).

\textsuperscript{263} 535 U.S. 405 (2001) (holding that fees imposed on mushroom handlers that were used to pay for advertisements promoting mushroom sales were not "germane to a larger regulatory purpose of the association and therefore unconstitutionally violated the mushroom handlers' free speech rights).

\textsuperscript{264} See May, 55 P.3d at 771.

\textsuperscript{265} Id.

\textsuperscript{266} See id. at 771-72.

\textsuperscript{267} Id. at 772.
the surcharge payers are not linked to any specific message, position or viewpoint.”

After finding that *Abood, Keller, and United Foods* did not provide the appropriate context for evaluating the CCEA, the court considered the United States Supreme Court’s approach in *Board of Regents v. Southworth*. In *Southworth*, a state university collected a mandatory student-activity fee from students and allocated the fee on a viewpoint-neutral basis to student organizations, including various political and ideological organizations. A group of students filed suit, asserting that the university violated their free speech rights by funding organizations with whose viewpoints the students disagreed. The Court held that the university’s viewpoint-neutral mode of allocation adequately protected the students’ free speech rights.

The *May* court noted that, similar to the university in *Southworth*, the CCEA sought to facilitate free speech. Additionally, like the university, the CCEA distributed public funds on a viewpoint-neutral basis. Therefore, because *Buckley* permitted the use of public funds to finance political campaigns, and because *Southworth* held that a viewpoint-neutral mode of distribution sufficiently protects free speech rights, the CCEA’s surcharge on criminal and civil fines to finance the public funding system was constitutional.

May argued that the mode of distribution was not viewpoint-neutral because the surcharge payers must support the view that public financing is good public policy and because not all candidates participate in the public funding system. The court rejected these arguments, however, noting first that “‘every appropriation made by [government] uses public money in a manner to which some taxpayers object,’” and that “government could not function if taxpayers could refuse to pay taxes if they disagreed with the government policy or function that the tax supported.” With respect to the candidate-participation argument, the court reasoned that *Southworth* focused on the “method of allocating funds, not the resulting viewpoints being supported,” and that in the case at hand, “[t]he method of allocation funds under the Clean Elections Act [was] clearly neutral with regard

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268 Id.
269 See id.
271 See id. at 222–26.
272 See id. at 226–27.
273 See id. at 230.
274 See 55 P.3d at 772–73.
275 See id. at 773.
276 See id.
277 See id.
278 Id. (quoting *Buckley v. Valeo*, 424 U.S. 1, 92 (1976)).
279 Id.
to the ideology or message of any candidate, and thus passe[d] muster under Southworth."280

Lastly, the court rejected an argument advanced in an amicus brief that the surcharge was a fee, not a tax, and therefore must be evaluated under a different analysis altogether.281 The court held that "whether the surcharge is a tax or a fee is not dispositive of the issues in this case" because "[g]overnment may no more violate the First Amendment by imposing a tax than it may by imposing a fee."282 However, the court did address the issue of whether the surcharge was a tax or a fee and concluded that the surcharge did, in fact, constitute a tax, noting that "[i]t was imposed by a citizen initiative on a broad range of payers for a public purpose."283 May argued that the tax was unconstitutional because the CCEA did not impose the tax on the entire population of the state, thus burdening the "First Amendment rights of a narrowly defined group of taxpayers."284 The court rejected this argument, holding that the tax applied to the whole state because "any person found to have parked illegally or committed a crime will face the surcharge."285 Therefore, "[n]o narrow, discrete group of taxpayers are before us, nor are the fine payers exercising a First Amendment right."286 The court, therefore, held the tax constitutional.287

The Supreme Court denied May’s petition for writ of certiorari in March 2003.288


Association of American Physicians & Surgeons v. Brewer presented the most recent challenge to CCEA.289 The plaintiffs were a former Republican gubernatorial candidate who ran in 2002 with private funds, two individuals who planned to run for office using private funds in upcoming elections, and a physicians’ association that made independent expenditures on behalf of political candidates.290 They collectively filed suit in the United States District Court for the District of Arizona, asserting that parts of the CCEA violated their free speech and equal protection rights under the First and Fourteenth Amend-

280 Id.
281 See id.
282 Id.
283 Id. at 774.
284 Id.
285 Id.
286 Id.
287 See id.
290 See id. at 1198.
ments. First, they claimed that the matching fund mechanism of the CCEA "neutralize[d] the expender's voice when it ma[de] an independent expenditure" and "create[d] a chilling effect on the Association's free exercise of protected speech." Second, they claimed that the CCEA violated the First Amendment by "attempting to equalize the relative financial resources of the candidates, and coercing involuntary participation in public campaign financing by punishing those candidates" who chose not to accept public funds. Third, they claimed that the CCEA regulated "much differently" each of the varied categories of independent expenditures in the CCEA in violation of the Equal Protection Clause. Fourth, they claimed that the CCEA violated the Equal Protection Clause by treating participating and nonparticipating candidates differently.

The Arizona Center for Law in the Public Interest and the Brennan Center for Justice of the New York University Law School intervened to defend the statute and filed a motion to dismiss. The district court addressed the complaint and the motion to dismiss by relying on the reasoning of the Daggett court. Although there were certain differences between the MCEA in Daggett and the CCEA in American Physicians, those differences were not dispositive. The district court explicitly adopted the First Circuit's reasoning in Daggett, held all of the challenged provisions to be constitutional, and granted the intervenors' motion to dismiss.

The plaintiffs appealed soon after. The Ninth Circuit heard oral arguments for the case on February 12, 2007. As this Note goes to press, a decision is pending.

e. Lessons from the Arizona Cases

Several lessons may be drawn from the various challenges mounted to the CCEA. First, as the holding in Citizens Clean Elections

\[\text{\textsuperscript{291}} \text{ See id.}\]
\[\text{\textsuperscript{292}} \text{ Id.}\]
\[\text{\textsuperscript{293}} \text{ Id. at 1198–99.}\]
\[\text{\textsuperscript{294}} \text{ These categories are: "(1) those statements brought forward to the voting populace against a participating candidate or in favor of the nonparticipating opponent of a participating candidate; (2) those statements that favor a participating candidate; and (3) those statements that oppose a nonparticipating candidate." Id. at 1199.}\]
\[\text{\textsuperscript{295}} \text{ See id.}\]
\[\text{\textsuperscript{296}} \text{ See id.}\]
\[\text{\textsuperscript{297}} \text{ See id. at 1198.}\]
\[\text{\textsuperscript{298}} \text{ See id. at 1200–03. For a complete discussion of Daggett, see supra Part II.A.3.a.}\]
\[\text{\textsuperscript{299}} \text{ See Ass'n of Am. Physicians & Surgeons, 363 F. Supp. 2d at 1200.}\]
\[\text{\textsuperscript{300}} \text{ See id. at 1202–03.}\]
\[\text{\textsuperscript{301}} \text{ See U.S. Court of Appeals for the Ninth Circuit, Location of Hearing for February Calendar (Revised Notice), http://www.ca9.uscourts.gov/ca9/calendar.nsf/818e02a1deab7b7b882567770063a742/ee1b00a1e12f9723882972350004e133?OpenDocument (last visited Feb. 16, 2007).}\]
Commission v. Myers suggests, the executive should appoint, or, alternatively, the populace should elect the members of a commission that administers a full public funding system to avoid separation of powers concerns. Similarly, the removal of commission members should be the responsibility of the executive branch. Legislative involvement should be limited to the consent of the state senate, at most.

Second, pursuant to Lavis v. Bayless, in order to limit the jurisdiction of the federal courts concerning matters including mandatory lobbyist charges, mandatory surcharges on criminal and civil fines, or any other similar assessments levied to fund a public financing system, the imposing body should be the legislature or the citizenry and not an administrative agency. Additionally, the assessment should affect as broad a class of parties as possible so that the assessment is more like a tax and less like a discriminatory fee. Furthermore, the relevant statute should allocate as large a portion of the funds as possible directly to the main purpose of the public funding program, funding campaigns, and not to administrative or enforcement costs. The statute should explicitly state how the program benefits the public. In Lavis v. Bayless, for example, the CCEA's explicit enumeration of its goals along with a list of specific problems the statute was trying to alleviate substantially aided the court in determining the benefit to the public.

Third, May v. McNally demonstrates the importance of an explicit requirement in the public funding program's statute that public funds are to be allocated using a viewpoint-neutral mechanism. This type of mechanism is critical to shielding the public funding programs from First Amendment attacks when individuals claim that the public funds are being distributed to candidates with whose views the individuals disagree.

Fourth, in litigation, supporters of full public funding programs should rely heavily on the First Circuit's Daggett opinion, the importance of which was bolstered significantly by the Arizona district court's highly deferential opinion in American Physicians.302

C. North Carolina

1. North Carolina Judicial Campaign Reform Act

In 2002, the North Carolina state legislature passed the North Carolina Judicial Campaign Reform Act,303 and Governor Mike Easley

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302 This recommendation may be strengthened or weakened depending on how the Ninth Circuit rules in American Physicians.
signed the bill into law. The statute creates a voluntary full public funding program for judicial candidates running for the state's court of appeals and supreme court and lowers contribution limits for non-participating candidates. The statute has been in effect since the 2004 elections.

Judicial candidates must voluntarily meet several conditions to be eligible for public funding. First, candidates must agree not to raise or spend more than $10,000 of private funds on their campaigns during the year preceding the election year. Second, after declaring their intent to participate, candidates must collect at least 350 qualifying contributions in amounts between $10 and $500 from North Carolina registered voters during a specified qualifying period. In addition, the aggregate sum of the qualifying contributions must be between a minimum of thirty times the candidate filing fee for the office and a maximum of sixty times the candidate filing fee for the office. Third, during the qualifying period, the candidate may only contribute up to $1,000 to his or her campaign, and family members of the candidate—spouse, parent, child, brother, or sister—may also only contribute up to $1,000 each. Fourth, during the qualifying period, a candidate may only spend the qualifying contributions, any remaining private funds, any remaining personal or family funds, and any potential matching funds. Fourth, after the qualifying period, the candidate must limit his or her spending to the public fund disbursement, any funds remaining from the qualifying period, and any potential matching funds.

The following chart indicates the minimum and maximum amounts of qualifying contributions, in addition to the initial public funds distribution, for each level of judicial office.

305 See N.C. GEN. STAT. § 163-278.64 (2005).
306 See id. § 163-278.61. For a general discussion on public financing in the judicial context including reference to North Carolina’s reforms, see Phyllis Williams Kotey, Public Financing for Non-Partisan Judicial Campaigns: Protecting Judicial Independence While Ensuring Judicial Impartiality, 38 AkrON L. REV. 597 (2005).
307 See N.C. GEN. STAT. § 163-278.64(d)(1) (2005). Therefore, the North Carolina program permits more private fundraising than the Maine and Arizona systems.
308 See N.C. GEN. STAT. §§ 163-278.62(15), 163-278.64(b).
309 See id. § 163-278.62(9), (10). For the current qualifying contribution aggregate minimums and maximums, see infra Table 5.
310 See id. § 163-278.64(d)(4).
311 See id. §§ 163-278.64(d)(2), (4).
312 See id. § 163-278.64(d)(3).
TABLE 5. NORTH CAROLINA JUDICIAL CAMPAIGN REFORM SYSTEM

<table>
<thead>
<tr>
<th>Office</th>
<th>Filing Fee (1% of Salary)</th>
<th>Min. Amt. of Qualifying Contributions (50x filing fee)</th>
<th>Max. Amt. of Qualifying Contributions (60x filing fee)</th>
<th>Initial Public Funds Distribution (125x filing fee)</th>
<th>Initial Public Funds Distribution (175x filing fee)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court</td>
<td>$1,150</td>
<td>$34,500</td>
<td>$69,000</td>
<td>—</td>
<td>$201,300</td>
</tr>
<tr>
<td>Court of Appeals</td>
<td>$1,110</td>
<td>$33,000</td>
<td>$66,000</td>
<td>$197,500</td>
<td>—</td>
</tr>
</tbody>
</table>


The North Carolina system also includes a matching fund mechanism termed "rescue funds."313 In a contested primary, if a participating candidate runs against a nonparticipating candidate who outspends him or her by about $67,000, then the participating candidate is eligible for rescue funds of up to $135,000.314 In a general election, if a participating candidate runs against a nonparticipating candidate who outspends him or her by the amount of the initial public funds distribution for that office, then the participating candidate is eligible for rescue funds of up to twice the initial distribution.315 The same matching fund mechanism applies with the same triggers if a participating candidate is the target of independent expenditure activity, which is spending in support of the nonparticipating candidate or spending to attack the participating candidate.316

The program was initially funded by a $3 check-off on the state income tax form,317 voluntary $50 contributions requested from attorneys at the time they pay their license tax,318 unspent funds remaining from past elections,319 and voluntary contributions from businesses and organizations.320 In 2006, the $50 attorney contributions became mandatory;321 all other funding sources remained the same.

2. North Carolina Results

Although North Carolina’s system has only operated since 2004, the early results are encouraging.322 As Doug Bend noted in his review of the system, “Perhaps the most impressive success is simply the number of judicial candidates who participated in the program.”323

313 Id. § 163-278.67.
314 See id. § 163-278.67(b).
315 See id.
316 See id.
317 See id. §§ 105-159.2, 163-278.63(b)(2).
318 See id. §§ 105-41, 163-278.63(b)(3).
319 See id. § 163-278.63(b)(4)-(5).
320 See id. § 163-278.63(b)(6).
321 See An Act to Make Base Budget Appropriations for Current Operations of State Departments, Institutions, and Agencies, and for Other Purposes, 2005 N.C. Sess. Laws 276 § 23A.1(b) (codified at N.C. GEN. STAT. § 163-278.63(b)(7) (2005)).
322 See, e.g., Bend, supra note 304, at 602.
323 Id.
In 2004, twelve of the sixteen candidates for the court of appeals and the supreme court qualified for the program. An additional two candidates sought to qualify but failed to obtain the required number of qualifying contributions. Four of the five winning candidates received public funding. Additionally, in 2002, 73% of judicial candidates' nonfamily campaign money came from attorneys and other private sources. In 2004, this number dropped to 14% for participating candidates.

In 2006, eight of the twelve candidates for the court of appeals and the supreme court qualified for the program. An additional candidate sought to qualify but failed to obtain the required number of qualifying contributions. Five of the six winning candidates received public funding. Furthermore, the first matching funds payment occurred in 2006. In the race for chief justice of the North Carolina Supreme Court, nonparticipating candidate Rusty Duke spent $54,595 more than the $216,650 public funding grant to participating candidate Sarah Parker. This triggered a rescue fund payment of $54,595 to Parker, who proceeded to win the election.

3. Notable Legal Challenge to the North Carolina System

a. Jackson v. Leake

In 2005, two potential judicial candidates, North Carolina Right to Life Committee Fund for Independent Political Expenditures, and North Carolina Right to Life State Political Action Committee, filed suit in federal court in North Carolina against state election officials, asserting that North Carolina's judicial public funding program violated the First Amendment and the Equal Protection Clause. Theplaintiffs originally filed suit in the Middle District of North Carolina. The defendants moved to dismiss the lawsuit, and in August 2006, based on certain
defendants filed a motion to dismiss as did the intervenor-defendants—Common Cause of North Carolina and James R. Ansley, a candidate in the 2004 North Carolina judicial elections.334

The plaintiffs, among other things, moved for a preliminary injunction to halt operation of the program,335 which the court denied on October 26, 2006.336 First, the court held that one of the judicial candidates lacked standing on all but one of the claims.337 Second, the court held that the Tax Injunction Act barred it from evaluating any claims regarding the mandatory $50 attorney contributions.338 On the one hand, several factors favored finding that the surcharge was a fee: it only affected “a relatively discrete segment of society—active members of the North Carolina State Bar”; the state placed the surcharges into North Carolina Public Campaign Financing Fund;339 and part of the fund “serve[d] to defray expenses associated with administering the Fund.”340 On the other hand, the fund also “ha[d] aspects which benefit the public at large (e.g., campaign finance, the Voter Guide[,] . . . public education),” which favored finding that the surcharge was a tax.341 Holding that “the surcharge falls in the middle of the tax/fee spectrum,” the court examined the purpose of the surcharge and concluded that the purpose tilted the balance in favor of finding that the surcharge was a tax.342 Therefore, the court lacked jurisdiction over the issue.343

The court then employed the “balance of hardships” test and found that a preliminary injunction was not warranted based on the

jurisdictional issues, the court granted the motion in part, denied the motion in part, and transferred the case to the Eastern District of North Carolina. See id. at *10.

334 See Motion to Dismiss, Jackson v. Leake, No. 1:05-CV-691 (M.D.N.C. Nov. 14, 2005); Intervenors-Defendants’ Motion to Dismiss, Jackson v. Leake, No. 1:05-CV-691 (M.D.N.C. Nov. 15, 2005).
335 See Plaintiffs’ Motion for a Preliminary Injunction, Jackson v. Leake, No. 1:05-CV-691 (M.D.N.C. Nov. 16, 2005).
337 See id. at 5.
338 See id. at 9–10.
339 Id. at 8.
340 Id. at 9.
341 Id.
342 Id. The surcharge supported the fund, and as stated in the statute, the purpose of the fund is to ensure the fairness of democratic elections in North Carolina and to protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, those effects being especially problematic in elections of the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts.

Id. (quoting N.C. GEN. STAT. § 163-278.61 (2005)).
343 See id. at 9–10.
plaintiffs' remaining claims. The court first addressed the "Irreparable Harm to Plaintiffs/Likelihood of Success" factor. The plaintiffs challenged the Act's reporting provision, which set forth reporting requirements for nonparticipating candidates and entities making independent expenditures. The court noted that the governmental interests supporting the reporting provision were "sufficiently compelling" to satisfy the "exacting" level of scrutiny required by Buckley. Among other things, the reporting provision furthered the purpose of the overall public funding system: "[T]o ensure fair judicial elections and protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of such elections." More specifically, the provision also "enable[d] the [North Carolina Board of Elections] to gather data to effectively implement the trigger and rescue funds provisions of the Fund." Additionally, voters could access the reported information.

The plaintiffs also argued that the reporting provision improperly burdened nonparticipating candidates because it "effectively required [nonparticipating candidates] to disclose [their] campaign strategy" and required "extensive time . . . to comply[ ] with the reporting requirements." The court disagreed. First, the Act also imposed reporting requirements on participating candidates, and "[e]ven if [one of the defendants] is required to report more than his participating opponent, that burden does not make the provision unconstitutional per se." Second, "[t]he reporting provision does not come into play for . . . nonparticipating candidates until 80% of trigger for rescue funds is reached," and "[t]hereafter, reporting is required after each additional amount exceeding $1000." According to the court, "[t]hese requirements [were] not unduly burdensome," and the $1,000 threshold was not "wholly without rationality."

The court then held that the provision enabled the Board of Elections to "determine when it may issue rescue funds." In turn,
"[t]he rescue funds, i.e., public financing, promote the State's anti-corruption interest," and "[d]isclosure promotes a fully informed electorate." The court concluded, "Thus, there is a 'substantial relation' between those interests and the information . . . nonparticipating candidates must disclose.'

The court also rejected plaintiffs' arguments that the statute's "obligations" reporting requirement and its twenty-four hour reporting requirement were overbroad, concluding, "In the court's opinion, the statute is narrowly drawn to further North Carolina's compelling interests."

The plaintiffs also challenged the "21 day provision" in the Act as an "unconstitutional time limitation on contributions." The "provision prohibits a candidate from accepting, or a contributor from making, a contribution during the 21 days before the general election until the day after that election under certain circumstances." The court held, however, that "it is significant to note that the statute does not operate as an outright ban on all contributions during the defined period" because it "specifically exclude[d] contributions and loans from a candidate or his or her spouse," and "the only contributions prohibited during the short time before the general election are those that 'cause[] the candidate to exceed the "trigger for rescue funds". . . . '] where an opposing participating candidate has not received the maximum rescue funds available.'

In upholding the twenty-one day provision, the court first held that North Carolina had a sufficiently compelling interest in preventing corruption to justify the restrictions in the provision. Second, the provision was not overly broad, because it "does not bar all contributions, applies only to appellate court candidates, . . . is for a limited time," and "is necessary to properly effectuate the trigger for rescue funds." Therefore, "it appears the provision is narrowly tailored to advance North Carolina's interest."

The plaintiffs also attacked the rescue funds provision of the Act, asserting that "because a nonparticipating candidate's own contributions and expenditures count towards the trigger for a participating

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356 Id.
357 Id.
358 Id. at 16–18.
359 Id. at 18.
360 Id. (citing N.C. Gen. Stat. § 163-278.13(e2)(3) (2005)).
361 Id. (quoting N.C. Gen. Stat. § 163-278.13(e2)(3)).
362 See id. at 18–19.
363 Id. at 20 ("Without the provision, if rescue funds are triggered by a contribution to a nonparticipating candidate shortly before the election, the Board may not have sufficient time to issue the funds to a participating candidate." (quoting Gahle v. Patton, 142 F.3d 940, 949-50 (6th Cir. 1998))).
364 Id.
(opposing) candidate’s receipt of rescue funds, nonparticipating candidates are effectively penalized for contributions to and expenditures for their own campaigns which Buckley prohibits.”365 Although there were no direct restrictions on nonparticipating candidate expenditures, the plaintiffs argued that “the indirect restriction . . . violates the constitution,” and because independent expenditures can trigger rescue funds, this chills the First Amendment rights of entities making these expenditures because this “may result in making more money available to an opposing participating candidate.”366 Lastly, the plaintiffs argued “that the rescue funds provision operates as content-based discrimination and impedes the ability of like-minded persons to pool resources.”367

Here, the court noted that “the First Circuit’s rationale” in Daggett was “persuasive”368 and adopted its reasoning. The court quoted a large portion of text from the Daggett opinion, in which the court held that the MCEA’s “‘provision of matching funds does not indirectly burden donors’ speech and associational rights.’”369

Lastly, the plaintiffs attacked the entire public financing system, asserting “that the scheme places nonparticipating candidates at a distinct disadvantage relative to participating candidates, representing invidious and unconstitutional discrimination.”370 The court flatly rejected this argument: “The court simply disagrees with plaintiffs’ argument that the scheme’s reporting provision, trigger, and 21 day provision unfairly or unnecessarily burden nonparticipating candidates’ political opportunities, . . . given the important interests advanced by the public financing scheme.”371

Therefore, the plaintiffs “have not shown a likelihood of success on the merits on any of their claims challenging [specific provisions of the Act] and North Carolina’s public financing system as a whole,” and “[a]ccordingly, plaintiffs have not made a strong showing of irreparable harm.”372

As a final consideration, the court held that the “Harm to Defendants/Public Interest” factor weighed in favor of not granting the injunction.373 The court held that granting the injunction “would likely disrupt the electoral process for appellate judges” because “[t]he general election [was] less than two weeks [a]way[,] . . .

365 Id.
366 Id.
367 Id. at 20–21.
368 Id. at 21.
369 Id. (quoting 205 F.3d 445, 464 (1st Cir. 2000)).
370 Id. at 22.
371 Id.
372 Id. at 23.
373 Id.
light of the twelve candidates in the general election are participating in the Fund,” and [t]hese candidates have relied upon the Fund.” 374

The court concluded, “In balancing the [irreparable harm to plaintiffs, likelihood of success, harm to defendants, and public interest] factors, . . . a preliminary injunction is not warranted.” 375

On March 20, 2007, the court granted defendants’ and intervenor-defendants’ motions to dismiss and entered judgment for the defendants. 376 First, the court dismissed two of the defendants—the state attorney general and the district attorney for Wake County—on the ground that the plaintiffs failed to establish standing to sue these two defendants. 377 Second, with respect to the remaining defendants, “[f]or the reasons set forth in the order denying plaintiffs’ motion for a preliminary injunction,” the plaintiffs failed to state a claim. 378

b. Lessons from Jackson v. Leake

The court’s opinion in Jackson affirms several important lessons from the Maine and Arizona cases and also offers additional insight. If a surcharge on lawyers or lobbyists must be used as a funding source in order for it to qualify as a tax and avoid federal jurisdiction, proceeds from the surcharge should be used to benefit the public at large as much as possible. Furthermore, the public financing statute should explicitly identify why the surcharge is being collected and how it benefits the public. At the very least, because the surcharge typically supports the public funding system as a whole, the statute should explicitly state the goals of the system and how the system benefits the public.

In addition, any reporting provisions should be narrowly tailored to advance identifiable and compelling governmental interests, including larger anticorruption goals, but also more program-specific goals (e.g., to enable operation of matching fund triggers). If possible, it would also be helpful to explicitly state these interests in the statute. Drafters of such reporting provisions also should be cognizant of the burdens placed on nonparticipating candidates. Moreover, as much as possible, any contribution limitation periods should be narrowly tailored with respect to coverage and time. Lastly, as was the case in American Physicians, for supporters of public financing programs, Jackson strongly affirms the importance of the First Circuit’s

374 Id.
375 Id.
377 See id. at 2–5.
378 Id. at 6.
Daggett decision, especially its reasoning with respect to matching fund provisions.

D. Connecticut

1. Connecticut’s Act Concerning Comprehensive Campaign Finance Reform for State-Wide Constitutional and General Assembly Offices

On December 1, 2005, the Connecticut legislature approved Public Act No. 5, An Act Concerning Comprehensive Campaign Finance Reform for State-Wide Constitutional and General Assembly Offices, and Governor M. Jodi Rell signed the bill into law six days later. Public Act No. 5 included a sweeping set of reforms, including restrictions on campaign contributions and the establishment of a voluntary full public funding system for candidates for the Connecticut state legislature, governor, lieutenant governor, attorney general, state comptroller, secretary of state, and state treasurer.

To be eligible for the public funding program, candidates must declare their intent to participate and then collect a certain dollar amount of qualifying contributions during a specified qualifying period. Qualifying contributions must come from individuals and may not exceed $100, including contributions from the candidate personally. Contributions from communicator lobbyists, state contractors, and prospective state contractors over $50 are prohibited. Gubernatorial candidates must collect $250,000 of which $225,000 must come from Connecticut residents. Candidates for the offices of lieutenant governor, attorney general, state comptroller, state treasurer, and secretary of state must collect $75,000, of which $67,500 must come from Connecticut residents. State senate candidates must collect $15,000, which must include contributions of at least $5 from a minimum of 300 individuals living in the applicable senate district. State house candidates must collect $5,000, which must include contributions of at least $5 from a minimum of 150 individuals living in the applicable house district.

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381 See § 3 (codified as amended at CONN. GEN. STAT. § 9-702) (Supp. 2006)).
382 See § 9-702.
383 See id. § 9-704(a).
384 See id. § 9-704(b).
385 See id. § 9-704(a)(1).
386 See id. § 9-704(a)(2).
387 See id. § 9-704(a)(3).
388 See id. § 9-704(a)(4).
The Connecticut statute has a special provision permitting participating candidates to contribute personal funds up to certain relatively low limits to their own campaigns: $20,000 for governor, $10,000 for the other statewide offices, $2,000 for state senate, and $1,000 for state house. These funds do not count, however, toward the qualifying contributions requirement. Furthermore, any public fund disbursements will be reduced by the amount of personal funds that a candidate contributed to his own campaign.

During the time preceding the primary, a participating candidate may only spend collected qualifying contributions in addition to any personally contributed campaign funds. After collecting the qualifying contributions, major-party candidates will receive the public fund disbursements for the primary election based on the office sought. For the primary election, major-party candidates may only spend the public funds, any remaining qualifying contributions, any remaining personal funds, and any additional monies authorized under the matching fund provisions of the statute.

If a candidate from any party prevails in the primary, he or she is then eligible for a public funding grant for the general election. The level of disbursements varies based on the office sought, party affiliation, and whether the race is contested. For the general election, a candidate may only spend the public funding grant for the general election, any remaining funds from the public funding grant for the primary, any remaining qualifying contributions, any remaining personal funds, and any additional monies authorized under the matching fund provisions of the statute.

The scheduled election disbursements for contested races in 2008 and 2010 are as follows:

389 See id. § 9-710(c).
390 See id.
391 See id. § 9-705(j)(1).
392 See id. § 9-702(c).
393 See id. § 9-705. Minor- and petitioning-party candidates are not eligible for primary grants. See id. § 9-705(c) (providing that minor- and petitioning-party candidates only receive funding for the general election).
394 See id. § 9-702(c).
395 See id. §§ 9-705, -708.
396 See id. § 9-705(a), (b), (c), (f), (j)(2). See infra Table 6 for the amounts of the initial public fund distributions. Candidates who run uncontested in the general election are eligible for 30% of the contested general election disbursement. See id. § 9-705(j)(3).
397 See id. § 9-702. Any remaining funds from the primary grant, however, will reduce the general election grant by the total amount of the unexpended primary funds. See id. § 9-705(j)(2).
TABLE 6. INITIAL PUBLIC FUNDS DISTRIBUTIONS FOR CONTESTED CONNECTICUT RACES

<table>
<thead>
<tr>
<th>Office</th>
<th>Major-Party Candidate</th>
<th>Minor-Party Candidate</th>
<th>Petitioning-Party Candidate</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Primary Election</td>
<td>General Election</td>
<td>Primary Election</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>General Election</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Primary Election</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>General Election</td>
</tr>
<tr>
<td>Governor</td>
<td>$1,250,000</td>
<td>$3,000,000</td>
<td>One-third of major-party</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>grant, if certain conditions are met</td>
</tr>
<tr>
<td>Lieutenant Governor</td>
<td>$375,000</td>
<td>$750,000</td>
<td>One-third of major-party</td>
</tr>
<tr>
<td>Attorney General</td>
<td></td>
<td></td>
<td>grant, if certain conditions are met</td>
</tr>
<tr>
<td>State Comptroller Secretary</td>
<td>$35,000, if certain conditions are met</td>
<td>$85,000</td>
<td>One-third of major-party grant, if certain conditions are met</td>
</tr>
<tr>
<td>State Treasurer</td>
<td></td>
<td></td>
<td>One-third of major-party</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>grant, if certain conditions are met</td>
</tr>
<tr>
<td>State Senate</td>
<td>$10,000, if certain conditions are met</td>
<td>$25,000</td>
<td>One-third of major-party grant, if certain conditions are met</td>
</tr>
<tr>
<td>State House</td>
<td></td>
<td></td>
<td>One-third of major-party</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>grant, if certain conditions are met</td>
</tr>
</tbody>
</table>


Like the Maine system, participating candidates are also eligible for matching funds up to twice the initial public distribution if independent expenditures target them or if nonparticipating opponents outspend them.  

The program’s funding sources differ from those in the Maine, Arizona, and North Carolina public funding systems. The North Carolina statute requires that the State Treasurer deposit at least $16 million a year from state sales of escheats into the Citizen Election Fund. If proceeds from escheat sales fail to reach $16 million in any given year, the shortfall is made up using revenues from corporate taxes.

The bill was updated on June 6, 2006, to close potential loopholes and to help protect the law from legal challenges. In addi-

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398 See id. § 9-713 (providing matching funds if a nonparticipating candidate opposed by at least one participating candidate expends over 90% of the grant for participating candidates), § 9-714 (providing matching funds for participating candidates targeted by independent expenditures).


400 See id. § 9-750.

tion, in the fall of 2006, the Connecticut State Elections Enforcement Commission released two declaratory rulings: one clarifying the statute’s prohibition on lobbyist contributions and solicitation, and the other clarifying the statute’s impact on political committees established or controlled by lobbyists. The commission hoped to clarify the intent and operation of the statute in these two areas to provide guidance to candidates and to help the courts evaluate legal challenges to the statute.

Public Act No. 5 became effective on January 1, 2006. Legislative candidates will be eligible for full public funding beginning with the 2008 election cycle, and statewide candidates will be eligible in 2010.

2. Notable Legal Challenges to the Connecticut System


On July 7, 2006, the Green Party of Connecticut along with the American Civil Liberties Union of Connecticut and certain other plaintiffs sued the executive director and general counsel of the state Elections Enforcement Commission and the state attorney general (in their official capacities) in federal court. The plaintiffs alleged that Public Act No. 5 violated the First and Fourteenth Amendments by “effectively excluding participation by minor and petitioning party candidates through unduly burdensome eligibility requirements.” In addition, the plaintiffs attacked the validity of the statute’s matching fund mechanism and its restrictions on lobbyists’ campaign activities as a violation of the First Amendment’s free speech rights. As
this Note goes to press, the action is pending in the United States District Court for the District of Connecticut.409

b. Lobbyist Challenges

On August 29, 2006, the Association of Connecticut Lobbyists LLC and Barry Williams, an individual lobbyist, instituted their own suit challenging Public Act No. 5 in the United States District Court for the District Court of Connecticut.410 The plaintiffs alleged that the act’s prohibitions on contributions by lobbyists and their spouses as well as the statute’s restrictions on how lobbyists can advise their clients on contributions violated their First and Fourteenth Amendment rights.411 On October 18, 2006, the court consolidated the suit with *Green Party of Connecticut v. Garfield*.412 The Brennan Center for Justice of the New York University Law School and several former state candidates (who plan to run again) moved to intervene in the consolidated cases to defend the statute, and the court granted their motion on February 27, 2007.413 As this Note goes to press, the consolidated action is still pending.

In the fall of 2006, several lobbyist groups also began the process to institute suit against Public Act No. 5 in state court. Like the federal suit, the state suit will challenge the act’s lobbyist contribution limits and other lobbyist restrictions.414 As this Note goes to press, this action is also still pending.


In December 2006, the Securities Industry and Financial Markets Association (SIFMA) filed the most recent challenge to Public Act No. 5 in the United States District Court for the District of Connecticut, alleging that some of the statute’s provisions pertaining to state contractors violate the First and Fourteenth Amendments of the federal Constitution.415 Specifically, the suit asserted that the provision in the statute requiring Connecticut to post the names of close relatives of...
state contractors on the Internet violated the First and Fourteenth Amendment rights of the relatives.416 The plaintiffs sought a preliminary injunction barring the publication of the names.417 The suit also attacked the validity of the statute's restrictions on the campaign finance activities of state contractors (and prospective state contractors) on First Amendment grounds.418 On January 2, 2007, District Court Judge Stefan R. Underhill orally granted the preliminary injunction with respect to posting the names of children on the Internet, issued a written order the following day,419 and subsequently issued a memorandum of decision explaining his decision.420 SIFMA then indicated that it "look[ed] forward to working with the state to find a solution that ensures the safety and privacy of children and serves the public interest."421 Subsequently, in February 2007, SIFMA moved to voluntarily dismiss its case,422 and Judge Underhill granted the motion.423

E. Massachusetts

1. Massachusetts Clean Elections Law

In 1998, Massachusetts voters approved the Massachusetts Clean Elections Law.424 The law provided for a voluntary system of full public funding, but differed in important respects from the Maine and Arizona systems. Like the Arizona system, coverage under the Massachusetts law was to be wider in scope than in the Maine public funding system and included candidates for governor, lieutenant governor, attorney general, treasurer, receiver general, state secretary, auditor, councilor, state house, and state senate.425

The Massachusetts public funding system, however, imposed different requirements on candidates who wished to participate in the public funding system. Instead of a blanket restriction on private and in-kind fundraising, a participating candidate could accept limited

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416 See id.
417 See id. at 3, 21.
418 See id. at 3.
private funds; donations of up to $100 from any individual, PAC, or political party per election cycle; and limited in-kind contributions. The total levels of permissible private and in-kind contributions were capped based on the office sought. The chart below indicates the maximum private contributions that the Massachusetts law permitted.

Table 7. Allowable Private Contributions for Selected Massachusetts State Offices

<table>
<thead>
<tr>
<th>Office</th>
<th>Allowable Private Contributions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Governor</td>
<td>$450,000</td>
</tr>
<tr>
<td>Lieutenant Governor</td>
<td>$112,000</td>
</tr>
<tr>
<td>Attorney General</td>
<td>$150,000</td>
</tr>
<tr>
<td>State Senator</td>
<td>$18,000</td>
</tr>
<tr>
<td>State Representative</td>
<td>$6,000</td>
</tr>
</tbody>
</table>


To participate in the Massachusetts public funding system, a candidate had to raise a certain number of “qualifying contributions” of at least $5 made during a specified qualifying period. The required number of contributions varied based on the particular office, and the qualifying contributions counted toward the candidate’s allowable private contribution totals. In contrast to the Maine and Arizona public funding programs, the qualifying contributions were to go directly to the candidate instead of into the general Clean Elections coffers. Additionally, the participating candidate could not accept more than a low level of in-kind contributions (from political committees and individuals only), with the permissible level set based on the office sought. Moreover, all funds expended on the campaign had to come from the limited private fundraising and in-kind contributions combined with the public fund disbursements.

The chart below sets forth the maximum public-fund disbursements under the Massachusetts program as enacted.

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426 See id. ch. 55A, § 9.
427 See id. ch. 55A, § 1.
428 See id. ch. 55A, § 10.
429 See id. ch. 55A, §§ 9(a), 10(b).
430 See id. ch. 55A, § 1.
431 See id. ch. 55A, § 4.
432 See id. ch. 55A, § 9.
433 See id. ch. 55A, § 24; supra note 85 and accompanying text.
435 See id. cb. 55A, § 2(a).
TABLE 8. Maximum Public Funds Distributions for Selected Massachusetts Offices

<table>
<thead>
<tr>
<th>Office</th>
<th>Primary Election Contested Seat</th>
<th>Primary Election Uncontested Seat</th>
<th>General Election Contested Seat</th>
<th>General Election Uncontested Seat</th>
</tr>
</thead>
<tbody>
<tr>
<td>Governor</td>
<td>$1,500,000</td>
<td>$750,000</td>
<td>$1,050,000</td>
<td>$525,000</td>
</tr>
<tr>
<td>Lieutenant Governor</td>
<td>$383,000</td>
<td>$191,500</td>
<td>$255,000</td>
<td>$127,500</td>
</tr>
<tr>
<td>Attorney General</td>
<td>$360,000</td>
<td>$180,000</td>
<td>$240,000</td>
<td>$120,000</td>
</tr>
<tr>
<td>State Senator</td>
<td>$43,000</td>
<td>$21,500</td>
<td>$29,000</td>
<td>$14,500</td>
</tr>
<tr>
<td>State Representative</td>
<td>$15,000</td>
<td>$7,500</td>
<td>$9,000</td>
<td>$4,500</td>
</tr>
</tbody>
</table>


The Massachusetts program also had a matching fund provision that made a candidate eligible for matching funds if a nonparticipating opponent exceeded the expenditure limits set for the participating candidates.436 As in the Maine and Arizona public funding systems, matching funds were triggered by disclosure requirements placed on nonparticipating opponents.437 Following Maine's example, the matching funds limit was capped at twice the initial distribution to the participating candidate.438 The Massachusetts program, however, did not provide funds to match independent expenditures. The public funding system was to be funded largely by legislative appropriations and supplemented by fines and penalties for campaign finance law violations, among other things.439

2. Status of the Massachusetts System

Something rather dramatic happened after Massachusetts voters approved the statute. In 2002, the first cycle in which the statute was to take effect, many candidates indicated that they intended to participate in the system.440 However, later that year, the state legislature refused to release any funds that had been previously appropriated to the Clean Elections system and subsequently passed a budget that did not include an allocation for the public funding system.441 The system never had a chance to operate.

A legal battle ensued between supporters of the full public funding system and the state legislature. An organization called Massachusetts Voters for Clean Elections sued the legislature, and the Massachusetts Supreme Judicial Court held that the legislature had to

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436 See id. ch. 55A, § 11.
437 See id.
438 See id.
441 See id. at 4.
either repeal the law or fully fund the program. The legislature “refused to do either,” and “the court . . . [gave] clean elections advocates the unprecedented power to seize state property and auction it off to raise the money needed to fund candidates’ campaigns.” Facing this untenable situation, the Massachusetts legislature repealed the statute.

Presently, Massachusetts reformers are advocating passage of a new law that would create a system very similar to the public funding system in Maine.

F. Vermont

1. Vermont’s Public Finance System

Vermont enacted comprehensive campaign finance reforms in 1997. These reforms included the creation of a voluntary public funding system for the offices of governor and lieutenant governor, low contribution limits, and a system of expenditure limits for nonparticipating candidates.

2. Legal Challenges and Subsequent Operation of the Vermont System

As soon as the district court declared the statute’s expenditure limits unconstitutional, that portion of the law became ineffective pending judicial reinstatement. The Supreme Court’s ruling in Randall v. Sorrell, however, rendered the limits permanently ineffective. The district court’s ruling also made political party and corporation contribution limits ineffective, but the Second Circuit’s reversal of the district court made the limits effective again. Finally, the Supreme Court’s ruling in Randall again struck down the limits. All other provisions of the law have been in full effect since the legislature passed the statute, including the public financing programs for gubernatorial and lieutenant governor candidates.

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442 See Bates v. Dir. of the Office of Campaign and Poliücal Fin., 763 N.E.2d 6, 7 (Mass. 2002).
443 Sifry, supra note 440, at 4.
446 See supra note 44 and accompanying text.
448 See Landell v. Sorrell, 118 F. Supp. 2d 459, 463-64 (D. Vt. 2000); see also supra notes 49-50 and accompanying text (discussing the district court’s opinion).
449 See Randall v. Sorrell, 126 S. Ct. 2479 (2006); see also supra text accompanying notes 52-59 (discussing the Supreme Court’s opinion).
Vermont’s public financing system prohibits a candidate seeking public funding from raising or spending more than $2,000 before February 15 of the general election year; announcing his candidacy before February 15; and soliciting, accepting, or expending any contributions except for qualifying contributions and public funding grants unless there is a shortfall in the public financing fund. During the specified qualifying period, a gubernatorial candidate must collect at least $35,000 from a minimum of 1,500 qualified individual contributors who each donate a maximum of $50. A candidate for lieutenant governor must collect at least $17,500 from a minimum of 750 qualified individual contributors who each give a maximum of $50. Challenger gubernatorial candidates who meet these requirements are eligible for $75,000 in public funds for the primary and an additional $225,000 for the general election. Challenger candidates for lieutenant governor are eligible for $25,000 in public funds for the primary and an additional $75,000 for the general election. Incumbent governors and lieutenant governors who qualify for participation are entitled to 85% of the amount allocated for challengers.

3. Limited Results from the Vermont Gubernatorial Elections

During the 2000 election cycle, Douglas Racine, Vermont’s lieutenant governor, used public funding and was reelected. In addition, Anthony Pollina of the Progressive Party ran for governor using public funds. Howard Dean, the Democratic candidate, initially accepted public funds but withdrew from the program (and returned the public funds) after “cit[ing] concerns that his Republican opponent was receiving enormous amounts of money, much of it from out-of-state groups, and that the recent court ruling [in Landell] left him no way to keep up.” Although no candidates used public funds during the 2002 election, in 2004 Steve Hingtgen of the Progressive Party used public funding in his bid for lieutenant governor.
III
AN EFFECTIVE AND LEGALLY VIABLE MODEL OF FULL PUBLIC FUNDING

Thus far, courts have upheld the main components of the full public funding systems that are currently operating in Maine and Arizona, which are the two systems that comply with Buckley. The non-Buckley-compliant aspect of the Vermont system failed to withstand constitutional attack, but the Buckley-compliant public funding program remains valid. The Massachusetts public funding system faltered for reasons independent of the judicial system, and the challenges to the North Carolina system are still pending. These court decisions and initial evaluations of the existing models provide meaningful guidance for the design of an effective and legally viable model of full public funding systems for other states, localities, and perhaps even the nation.

A. Components to Maximize the Effectiveness of the Proposed Model

The full public funding "experiments" conducted at the state level indicate that a full public funding system should include seven key components to maximize its reform potential. First, a state public funding system should—like the systems in Maine and Arizona—cover the state legislature, the office of the governor, all statewide-elected officials, and—like the system in North Carolina—encompass judicial offices as well. A larger public funding system results in more candidates and subsequently elected officials who are free from the encumbrances of private fundraising and the resultant influence of large donors. More candidates and elected officials are thus able to spend time on the issues and with their constituents, rather than raising money.

Second, the model should adopt Maine, Arizona, North Carolina, and Connecticut's approach to candidate qualification and require that candidates collect a certain number of low-level financial contributions within a specified qualifying period. This requirement effectively restricts the distribution of scarce public funds to serious candidates, an essential component of the credibility and financial via-

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Justice Louis Brandeis once observed that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Maine, Arizona, and North Carolina are conducting such "experiments" in the area of campaign finance, and Connecticut will begin its "experiment" in 2008.

For an explanation of the importance of publicly financed judicial elections, see Kotev, supra note 306.
bility of any public funding program. Indeed, the *Buckley* Court specifically upheld this gatekeeper requirement. 463 Additionally, qualifying contributions should go directly into the public financing fund, as the Maine system requires, rather than directly to the candidates, as the Arizona system suggests.

Third, to assist candidates with collecting qualifying contributions, states should permit participating candidates to accept limited private money contributions in the form of seed money at the outset of their campaigns. Like the Maine public funding system, however, a public funding system should restrict these limited private contributions to individuals only; subject the contributions to low contribution limits (e.g., $100 per person), including the candidate and the candidate’s family; and subject the contributions to low-level aggregate limits determined by the particular office sought. By limiting the levels of individual seed money contributions and by imposing aggregate-level caps on such monies, the concerns about the undue influence of large donors are substantially alleviated. Additionally, participating candidates should only be able to accept this limited private money during the period preceding their acceptance of public funds. Once a candidate accepts public funding, the candidate must agree not to accept any additional contributions, including any contributions from the candidate personally or the candidate’s family, as well as any private contributions and any in-kind contributions. A model state system would thus limit a candidate’s campaign spending to initial private seed money combined with the eventual public funds disbursement.

Fourth, an effective system should ensure that the public funds that the system disburses to candidates are sufficient to win an election. As this Note observes, the Maine, Arizona, and North Carolina systems have substantially achieved this objective. 464 If the system cannot provide a competitive level of support, it will suffer from the same types of problems that plagued the partial public financing systems. 465 The appropriate funding levels, of course, would depend on the state in which the system is based. States would have to determine the funding level by evaluating historical data on the typical costs of winning a particular elected office in that state. Moreover, as in the Maine, Arizona and North Carolina systems, public funding disbursements should be the same for major-party candidates and third- or minor-party candidates. Providing lower disbursements to minor- or third-party candidates, as in the recently passed Connecticut system, creates less of an incentive for these candidates to participate in the public funding system and run for office. In addition, this creates the

463 *See* *Buckley v. Valeo*, 424 U.S. 1, 96–97 (1976) (per curiam).
464 *See supra* Parts II.A.2, II.B.2, II.C.2.
465 *See supra* text accompanying notes 60–64.
risk that the monies that the system disburses to minor- or third-party candidates might be insufficient to win election. Both of these factors will limit the system's potential to increase minor- or third-party participation. In turn, this limits the system's overall ability to enhance electoral competition, which is one of the main goals of a public funding system.

Fifth, an effective system must provide matching funds to participating candidates when nonparticipating or personally financed opponents outspend them and to participating candidates who are the target of independent expenditures. Unless a matching fund mechanism exists, a wealthy opponent or a barrage of independent expenditures by third-party groups could easily defeat the utility of the public funding program.

Sixth, because one of the main concerns regarding the effectiveness of public funding systems is the ability of states to pay for them, a successful public funding system should draw its resources from a variety of sources, thus ensuring a more diversified and stable revenue stream. Failure to do so will put any potential public funding system at risk, as demonstrated by the failed reform program in Massachusetts. The system should include several options for taxpayers and not merely limit taxpayers to a low, preset tax check-off. The model should instead include tax check-offs at multiple levels. For example, a tax form should allow check-off contributions to the public funding system of $3, $6, or $9, instead of limiting the potential allocation to $3. In conjunction with the multilevel tax check-off, the model should include a multilevel tax add-on option. For example, the taxpayer should be given the option to contribute voluntarily an extra $3, $6, $9, or any other amount in taxes to help fund the system. Given the importance of campaign finance reform, it is likely that at least a certain portion of the population either would want more of their tax liability to apply to public funding programs or would choose voluntarily to contribute a few extra dollars to fund the system. \(466\)

The model should also raise the fines for violations of the campaign finance law and contribute 100% of the proceeds from the fines toward the public funding system. Higher fines would theoretically strengthen the deterrent effect of the laws while simultaneously providing more funds for the system.

The model should also include voluntary $50 contributions requested from lobbyists when they register and from attorneys when they pay their license tax. Furthermore, it is critical that the state legislature, as in Maine and Arizona's models, commits to allocating a

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\(466\) An example of this type of behavior is the multitude of customers who voluntarily pay an extra $1 or $2 at the supermarket or drug store to donate to a charity or community organization. I believe the same phenomenon would likely apply here.
certain amount of funds in the annual budget toward the operation of the system. This act by the state legislature demonstrates a commitment to the system itself by the very people whom the public funding system is intended to regulate while simultaneously helping to ensure the continued financial viability of the program.

Finally, educating potential candidates, elected officials, and the public about the existence, goals, operation, and results of the public funding system is critical to the program's effectiveness and success. The more widespread the public's knowledge of the public funding system, the more likely it is that citizens will believe in the fairness and integrity of the democratic process and subsequently, the fairness and integrity of their state government. Additionally, because the public funding systems appear to enable a greater number and wider variety of citizens to run for office, the larger the system, the more opportunities there are for people to run for office. Moreover, as public funding programs expand and candidates grow more aware of their existence and benefits, participation in the system will likely increase. Similarly, as public awareness of the system and its goals grows, taxpayers will likely be increasingly willing to check off part of their taxes to the program or even add on additional money to support the program.

B. Components to Maximize the Legal Viability of the Proposed Model

A full public funding system must withstand legal challenges in order to fulfill the goals of reform. This Note's model proposes nine critical components to strengthen the legal viability of a public funding model.

First, pursuant to May v. McNally, the public fund distribution mechanism must be viewpoint neutral. Without viewpoint neutrality, the program is susceptible to attack on First Amendment grounds.

Second, to avoid attack under the Equal Protection Clause, as in Green Party of Connecticut v. Garfield, public funding disbursements should be equivalent for major-party candidates and minor- or third-party candidates.468

Third, the matching fund mechanisms should have limits. Daggett and the Arizona cases establish that two or three times the initial distribution is an acceptable limit. Courts may view an unrestricted matching fund mechanism as conferring a disproportionate benefit on a participating candidate, thus elevating the public funding system

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467 See Frasco, supra note 20, at 112–38.
468 This requirement will also enable more minor- and third-party candidates to run competitively for elected office, thereby increasing electoral competition.
to a level of impermissible coercion in violation of the free speech rights of nonparticipating candidates. Ideally, the limit would be three times the initial distribution, but a state’s budget constraints may force the limit to be twice the initial distribution.

Fourth, *Daggett* implies that simple statutory terminology might confer a “substantial benefit” to participating candidates that rises to the level of impermissible coercion. Therefore, to avoid any prospective complications, the enacting statute or ballot initiative, in addition to the government body responsible for administering the program, should refer to the program as a system of “full public funding” or “full public financing” and avoid terms like “clean elections.” The statute or the administering body should similarly refer to candidates who accept public funds as “participating” candidates, not “clean” candidates. Furthermore, although the statute and administering body can certainly encourage participation in the system, neither should give any indication, express or implied, that “participating” candidates are in any way better than “nonparticipating” candidates.

Fifth, *National Right to Life* in Maine and *Lavis* in Arizona both demonstrate the potential legal pitfalls associated with charging lobbyists mandatory registration fees or surcharges and imposing mandatory surcharges on civil and criminal fines. To avoid these concerns, these fees and surcharges should instead be voluntary contributions, as in the proposed model.

Sixth, *Myers* suggests that either the public should elect members of the funding system’s administering body or the governor should have the sole power to appoint these members. Other schemes may implicate or violate the separation of powers doctrine. Additionally, the program should limit removal power to the governor, requiring at most the consent of the state senate.

Seventh, *Daggett* teaches that the full public funding system must carefully balance the incentives and benefits of participation in the program with meaningful detriments and burdens of participation. This should be an identifiable theme throughout the program. The creators and administrators of the program must keep this balance in mind and ensure that the program explicitly reflects this balance. Otherwise, as the *Daggett* court suggests, a lack of balance may threaten the First Amendment rights of nonparticipating candidates and contributors.

Eighth, *Jackson* emphasizes the importance of carefully structuring reporting requirements for nonparticipating candidates. These requirements should be narrowly tailored to advance identifiable and compelling interests, including general anticorruption interests but also interests specific to the public financing program. In addition, creators and administrators of public financing programs must always
be cognizant of the reporting burdens imposed on nonparticipating candidates.

Lastly, supporters of full public funding programs should emphasize the holding and reasoning of Daggett in any pertinent litigation, given the North Carolina district court’s reliance on the opinion in Jackson, and the Arizona district court’s almost complete deference to the opinion in American Physicians.

CONCLUSION

Maine, Arizona, and North Carolina’s full public funding systems are comprehensive and ambitious attempts to guarantee the integrity and fairness of the American political process. In this respect, Maine, Arizona, and North Carolina are truly operating as “laboratories of democracy” for other states and for the nation as a whole.\textsuperscript{469} The initial results of these systems are encouraging; the response by participating candidates and elected officials is overwhelmingly positive, and all three systems have withstood all major legal challenges in the courts.

In light of the initial successes of Maine, Arizona, and North Carolina’s experiments in full public funding, the path is now clear for the rest of the states—and ultimately the nation—to adopt full public funding systems. The system proposed in this Note aims to provide a model for states to achieve this objective. Because courts have upheld all of the components of the proposed model, the model is one that combines effective tools for reform with the ability to withstand legal challenges. The time may have finally come for comprehensive campaign finance reform in the United States—a true system of “clean elections.”

\textsuperscript{469} See supra note 461.