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As Goes Maine? The 1996 Maine Clean Election Act: Innovations and Implications for Future Campaign Finance Reforms at the State and Federal Level

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I. INTRODUCTION

The 1996 elections prompted the emphatic pronouncement that America's campaign finance system was out of control.¹ Political campaign fundraising during the 1996 election cycle fostered numerous allegations of, and investigations into, illegal and improper activities as well as producing a striking picture of the influence of money in politics.² This led many observers to charge the fundraising

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1. See Anthony Corrado, *Giving, Spending, and "Soft Money,"* 6 J.L. & POL'Y 45 (1997) ("Our country's current campaign finance system is simply not working"); CAMPAIGN FINANCE REFORM: A SOURCEBOOK 379 (Anthony Corrado et al. eds., 1997) [hereinafter SOURCEBOOK] (observing that in 1996 America's campaign finance system "went from the political equivalent of a low-grade fever to Code Blue—from a chronic problem needing attention sooner or later to a crisis"); Brooks Jackson, *Financing the 1996 Campaign: The Law of the Jungle,* in TOWARD THE MILLENNIUM: THE ELECTIONS OF 1996 225, 256 (Larry J. Sabato ed., 1997) [hereinafter TOWARD THE MILLENNIUM] (noting that the 1996 fundraising abuses marked the "final collapse of campaign finance regulations enacted 22 years earlier in the wake of the Watergate scandal").

2. See Rebecca Carr & Jackie Koszczuk, *Probe Reports Decry Abuses, But Overhaul Still Unlikely,* 56 CONG. Q., 371 (detailing findings from the U.S. Senate's 1997 campaign finance investigation reports which revealed a myriad of fundraising abuses by both political parties); Anthony Corrado, *Party Soft Money,* in SOURCEBOOK, *supra* note 1, at 167; Ruth Marcus, *Democrats Cite Links Between GOP, Issue Ads: Report Says Candidates Raised Unreported Cash,* WASH. POST, Feb. 6, 1998, at A27. Such activities included accepting possible illegal foreign campaign contributions, hosting private White House coffees and overnight stays in the Lincoln Bedroom for contributors donating \$100,000 or more, and violating federal spending limits. *Id.*

See CENTER FOR RESPONSIVE POLITICS, 10 MYTHS ABOUT MONEY AND POLITICS (1995); David E. Rosenbaum, *In Political Money Game, the Year of Big Loopholes,* N.Y. TIMES, Dec. 26, 1996, at A1 (discussing the record-breaking amounts of money raised during the 1996 election cycle). The Center for Responsive Politics (CRP), a non-profit, non-partisan research organization which studies the role of money in elections documented the following statistics:

excesses and abuses at the federal level with creating the most significant controversy since the 1972 Watergate scandal.³

While Congressional investigations and the media's spotlight continues to remain focused on allegations of illegal fundraising activities, a growing majority of citizens⁴ and campaign finance experts⁵ are equally troubled by campaign fundraising practices that

(1) approximately one-third of one percent of the American public made a campaign contribution of \$200 or more to a federal candidate in the 1991-92 election cycle; (2) only four percent of the American public made a campaign contribution of any amount, in 1980, 1984, or 1992; (3) "[t]he residents of one zip-code area—10021—on New York City's Upper East Side contributed more money to Congress during the 1994 Elections than did all the residents of each of 21 states"; (4) the U.S. House candidate who spent the most money in 1994 won 90 percent of the elections. *Id.* Operating under this system, 95 percent of incumbents won reelection in 1996. 95 Percent of Incumbents Win Reelection in 1996, Aided by Dramatic Fundraising Advantage over Challengers, According to Common Cause (visited Nov. 7, 1996) <<http://www.commoncause.org/publicatins/11-71sdy.html>>. See generally Center for Responsive Politics, 1996 Election Report (visited Feb. 10, 1998) <<http://www.crp.org/pubs/bigpicture/bpstats.html>>.

3. Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in SOURCEBOOK, *supra* note 1, at 35. Even veteran campaign finance reporter Brooks Jackson observed that "[w]atching the hundreds of millions of dollars spent in the 1996 elections, citizens might be surprised to find that there were any laws limiting campaign finance at all." TOWARD THE MILLENNIUM, *supra* note 1, at 225. For example, one corporation gave nearly \$2.2 million to the Republican party even though corporate contributions made in connection with federal elections have been illegal since 1907. *Id.* The American Federation of Labor-Congress of industrial Organizations (AFL-CIO) spent approximately \$22 million in targeted congressional districts on negative television ads aimed at Republicans, even though union contributions made in support of federal candidates have been illegal since 1943. *Id.* See generally TOWARD THE MILLENNIUM, *supra* note 1, (providing an overview of improper and illegal 1996 fundraising activities); *Washington's Other Scandal* (visited Oct. 7, 1998) <<http://www.pbs.org/wgbh/pages/frontline/shows/scandal>> (detailing both political parties' money chase in the 1996 election cycle).

4. See Center For Responsive Politics, *Poll* (visited Feb. 15, 1998) <<http://www.crp.org/pubs/survey/top.html>> (highlighting an April 1997 poll finding that 66 percent of Americans believe the influence of political contributions on elections and government policy is a major problem).

5. See *Campaign Finance Investigations, 1996: Hearings Before the U.S. Senate Governmental Affairs Committee*, 105th Cong. (1997) (statement of Ellen S. Miller, Executive Director of Public Campaign) ("[M]ost of what is wrong with the [campaign finance] system is perfectly legal . . . The real scandal is the day-to-day corruption of the democratic process that takes place when all candidates—except the personally wealthy ones—are dependent on private special-interest money to finance their election campaigns."); Jamin Rasking & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 277-78 (1993) (asserting that the private campaign finance system "[i]nvites the kickback, the sweetheart relationship, and the de facto bribe, but also undermines the very essence of democracy"); J. Skelly Wright, *Money And The Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?* 82 COLUM. L. REV. 609 (1982) ("Concentrated wealth . . . threatens to

are legal under the current private campaign finance system.⁶ Four fundamental problems exist⁷: (1) campaign spending continues to skyrocket;⁸ (2) politicians are preoccupied with fundraising rather than their official duties;⁹ (3) special interests exercise undue

distort political campaigns and referenda. The voices of individual citizens are being drowned out in election campaigns If the ideal of equality is trampled there, the principle of 'one person, one vote,' the cornerstone of our democracy, becomes a hollow mockery.'") *See also* Marty Jezer & Ellen Miller, *Money Politics: Campaign Finance and the Subversion of American Democracy*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 467 (1994); Marty Jezer et al., *A Proposal for Democratically Financed Congressional Elections*, 11 YALE L. & POL'Y REV. 333 (1993); E. Joshua Rosenkranz, *Faulty Assumptions in "Faulty Assumptions": A Response to Professor Smith's Critiques of Campaign Finance Reform*, 30 CONN. L. REV. 867 (1998).

6. For instance, Alabama State Senator Charles D. Bishop describes a scenario familiar to most state legislatures:

It's legal in Alabama, for instance, if there is a bill on the floor to address an envelope [to me], and I'm walking out of the Senate floor, and one these people can walk up to me and hand me a check for \$10,000 and say to me: 'Senator, now this is for your next campaign. This is not anything to do with swaying your vote on the bill.' That's legal in Alabama and it's rotten.

CENTER FOR RESPONSIVE POLITICS, *MONEY IN POLITICS REFORM: PRINCIPLES, PROBLEMS, AND PROPOSALS* 6 (1996).

7. *See generally* Public Campaign, *Clean Money Campaign Reform* (visited Mar. 1, 1998) <<http://www.publiccampaign.org/cleanmoney.html>> [hereinafter Public Campaign].

8. In 1996, U.S. congressional candidate campaign spending totaled over \$2 billion with state and local candidate spending costing another \$2 billion. KENNETH N. WEINE, *THE FLOW OF MONEY IN CONGRESSIONAL ELECTIONS* 1 (1997). Since 1976, the aggregate cost of U.S. House and U.S. Senate general election campaigns increased from \$99 million to \$626 million in 1996. *Id.* at 17. In 1976, the average House candidate spent \$87,200 to win a race and \$661,000 in 1996, while the average Senate candidate spent \$609,100 in 1976 and \$3.6 million in 1996. *Id.* *But see* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1059, 1049-62 (1996) (rejecting the notion that too much money is spent on political campaigns).

9. The current fundraising climate harkens back to former U.S. Senator Mark Hanna's famous observation in 1895: "There are only two things that are important things in politics. The first is money and I can't remember what the second one is." Helen Dewar, *For Campaign Finance Reform, A Historically Uphill Fight*, WASH. POST, Oct. 7, 1997, at A5. Many current and former candidates attest the inordinate amount of time they must devote to raising campaign funds. Former Congressman Jeff Coopersmith (D-WA) acknowledged that the "constant need to raise large sums of money convinced me not to run for re-election. Last time I spent 75 percent of my time raising money. It shouldn't be that way." *Dellums Announces Resignation; Capps Set to Run*, CONGRESS DAILY (Nat'l Journal Group, Washington, D.C.) Nov. 20, 1997, at 1. In her Sunday, January 11, 1998 appearance on NBC's "Meet the Press," then-U.S. Senate candidate Geraldine Ferraro explained to interviewer Tim Russert how she conducted her 1998 campaign: "I got on the phone on Tuesday. I spent Tuesday, Wednesday, Thursday and Friday on the phone, eight hours a day [fundraising] Now, I'm going to remain on that phone for the rest of the next three months." Greg Pierce, *Inside Politics*, WASH.

influence in the electoral system;¹⁰ and (4) potential candidates

TIMES, Jan. 12, 1998, at A5.

Moreover, many agree that such time-consuming fundraising impairs elected officials' job performance. See MARTIN SCHRAM, *SPEAKING FREELY: FORMER MEMBERS OF CONGRESS TALK ABOUT MONEY IN POLITICS 1* (1995) [hereinafter *SPEAKING FREELY*] (presenting in-depth interviews with former members of Congress regarding their personal experiences with campaign fundraising); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1282-83 (1994) (arguing that "[t]he quality of representation has to suffer when legislators continually concerned about re-election are not able to spend the greater part of their workday on matters of constituent service, information gathering, political and policy analysis . . ."). Former lawmakers attest to the detrimental effects of constant fundraising. Former Representative Vin Weber (R-MN) explains "the amount of time people have to put into raising money is a serious problem in the country . . . when the members making decisions can't devote serious quality time to serious decisions, it has to (result in) a lower quality of work." *SPEAKING FREELY*, at 38. Former Representative Leslie Byrne (D-VA) recalls that, as a lawmaker, she was "constantly drawn by the siren song of trying to raise money for your race . . . A very real distraction from the real business of legislating." *Id.*

10. See Jezer, *supra* note 5, at 340 (describing how "special interests usually target their contributions to those candidates who sit on legislative committees" responsible for policy-making in the area(s) of the special interests' concerns); Tom R. Moore & Richard D. La Belle III, *Public Financing of Elections: New Proposals to Meet New Obstacles*, 13 Fla. St. U. L. Rev. 863, 866 (1985) (noting the consensus among scholars supports the popular belief that the larger the contribution, the greater potential it holds for actually corrupting the political process); Richard N. Goodwin, Commentary, *The Selling of Government is a Scandal Beyond 'Reform'*, L.A. TIMES, Jan. 30, 1997, at A11 ("Does anyone really think that hundreds of millions of dollars are being poured into political campaigns out of an excess of public-spirited zeal? The reality is simply common sense: Most of those who give this money are making . . . a business investment."); Editorial, *States Lead the Way in Cleaning Up Campaigns*, USA TODAY, May 1, 1997, at 1214 (citing a survey revealing that 80 percent of respondents believe that special interests buy politicians).

In addition to the public's perception, numerous empirical studies reveal a correlation between special interests' campaign contributions and lawmakers' legislative activity. See LARRY MAKINSON & JOSHUA GOLDSTEIN, *OPEN SECRETS: THE ENCYCLOPEDIA OF CONGRESSIONAL MONEY AND POLITICS* (1996) (providing contributions profiles of each member of the 1994 Congress and its standing committees that detail the industries, companies, unions, and other organizations contributing to each candidate, outlining top recipient aside top contributors and providing an overview of the role of political actions committees). Further, many lawmakers attest to special interests' ability to influence the legislative process through campaign contributions. See *SPEAKING FREELY*, *supra* note 9. For example, former U.S. Senator Wyche Fowler (D-GA) admits:

[I] am sure that on many occasions—I'm not proud of it—I made the choice that I needed [contributions from] this big corporate client and therefore I voted for, or sponsored its provision, even though I did not think that it was in the best interests of the country or the economy.

Id. at 28. Former U.S. Representative Mel Levine (D-CA) reveals that "[o]n the tax side . . . the appropriations side, decisions are clearly weighted and influenced . . . by who has contributed to the candidates. The price that the public pays for this process, whether it's in subsidies, taxes, or

without personal wealth (or access to it) cannot fairly compete for political office.¹¹ Even elected officials, those most familiar with the traditional private campaign finance system, concur that these problems undermine the integrity of the electoral system.¹² Accordingly, public support for comprehensive campaign finance reform is at its highest level to date.¹³ Yet, despite overwhelming public support, Congress has not enacted any significant campaign finance reform legislation for over two decades.¹⁴

appropriations, is quite high.” *Id.* at 89. *But see* Smith, *supra* note 8, at 1068 (arguing that money has not “corrupted” the electoral system and that some studies of voting patterns show that campaign contributions affect very few legislative votes).

11. *See* Center for Responsive Politics, *Poll*, *supra* note 4 (revealing that 71 percent of respondents believe “a major problem” [with the campaign finance system] is that the high cost of financing a campaign discourages good people from running for office); Raskin & Bonifaz, *supra* note 5, at 287-88 (contending that the campaigning costs have increased to the point that “most people of average means cannot even contemplate” running for office); Rosenkranz, *supra* note 5, at 884 (explaining that “[t]alented, brilliant, energetic, committed leaders need not apply if they lack either a trust fund or the will, stomach, capacity, and contacts to raise large sums of money”).

12. *See* SPEAKING FREELY, *supra* note 9. *See also* Cornelius P. McCarthy, *Campaign Finance: A Challenger’s Perspective on Funding and Reform*, 6 J.L. & POL’Y 69, 73 (1997) (detailing his personal experience with the frustrations of fundraising as a congressional candidate and concluding that access to money has become the “preeminent qualification for running . . . and often the only qualification”).

13. *See* Joel Bleifuss, *Cleaning Up Elections*, IN THESE TIMES, May 12, 1997, at 12 (citing an Apr. 8, 1997 *New York Times/CBS News* poll showing that “89 percent of respondents supported a complete overhaul of the campaign finance system”). *But see* Bradley A. Smith, *The Sirens’ Song: Campaign Finance Regulations and the First Amendment*, 6 J.L. & POL’Y 1 (1997) (rejecting the notion that campaign finance regulations require any reform).

14. Over the last decade the U.S. Senate held 29 hearings, interviewed 552 witnesses, endured 17 filibusters, and took 133 votes on campaign finance reform, none of which produced new reform laws. Public Campaign, *The Money Meter* (visited Feb. 1, 1998) <<http://www.publiccampaign.com>>. As a result, the U.S. has not seen significant federal campaign finance reform laws since 1979. Anthony Corrado & Daniel R. Ortiz, *Recent Innovations*, in SOURCEBOOK, *supra* note 1, at 337. Even in the wake of the scandals, investigations, and a barrage of negative publicity surrounding the 1996 campaign fundraising abuses, the 105th Congress failed to enact any campaign finance reform legislation. The United States House of Representatives passed the Shays-Meehan campaign finance reform bill on August 6, 1998. Helen Dewar, *House Approves Campaign Finance Limits*, WASH. POST, Aug. 7, 1998, at A1. However, the United States Senate failed to pass its companion reform bill, the McCain-Feingold when, on September 10, 1998, supporters of the McCain-Feingold bill fell eight votes short of the sixty needed to pass the bill. Helen Dewar, *Campaign Finance Bill Buried for Year; GOP Senators Sustain Filibuster*, WASH. POST, Sept. 11, 1998, at A4. Given Congress’ track record on campaign finance reform, commentators were not surprised by its failures to enact reform. *See* Corrado & Ortiz, *supra* (calling the recent history of federal campaign finance reform efforts “a tale of frustration” because each year Congress promises reform but then fails to follow through); Editorial, *A Plateful of Hypocrisy*, WASH. POST, Nov.

In contrast to congressional inaction, the states are implementing reforms by passing campaign finance reform laws.¹⁵ Plagued by political fundraising problems similar to those at the federal level, several states enacted new campaign finance reform laws through ballot initiatives.¹⁶ Maine voters enacted the most notable and comprehensive of such reforms by passing the Maine Clean Election Act (MCEA).¹⁷ The MCEA represents an innovative legislative scheme because it establishes the nation's first voluntary, full-public financing alternative for political campaigns.¹⁸

Although a majority of Maine voters and commentators supported the MCEA's reforms, the law did encounter opposition.¹⁹ Soon after

6, 1997, at A22 (noting that "Congress will shortly go home with both parties pretty well pleased with what they have been able to accomplish in the field of campaign finance reform: nothing Year after year they pull it off. . . .").

15. See Editorial, *Vermont's Bid for Better Politics*, BOSTON GLOBE, Apr. 6, 1997, at D6 (observing that "[w]hile members of Congress and the president look for ways to avoid action on campaign finance reform, individual states" have addressed the issue directly); Editorial, *States Taking Initiative on Voting Reform*, BOSTON GLOBE, June 9, 1997, at A3 (noting that "[s]tates across the country, frustrated by congressional gridlock on campaign finance reform, are enacting tough new laws of their own"). See generally SOURCEBOOK, *supra* note 1, at 337-38 (detailing the history of statewide campaign finance reform initiatives). Beginning 1980, a majority of states reformed their statewide campaign finance laws. *Id.* Nineteen ninety-one saw ten states pass laws establishing or reducing campaign contribution limits while twenty-three states and the District of Columbia revised their laws in significant ways during the 1992-1996 election cycle. *Id.* See generally William J. Connolly, Note, *How Low Can You Go? State Campaign Contribution Limits and the First Amendment*, 76 B.U. L. REV. 483, 497 (1996) (detailing the history of various statewide campaign finance reform legislation).

16. Like federal campaigns, the cost of state and local campaigns increased exponentially over the last twenty years. SOURCEBOOK, *supra* note 1, at 337. Candidate spending for statewide elections increased from \$120 million in 1976 to \$540 million in 1988; a 450 percent increase. *Id.* State and local races began to mirror federal races in other ways: (1) candidates began placing greater emphasis on fund-raising and political action committees (PACs); (2) Candidates became increasingly dependent on large donors as the primary source of campaign revenue; (3) incumbents outspent challengers by greater margins; and (4) the public's suspicions of the undue influence of political contributions increased. *Id.* at 338.

In 1996, seven states (Arkansas, California, Colorado, Maine, Massachusetts, Montana, and Nevada) approved campaign finance proposals through ballot initiatives. *Id.* at 340. See also TOWARD THE MILLENNIUM, *supra* note 1, at 256; Eliza Newlin Carney, *Taking on the Fat Cats*, NAT'L J., Jan. 18, 1997, at 110; Editorial, *Campaign Reform Dead? Not According to Public*, USA TODAY, Oct. 22, 1997, at 14A.

17. ME. REV. STAT. ANN. tit. 31-1A, §§ 1001-201A, 1121-28 (Klepp Supp. 1998). On November 5, 1996, Maine voters passed the Maine Clean Election Act by a 56 percent to 44 percent margin. See *infra* Part III (detailing the history of the Act's passage).

18. See *infra* Part III for an explanation of the MCEA's provisions.

19. See RONALD KESSLER, INSIDE CONGRESS 240 (1997); Michael E. Campion, Note, *The Maine Clean Election Act: The Future of Campaign Finance Reform*, 66 FORDHAM L.

voters approved it, the National Right to Life Political Action Committee (NRLPAC) and the Maine Civil Liberties Union (MCLU) filed lawsuits challenging various provisions of the MCEA on First Amendment grounds and seeking permanent injunctive relief prohibiting its enforcement.²⁰ However, United States District Court Judge Brock Hornby dismissed the plaintiffs' challenges on all counts, holding that they lacked standing and that the legal issues were not ripe for adjudication.²¹

Judge Hornby's refusal to rule on the merits left open several legal questions regarding the MCEA's constitutionality and, assuming the plaintiffs refile their lawsuit, such questions will likely arise again.²² Resolving these questions not only holds important implications for Maine's campaign finance system but for other campaign finance

REV. 2391 (1998); Robert Kuttner, *Rescuing Democracy from "Speech,"* THE AMERICAN PROSPECT, Jan.-Feb. 1998, at 10, 13; Burt Neuborne, *One Dollar, One Vote?*, THE NATION, Dec. 2, 1996, at 21; *Public Should Pay for Campaigning*, WIS. LEADER-TELEGRAM, July 7, 1997; Jonathan Rauch, *How to Repair America's Campaign Finance System, Part I: Give Pols Free Money, No Rules*, U.S. NEWS & WORLD REP., Dec. 29, 1997-Jan. 5, 1998, at 54, 55; *Sign Up for Clean Elections*, BOSTON GLOBE, Oct. 24, 1997, at A18; Paul Starr, *The Loophole We Can't Close*, THE AMERICAN PROSPECT, Jan.-Feb. 1998, at 6, 7; *States Lead the Way in Cleaning Up Campaigns*, USA Today, May 1, 1997, at B1; *A Worthy Experiment in Maine*, BOSTON GLOBE, Nov., 1, 1996, at A26; Editorial, *"Yes" On Question 3 Can Improve Elections*, PORTLAND PRESS HERALD, Oct. 31, 1996, at 12A.

20. Six additional plaintiffs joined the MCLU. Some claimed they were candidates who anticipated running for statewide office in Maine's 2000 elections, others claimed they were campaign contributors who anticipated making donations in Maine's 2000 elections. Plaintiff's Complaint at 6-8, *Daggett v. Devine*, 973 F. Supp. 203 (D.Me. 1997) (No. 97-56-B-H, No. 96-359-P-H).

The NRLPAC directed its principal challenge at the MCEA's lowered campaign contribution limits, claiming that they were impermissibly low in violation of the First Amendment. *Id.* at 9-11. The MCLU directed its principal challenge to the MCEA's alternative public financing system, the "Clean Election Option," claiming that it would effectively coerce candidates to participate in the system and impermissibly burden the First Amendment rights of potential candidates and their campaign contributors. *Id.* at 26-29.

21. *Daggett v. Devine*, 973 F. Supp. 203 (D. Me. 1997). The judge reasoned that it was too soon to consider such legal challenges because there was too much time (over three years) and too many intervening factors (such as the 1998 elections) before the year 2000 when the act would take effect. *Id.* at 204. For instance, the plaintiffs' future plans to run for political office or to contribute to political campaigns might change, which would thereby affect whether they were injured by the MCEA. Thus, the judge concluded that it was too difficult to determine how the MCEA would harm the plaintiffs. *Id.* Currently, the MCEA is in the implementation process.

22. The judge indicated there would be ample time to revisit the same legal challenges if the plaintiffs brought them after the 1998 elections and before the MCEA provisions take effect in the year 2000. *Id.* at 205.

reform proposals modeled after the MCEA as well. Currently, approximately twenty-five states are drafting or actively considering legislation similar to the MCEA.²³ The Vermont legislature has already passed legislation modeled after the MCEA,²⁴ and both houses of Congress recently introduced similar bills.²⁵

As the MCEA created the nation's first voluntary, alternative full-public financing system, this note analyzes the legal challenges against it. Part II of this note examines the history of leading campaign finance reform jurisprudence involving public financing provisions while part III focuses on the MCEA and its legal challenges. Part IV explains why the MCEA should be upheld as constitutional and, finally, Part V suggests measures states should consider when drafting legislation modeled after the MCEA to avoid similar legal challenges.

II. A BRIEF HISTORY OF CAMPAIGN FINANCE REFORMS THROUGH PUBLIC FINANCING PROVISIONS: LEADING CASES

Over the last two decades the federal courts addressed the constitutionality of federal and state campaign finance reform laws, including public financing provisions.²⁶ This section reviews the leading cases examining such provisions and the implications they hold for resolving constitutional challenges to the MCEA.

23. Ellen S. Miller, *Reform May be Dead in Congress—But Not in the States*, THE HILL, Oct. 22, 1997, at A12 (reporting that efforts to enact legislation similar to the MCEA through 1998 ballot initiatives are moving forward in Arizona and Massachusetts). State legislatures in Connecticut, Illinois, and North Carolina are currently considering bills modeled after the MCEA, and reform movements in support of MCEA-style reform are gaining momentum in more than seventeen other states. *Id.*

24. See VT. STAT. ANN. tit. 17 § 2853 (1997). On June 13, 1997, in response to Vermont citizens' successful grassroots lobbying efforts, Vermont's state legislature enacted the Vermont Campaign Finance Option.

25. On June 17, 1997, the "Clean Money, Clean Elections" bill, S.918, 105th Cong. (1997) was introduced in the U.S. Senate. On July 17, 1997, the "Clean Money, Clean Elections" bill, H.R. 2199, 105th Cong. (1997) was introduced in the U.S. House of Representatives.

26. "Public financing" refers to a legislative system that grants public funds to political candidates to finance all or part of their campaigns. While public financing systems vary in form, most condition the grant of public funds upon candidates' agreement to limit their overall campaign spending.

A. Public Financing Provisions in Federal Campaign Finance Reform Legislation

1. *Buckley v. Valeo*

The Supreme Court first addressed the issue of public financing for electoral campaigns when it upheld a public financing provision for presidential elections in the landmark campaign finance reform decision, *Buckley v. Valeo*.²⁷ In *Buckley*, the Court evaluated constitutional challenges against amendments Congress' made to the Federal Election Campaign Act of 1971 (FECA).²⁸ While the Court struck down limits on both the amount of money candidates could expend on their campaigns and "independent expenditures" made by non-candidates, it did uphold limits on campaign contributions to candidates and FECA's campaign finance reporting and disclosure requirements.²⁹ It also upheld FECA's proviso allocating public funds to presidential candidates who voluntarily agree to adhere to the spending limits and forego private fundraising.³⁰ In upholding FECA's public financing provision, the Court announced:

Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an

27. 424 U.S. 1 (1976) (per curiam).

28. *Id.* at 6. The Court considered challenges to FECA's four primary provision: (1) campaign contribution limits; (2) campaign expenditure limits; (3) campaign finance reporting and disclosure requirements; and (4) public funding grants to presidential candidates who voluntarily agree to spending caps. *Id.* at 7.

29. *Id.* at 19-23, 39-51. The Court reasoned that limiting one's campaign spending was analogous to limiting one's speech and thus the expenditure limits impaired candidates' First Amendment rights. *Id.* at 19-23. The Supreme Court has consistently held that individuals or groups must remain free to make unlimited expenditures on a candidate's behalf, so long as the expenditures are independent from the candidate. *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985); *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996).

The Court decided that contributing money to a candidate did not constitute a direct act of expression and the government's interest in deterring actual or apparent corruption caused by large contributions was legitimate. *Id.* at 64-68, 74-82. The Court found that unlike the overall limitations on contributions and expenditures, the disclosure requirements did not impose ceilings on campaign-related activities. *Id.* at 64. The disclosure requirements can be found at 18 U.S.C. § 431 et seq. (1970 ed.).

30. *Id.* at 86.

agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forego private fundraising and accept public funding.³¹

The Court reasoned that the public financing provision would not abridge First Amendment values and in addition, served significant state interests by preventing corruption—or at least the appearance of corruption—by eliminating the improper influence of large private campaign contributions and relieving candidates from the rigors of soliciting private campaign contributions.³² By articulating the contours of the FECA, the Court's *Buckley* decision created a legal framework that continues to guide campaign finance analysis.

2. *Republican National Committee v. Federal Election Commission*

Four years after *Buckley* the Supreme Court reaffirmed the constitutionality of conditioning public financing upon a candidate's agreement to limit his or her overall campaign spending in *Republican National Campaign Committee v. Federal Election Commission*.³³ There, the plaintiffs' challenged FECA's public financing provision by claiming that it abridged their First Amendment rights by forcing them to accept public financing while restricting their campaign spending.³⁴ In rejecting the plaintiffs' argument and upholding the public financing provision, the district court reasoned that the provision offered candidates a permissible choice between engaging in unlimited private funding or accepting limited public funding conditioned upon compliance with private

31. 424 U.S. 1 at 57 n.65.

32. *Id.* at 92-93, 96. The Court found that the public funding provision would not "abridge, restrict, or censor speech." *Id.* at 92. Rather, they would "facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93.

33. 487 F. Supp. 280 (S.D.N.Y. 1980), *aff'd mem.*, 445 U.S. 955 (1980). See also Gary S. Stein, *The First Amendment and Campaign Finance Reform: A Timely Reconciliation*, 44 RUTGERS L. REV. 743, 775 (1992) ("Any doubt about the constitutionality of spending limits imposed as a condition of public financing, however, was put to rest in *Republican National Committee v. Federal Election Commission*.").

34. 487 F. Supp. at 283.

expenditure limits.³⁵ The court explained that such a choice was constitutional so long as it remained voluntary.³⁶ Since the FECA presented candidates with a voluntary choice between the two funding alternatives, the district court concluded that the public financing provision did not burden their First Amendment rights.³⁷ However, the court did note that even if the provision did burden a candidate's First Amendment rights, the burden was justified by the government's significant interest in reducing the detrimental influence large contributions have on the political process and facilitating candidates' communications with the electorate while freeing candidates from the rigors of fundraising.³⁸ The court found that the public financing provision was narrow enough to meet these compelling governmental interests.³⁹

The Supreme Court summarily affirmed the district court's decision.⁴⁰ The Court agreed that where compelling governmental interests exist, the government may condition the grant of public funds to candidates who agree to adhere to the spending limits, even at the expense of their First Amendment rights.⁴¹

B. Public Financing Provisions in Statewide Campaign Finance Reform Legislation

After the Supreme Court approved public financing, the states began to include various public financing provisions in their campaign finance laws.⁴² They adopted such schemes because their

35. *Id.* at 284-86.

36. *Id.* at 285.

37. *Id.*

38. *Id.* (citing *Buckley v. Valeo*, 424 U.S. at 91, 95-96).

39. *Id.* at 286-87 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

40. *Republican Nat'l Comm'n v. Fed. Election Comm'n*, 445 U.S. 955 (1980).

41. 487 F. Supp. at 285.

42. See BURT NEUBORNE, A SURVEY OF EXISTING EFFORTS TO REFORM THE CAMPAIGN FINANCE SYSTEM 13 (Brennan Center for Justice Campaign Finance Reform Series 1997) (noting that twenty-one states provide some type of public financing measure for state candidates). Some form of direct public financing is made available to qualified candidates in Florida, Hawaii, Kentucky, Maine (beginning in 2000), Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, North Carolina, Rhode Island, Vermont, and Wisconsin. EDWARD D. FEIGENBAUM & JAMES A. PALMER, FEDERAL ELECTION COMM'N, CAMPAIGN FINANCE LAW 98: A SUMMARY OF STATE CAMPAIGN FINANCE LAWS WITH QUICK REFERENCE CHARTS Chart 4 (1998).

statewide campaigns under the traditional campaign finance system were plagued with problems resembling those in federal campaigns.⁴³ However, these states recognized that candidates would likely hesitate to participate in a public financing system for fear of being grossly outspent by their privately-financed opponents.⁴⁴ Thus, in order to encourage candidates' participation in their public financing systems, some states provided additional benefits to participating candidates.⁴⁵ Such benefits are commonly referred to as "triggers."⁴⁶ Opponents of triggers claim these incentives violate the First Amendment by either punishing independent spenders on candidates who do not accept the voluntary spending limits or coercing candidates into accepting spending limits.⁴⁷ This part examines lower court cases addressing the constitutionality of trigger provisions in public financing systems.

1. *Vote Choice v. DiStefano*

In *Vote Choice v. DiStefano*,⁴⁸ the First Circuit upheld a trigger provision included in Rhode Island's 1992 amended campaign finance statute. The statute provided limited public funds to candidates who voluntarily agreed to abide by expenditure ceilings and fundraising caps.⁴⁹ The state agreed to match the money a candidate raised from private sources up to a maximum of \$750,000 if the candidate chose to participate.⁵⁰ To encourage participation, the statute included a contribution "cap gap," which allowed participating candidates to accept individual contributions twice the

43. See *supra* notes 7-11 and accompanying text for a discussion of four fundamental problems with the private campaign finance system.

44. Kenneth N. Weine, *Triggering the First Amendment: Why Campaign Finance Systems That Include "Triggers" Are Constitutional*, 24 J. LEGIS. 223, 226-27 (1998) (explaining why publicly-funded candidates would fear being outspent by privately-financed opponents or their supporters).

45. *Id.*

46. *Id.* at 227-32 (providing an explanation of various types of triggers and their jurisprudence).

47. *Id.* at 223.

48. 4 F.3d 26 (1st Cir. 1993).

49. *Id.* at 29-30.

50. *Id.* at 30.

size of allowed contributions to non-participating candidates.⁵¹ If a privately-financed opponent began to outspend the participating candidate, the participating candidate could then exceed the original spending limit, but only to the extent that the additional fundraising matches the amount the opponent spent in excess of the original limit.⁵² The plaintiffs claimed that this provision was unconstitutional because it coerced candidates into participate in Rhode Island's public funding scheme.⁵³

The First Circuit disagreed; instead, it found that the provision offered candidates a "permissible choice" between running as a privately-financed candidate or a publicly-financed candidate.⁵⁴ The provision did not abridge a candidate's First Amendment rights because it gave the candidate the choice of limiting his campaign spending and was narrowly tailored and logically related to furthering the state's compelling interest in encouraging candidates to participate in public financing.⁵⁵ As such, the court upheld the

51. This note refers to candidates who choose to participate in a public financing scheme as "publicly-financed candidates" and those who run under the traditional private campaign finance system as "privately-financed candidates."

52. 4 F.3d at 30 n.5. The trigger provided that when the outspending began, publicly-financed candidates were: (1) released from their initial spending limits and free to raise private funds in proportion to the amounts that their privately-financed opponents had already spent; and (2) permitted to accept campaign contributions of up to \$2,000 per individual contributor, while their privately-financed opponent could only accept contributions of up to \$1,000 per individual contributor. *Id.* at § 17-25-30(3). The trigger's purpose was to encourage candidates to participate in the public financing program. 4 F.3d at 30.

53. *Id.* at 38-40. The plaintiffs claimed that the benefits afforded to publicly-financed candidates were so attractive and one-sided that a candidate's choice to participate in it would not be truly voluntary.

54. *Id.* at 38. The court reasoned that the provision achieved a "rough proportionality" between the advantages available to publicly-financed candidates and the restrictions they must accept in order to receive those advantages. *Id.* at 39. While the court acknowledged that the statutory scheme may not be in exact balance, it suspected "that very few campaign financing schemes ever achieve perfect equipoise." *Id.* The court explained that "a permissible choice occurs where, as here, there is no credible evidence of a penalizing purpose, the choice between the packages is real, uncoerced, and available to all . . . and the challenged disparity is narrowly-tailored and logically related to compelling governmental interests." *Id.* at 40.

55. *Id.* at 39-40. In turn, encouraging candidate participation in the public financing program would tend to further the state's compelling interests in facilitating candidates' communications with the electorate, freeing candidates from fundraising pressures, and combating electoral corruption. *Id.* (quoting *Buckley*, 424 U.S. at 91; *Republican Nat'l Comm.*, 487 F. Supp. at 285-86).

provision.⁵⁶

2. *Day v. Holahan*

In *Day v. Holahan*,⁵⁷ the Eighth Circuit struck down a trigger in a 1993 amendment to Minnesota's voluntary public financing statute. The trigger allowed publicly-financed candidates to receive additional matching public funds to combat independent expenditures made on behalf of their privately-financed opponents.⁵⁸ The plaintiffs claimed that the trigger imposed an unconstitutional burden on their First Amendment rights because it deterred non-candidates from making independent expenditures.⁵⁹ The Day court rejected this claim and upheld the trigger, reasoning that it did not impair non-candidates' First Amendment rights.⁶⁰ In fact, the court found that the trigger actually enhanced First Amendment values about the issues surrounding independent expenditures by fostering "free and public" discourse.⁶¹

On appeal, the Eighth Circuit struck down the trigger using a different analytical approach. The court found that the trigger imposed a cognizable injury to the First Amendment rights of

56. *Id.*

57. 34 F.3d 1356 (8th Cir. 1994).

58. The statute defined an "independent expenditure" as: "an expenditure expressly advocating the election or defeat of a clearly identified candidate, which expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent." MINN. STAT. § 10A.01 subd. 10b. (Supp. 1993).

Thus, when any individual or group made an independent expenditure of more than \$100 on behalf of any privately-financed candidate, the publicly-financed candidate benefited in two ways: (1) her expenditure limits were increased by the amount of the independent expenditure; and (2) she received additional matching public funds equal to one-half the amount of the independent expenditure. MINN. STAT. § 10A.25 subd.13.

59. *Day v. Hayes*, 863 F. Supp. 940, 946 (D. Minn. 1994) consolidation appeal with *Day v. Holchen*, 34 F.3d 1356. According to the plaintiffs, the trigger would be a deterrent because it forced independent spenders to choose between either not making an independent expenditure or "subsidizing the campaign coffers of a candidate being opposed." *Id.*

60. *Id.* at 947. The court reasoned that the trigger did not significantly restrict the plaintiffs' speech because they remained free to make independent expenditures without limit. Further, their speech was not restricted merely because their independent expenditures triggered an opportunity for their publicly-financed opponent to respond. *Id.*

61. *Id.* at 947. The court reasoned that "[t]o the extent the statute provides for increased debate about issues of public concern raised by an independent expenditure, it promotes the free and open debate the First Amendment seeks to foster and protect." *Id.*

privately-financed candidates and non-candidates who wished to make independent expenditures by deterring them from making independent expenditures in the first place.⁶² Applying a strict scrutiny test, the Eight Circuit concluded that it could not uphold the provision because it was not narrowly drawn to serve a compelling state interest.⁶³ The court declared that Minnesota's interest in encouraging candidates to participate in its public financing scheme was not "sufficiently compelling" because nearly all of Minnesota's candidates participated in the system before the inclusion of the trigger in the statute.⁶⁴

3. *Wilkinson v. Jones*

The U.S. District Court for the Western District of Kentucky upheld a different statutory scheme in *Wilkinson v. Jones*.⁶⁵ There, the plaintiffs argued that a 1992 Kentucky public financing statute allowing publicly-financed candidates to raise private funds and receive public matching funds once the expenditures or contributions of their privately-financed opponents exceeded \$1.8 million (the statutory ceiling) unconstitutionally burdened the First Amendment rights of privately-financed candidates by coercing them to limit their spending so as to avoid triggering matching funds for their publicly

62. *Id.* First, the court explained that "[t]he First Amendment affords the broadest protection" for independent expenditures. *Day*, 34 F.3d at 1360 (quoting *Buckley*, 424 U.S. at 14). The court reasoned that to the extent that a publicly-financed candidate benefits from matching public funds that were triggered by an independent expenditure, the political speech of the independent speaker was impaired. *Id.* The trigger would deter speech because "[t]he knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy . . . as a direct result of that independent expenditure, chills the free exercise of that protected speech." *Id.*

63. *Id.* at 1361. The state declared its compelling interest was enhancing public confidence in the political process by encouraging candidates to accept the voluntary spending limits. *Id.* Under a "strict scrutiny" test, a campaign finance law which burdens protected speech will be upheld if the court finds it is narrowly drawn to serve a compelling government interest. *Shrink Missouri Gov't PAC v. Maupin*, 71 F.3d 1422, 1424 (8th Cir. 1995) (quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990)). The Eighth Circuit applied a strict scrutiny test after it deemed the trigger a "content-based" restriction because it singled out political speech, which advocated the defeat of one candidate and/or the election of an opponent. *Day*, 34 F.3d at 1360-61.

64. *Id.*

65. 876 F. Supp. 916 (W.D. Ky. 1995).

financed opponents.⁶⁶ The court found that the statute promoted “more speech, not less” and did not coerce or chill the free speech rights of privately-financed candidates because the Kentucky General Assembly narrowly tailored the statute’s public financing trigger to promote the state’s compelling interest in encouraging candidate participation in its public finance scheme.⁶⁷ The court reasoned that this candidate participation would promote greater political dialogue among candidates and combat electoral corruption by decreasing the need for candidates to rely on private fundraising.⁶⁸

4. *Rosenstiel v. Rodriguez*

In *Rosenstiel v. Rodriguez*, the Eighth Circuit upheld a similar trigger included in a 1996 amendment to Minnesota’s public financing system that allowed publicly-financed candidates to raise private campaign funds in excess of legal spending limits when their privately-financed opponents began to outspend them.⁶⁹ The

66. 876 F. Supp. at 927. KY. REV. STAT. ANN. §§ 121A.030(5)(a), 121A.080(4), (5) (Michie 1993). The General Assembly acted largely in response to the record-breaking price tag of Kentucky’s 1991 gubernatorial race, in which total candidate spending exceeded \$19 million. See Tom Loftus, *Big-Money Politics: With Growing Pressure to Raise Vast Sums, Even Candidates and Contributors Are Calling For Changes*, Courier-Journal (Louisville, Ky.), Dec. 29, 1991, at 1A.

The plaintiffs claimed they would be coerced because if they did not participate, the trigger would (1) punish them for exercising their right to forgo the public funding option; and (2) chill their speech by forcing them to restrict their spending in order to prevent the release of matching funds to their publicly-financed opponent. *Id.*

67. 876 F. Supp. at 928. The court noted that the trigger took effect only when the privately-financed candidate began to surpass the publicly-financed candidates’ \$1.8 million spending limit. *Id.* at 927. At that point, the court reasoned, the candidates would have already generated a significant amount of speech on campaign issues. *Id.* Further spending would simply promote more speech. *Id.* at 927-28. The court reasoned that the trigger was not coercive because the privately-financed candidate retained complete control over whether to trigger the release of matching funds to her opponent by outspending her. *Id.* at 927-28. The court was “not convinced that [the trigger] impermissibly chills the speech of privately-financed candidates simply because it enables the speakers’ adversaries to respond.” *Id.* at 928. The court noted that without the trigger, publicly-financed candidates would be subject to absolute spending limits. 876 F. Supp. at 928. This would likely “discourage candidates from accepting public financing” because they would risk being grossly outspent by their privately-financed opponents. *Id.* Accordingly, the trigger was narrowly-tailored because it took effect “only to avoid a circumstance in which the publicly-financed candidates may be unfairly disadvantaged. *Id.*

68. *Id.* (citing *Vote Choice*, 4 F.3d at 26).

69. 101 F.3d 1544 (8th Cir. 1996). See MINN. STAT. ANN § 10A.25(10) (West 1996).

plaintiffs argued that the attractiveness of this alternative coerced candidates to participate in public financing and accept spending limits—a violation of their First Amendment rights.⁷⁰ The Eighth Circuit disagreed. Instead, the court found that Minnesota’s public financing scheme promoted “cherished First Amendment values” by presenting candidates with additional campaign funding option; the trigger did not compel candidate participation in public financing and, therefore, did not burden privately-financed candidates’ First Amendment rights.⁷¹ Even so, the court proceeded with a strict scrutiny inquiry and concluded that the trigger’s emphasis on public financing was narrowly tailored to serve Minnesota’s compelling interest in reducing electoral corruption, decreasing private fundraising, and increasing voter-candidate communication.⁷²

5. *Gable v. Patton*

Gable v. Patton revisited the constitutionality of Kentucky’s public financing scheme with a frontal attack on the trigger’s \$1.8 million ceiling.⁷³ The plaintiffs argued that the trigger’s ceiling

70. 101 F.3d at 1549.

71. *Id.* at 1550-51, 1552. Relying on *Vote Choice*, 4 F.3d at 26, the court concluded that the statute was not coercive because it “achieve[d] a relative balance between the benefits provided to publicly financed candidates and the restrictions [they] must accept” in exchange. *Id.* Further, the court explained that the inducements for candidates to limit their spending were not “inherently penal.” *Id.* at 1550. They were simply intended to prevent candidates from declining to participate in the public financing option because they risked being grossly outspent by a privately-financed opponent. *Id.* at 1551.

72. *Id.* at 1553 (citing *Vote Choice*, 4 F.3d at 39, and *Wilkinson*, 876 F. Supp. at 928). The court reasoned that the statute was narrowly tailored to further these compelling state interests because (1) the public financing was consistent with previous campaign finance plans that satisfied strict scrutiny, *id.* at 1553-54 (citing *Republican Nat’l Comm.*, 487 F.Supp. at 285-87; *Vote Choice*, 4 F.3d at 39-40); (2) it merely removed candidates’ disincentive to accept public-funding for fear of being grossly outspent, *id.* at 1554; and (3) it simply rewarded candidates who adhered to spending limits until they began to be outspent by their opponent. *Id.* at 1553-54. By not accepting private contributions, publicly-financed candidates could not become indebted to their campaign contributors. Moreover, they could spend all their time interacting with voters, rather than raising funds.

See supra note 63 for an explanation of a strict scrutiny test.

73. 142 F.3d 940 (6th Cir. 1998). *See* KY. REV. STAT. ANN. § 121A.030.1 (Michie 1993). This limit applied separately to primary and general elections. *Id.* In order to be eligible to receive public funding, the statute required candidates to raise between \$300,000 and \$600,000 in private funds. *Id.* § 121A.606.1. Once candidates raised this amount, they would receive two-for-one matching public funds to provide them with up to \$1.8 million in campaign funds. *Id.*

coerced privately-financed candidates into limiting their campaign spending to \$1.8 million, “thereby forgoing protected speech,” but, like *Wilkinson*,⁷⁴ the court found this argument without merit. The U.S. District Court for the Eastern District of Kentucky held that even though the trigger might stifle speech “to some degree,” the legislature narrowed its strictures to achieve Kentucky’s compelling interest in keeping campaign expenditures at levels that would not encourage actual or apparent corruption of the political process.⁷⁵ Therefore, the trigger’s \$1.8 million ceiling did not unduly burden the First Amendment rights of privately-financed candidates.⁷⁶ The Sixth Circuit affirmed, explaining that conditioning public funding on a candidate’s adherence to expenditure limits was constitutional in spite of its potential for pressuring candidates to accept the expenditure limits.⁷⁷ The “substantial advantage” the trigger provided to publicly-financed candidates did not rise to unconstitutional coercion, although the trigger provided “very strong” incentives for participation and placed candidates under financial pressure to participate.⁷⁸ It did so because the scheme was voluntary and relied

§ 121A.606.3(c). A privately-financed slate activates the trigger by raising or spending more than \$1.8 million in either a primary or general election; this includes contributions from the candidates themselves. § 121A.030.5(a). however, the prohibition against accepting contributions during the twenty-eight days proceeding either a primary or general election is lifted for both candidates. *Id.* § 121A.030.5(a).

74. 142 F.3d at 947. The plaintiffs claimed the statute would coerce candidates into accepting the public financing option because once the privately-financed slate surpassed the \$1.8 million ceiling, the statute placed publicly-financed slates in a more advantageous position. *Id.* See *Wilkinson*, 876 F. Supp. 916, and *supra* notes 65-68 and accompanying text.

75. 142 F.3d at 947. The Sixth Circuit’s reasoning resembled the district court’s logic in *Wilkinson* by concluding that “even if ‘the trigger provision chills speech to some degree . . . it is a narrowly tailored means which addresses a compelling state interest . . . in encouraging candidates to accept public financing and its accompanying limitations which are designed to . . . combat corruption.’” *Id.* at n.7 (alterations in original) (quoting *Wilkinson v. Jones*, 876 F. Supp. at 928).

76. 142 F.3d at 947.

77. *Id.* at 948.

78. *Id.* The court noted the district court’s example of how a trigger provision could become unconstitutionally coercive. If, for instance, the state provided four dollars in matching funds for every dollar the publicly-financed slate raised, the system would be coercive because a privately-financed slate would have no way of remaining competitive once the publicly-financed slate was released from its \$1.8 million spending limit and began receiving the matching funds. If candidates had no way of remaining competitive, they would have no real choice but to participate in the public financing system. Such a system would be unconstitutional because the state would effectively be forcing a candidate into accepting

on incentive for participation, which, the court concluded, met structuring the scheme so that participation was the rational choice.⁷⁹ Citing *Buckley v. Valeo*, the Sixth Circuit concluded that the incentives did not differ in kind from triggers that offered “clearly constitutional” incentives and upheld Kentucky’s trigger.⁸⁰

III. THE 1996 MAINE CLEAN ELECTION ACT: THE MCEA’S PROVISIONS

Prior to November 1996, Maine conducted its elections under the traditional private campaign finance system.⁸¹ However, the public’s increasing concern with the system fueled a grass-roots reform movement.⁸² On November 5, 1996, Maine voters approved the

expenditure limits by providing overwhelming benefits to publicly-financed slates. *Id.*

The trigger provides a strong incentive to participate because publicly-financed slates receive two-for-one matching public funding, which enables them to spend three dollars for every one dollar they raise. *Id.* The court reasoned that there would “only [be] a narrow set of circumstances under which a candidate could make a financially rational decision not to participate” in the public financing system. *Id.*

79. 142 F.3d at 949.

80. *Id.* In *Buckley*, the court upheld a \$1,000 limit on campaign contributions by individuals, stating that “if ‘some limit on contributions is necessary, a court has no scalpel to probe, whether, say a \$2,000 ceiling might not serve as well as \$1,000.’ Such distinctions in degree become significant only when they can be said to amount to differences in kind.” *Id.* (quoting *Buckley*, 424 U.S. at 30 (citation omitted)). The *Gable* court applied this principle to the trigger provision and concluded that, “[a]bsent a clearer form of coercion,” the trigger’s inherent incentives were “not different in kind from clearly constitutional incentives.” 142 F.3d at 949. Similarly, the *Rosenstiel* court reasoned that a trigger was not “inherently penal.” 101 F.3d 1544 at 1550.

81. This meant candidates could raise and spend campaign funds without limit and were permitted to solicit private sources including individuals, political action committees (PACs), and corporations. See *infra* note 84 for Maine’s contribution limits prior to the MCEA’s enactment.

82. The rising cost of statewide campaigns troubled Maine citizens. For example, the cost of running a winning gubernatorial campaign in Maine increased by 1,610% over the last twenty years (1974-1994). THE MONEY AND POLITICS PROJECT, ELECTIONS OR AUCTIONS? WHO PAID FOR MAINE’S GUBERNATORIAL ELECTIONS? 4 (1995). In 1994, gubernatorial candidate Angus King spent \$1,657,875 (\$1,061,186 of it his own money) to win the Maine governorship. *Id.*

Citizens were also concerned that special interests exercised undue influence over Maine’s elected officials by supplying the bulk of their campaign contributions. Public awareness about the financing of Maine elections grew in part because of the efforts of The Money and Politics Project, a nonprofit, non-partisan research organization that studies campaign financing in Maine. The Money and Politics project published a series of studies detailing possible connections between special interests’ contributions and elected officials’ actions in the 117th

MCEA through a ballot initiative by a 56 percent margin, reforming Maine's campaign finance system in three principal areas.⁸³ It lowered the current campaign contribution limits, added provisions designed to strengthen Maine's Commission on Governmental Ethics and Election Practices—the government body responsible for implementing and regulating Maine's campaign finance laws—and, most significantly, created the “Clean Election Option,” an alternative public-financing option available to candidates running for Governor, State Senator, and State Representative.⁸⁴ This option becomes available to all qualifying candidates beginning with the 2000 elections; its passage established the nation's first voluntary, full-public financing alternative for political campaigns.⁸⁵

and 118th Maine Legislatures. See JOHN BRAUTIGAM ET AL., THE MONEY AND POLITICS PROJECT, CASHING IN: THE TRUCKING INDUSTRY WEIGHS IN AGAINST THE TIRED TRUCKER BILL (1996); ROBERT COLLINS & MONICA CASTELLANOS, MONEY AND POLITICS PROJECT, CASHING IN: GAMBLING INTERESTS BET HEAVILY ON MAINE (1996); ROBERT COLLINS & MONICA CASTELLANOS, MONEY AND POLITICS PROJECT, CASHING IN: THE BLUE'S BID TO GO FOR-PROFIT (1996).

Prior to 1996, the Maine legislature rejected various campaign finance reform proposals 40 different times. *Public Campaign* (visited Feb. 1, 1998) <<http://www.publiccampaign.org/statereform.html>>. In response to the legislature's inaction, the Maine Coalition for Clean Elections initiated organizing efforts in 1995 in order to pass the MCEA via ballot initiative in 1996. *Id.* On a single day, “eleven-hundred grassroots volunteers collected more than 65,000 signatures” in fourteen hours, at a pace of 4,700 signatures per hour and successfully placed the measure on the state ballot. *Id.* To qualify the initiative for the ballot, MCEA supporters were required to collect 51,131 signatures from eligible voters. Election division, *Statewide Citizen Initiatives which May be Circulating, State of Maine (U.S.A.)* <<http://www.state.me.us/sos/ccc/elec/pets98.html>>.

83. *Public Campaign* <<http://www.publiccampaign.org/statereform.html>>. The Maine Clean Election Act consists of Maine Revised Statutes Annotated title 21-A, §§ 1001-20A and §§ 1121-28.

84. ME. REV. STAT. tit. 21-A, §§ 1015, 1123, 1126 (West Supp. 1997). Beginning in 1999, the MCEA lowers contribution limits for privately financed candidates from their previous limits (\$5,000 for political action committees (PACs) and corporations, and \$1,000 for individuals). Under the MCEA, the new aggregate contribution limits per candidate are \$500 for gubernatorial candidates and \$250 for all other candidates. The new limits apply separately to the primary and general elections. They apply to individuals, political and other committees, corporations, and associations. They do not apply to contributions made by candidates or candidates' spouses. *Id.*

85. *Id.* at § 1123.

A. The Public Funding Provision: The Clean Election Option

Under the Clean Election Option a candidate may voluntarily participate and receive certification as a Clean Election candidate if the candidate qualifies and complies with all other applicable election and campaign finance laws and regulations.⁸⁶ Candidates who qualify as Clean Election candidates are eligible to receive public funds (“Clean Election Funds”) from a separate, specially-designated fund for their primary and general election races.⁸⁷ In exchange, Clean Election candidates must agree to use only public funds for their campaign expenditures; they may not accept or spend any private

86. Section 1125(1)-(5).

87. *Id.* Candidates must take several steps in order to receive certification as Clean Election candidates. First, they must file a declaration of intent to seek certification as Clean Election candidates. *Id.* § 1125(1). Second, they must collect a certain number of \$5 “qualifying contributions” from registered voters in their electoral district. *Id.* §§ 1122(7), 1125(3). Gubernatorial candidates must obtain at least 2,500 qualifying contributions from registered Maine voters. *Id.* § 1125(3)(A). State Senate candidates must obtain at least 150 qualifying contributions while § 1125(3)(B),(C) State House candidates must obtain at least 50. All candidates must collect these \$5 qualifying contributions during a specific time period. *Id.* § 1122(8). Legislative candidates must do so between January 1st and March 15th of the election year, while gubernatorial candidates must collect them between November 1st of the year prior to the election and March 16th of the election year. *Id.* Once candidates file their statements of intent and begin collecting qualifying contributions, they may not accept any campaign contributions except for private “seed money” contributions. *Id.* § 1125(2). Seed money contributions are contributions of no more than \$100 per individual. *Id.* § 1122(9). Candidates may use their seed money to pay for initial campaign expenses and for the process of collecting qualifying contributions. § 1122(9). Candidates are limited to raising the following aggregate amounts of seed money contributions: \$50,000 for gubernatorial candidates, \$1,500 for State Senate candidates, and \$500 for State House candidates. *Id.* § 1125(2)(A)-(C).

The Commission on Governmental Ethics and Election Practices will determine the amount of public funds (“Clean Election” funds) allocated to Clean Election candidates. *Id.* § 1125(8). The amount will be based on the spending average in similar races in the last two election cycles. *Id.* For both primary and general campaigns, candidates receive funds equaling the average campaign expenditures for candidates during all primary or general election races for the preceding two cycles. *Id.* Candidates receive smaller sums when they are unopposed in their primary race or, in the case of independent candidates, if they have no primary opponent. *See id.* § 1125 (8)(B)-(D) for the amount of Clean Election funds distributed in uncontested primary and general elections.

The Clean Election Fund’s revenue comes from the following sources: \$5 qualifying contributions; a voluntary \$3 check-off on tax forms; allocations from the legislative and executive branch administrative divisions; any unspent seed money returned by the candidates once they qualify for the Clean Election funds; any unspent Clean Election funds remaining in the hands of candidates after the election; voluntary contributions; and any fines collected for MCEA violations. *Id.* § 1124(2).

contributions—including personal funds—during the primary or general election.⁸⁸ Further, Clean Election candidates may use public funds only for campaign-related purposes.⁸⁹

B. The Matching Funds Trigger

Under the MCEA, Clean Election candidates may receive additional public funds to match their privately-financed opponents' spending when their opponents raise or spend campaign funds in excess of the MCEA's total spending limit.⁹⁰ In calculating a privately-financed candidate's war chest, the MCEA factors in not only the candidate's total expenditures but also independent expenditures made in support of the candidate as well as expenditures made against the candidate's Clean Election opponent.⁹¹ Thus, the MCEA provides for the possibility that independent expenditures made on the behalf of privately-financed candidates could trigger the release of matching funds to the candidate's Clean Election opponents.⁹² However, even if a privately-financed candidate triggers

88. ME. REV. STAT. ANN. tit. § 1125(6).

89. *Id.*

90. ME. REV. STAT. ANN. tit. § 1125(9). Privately-financed candidates must abide by the MCEA's campaign contribution limits, which includes filing regular campaign finance disclosure reports with the Ethics Commission so that the Commission can monitor the candidates' compliance with the limits. *Id.* § 1017. If the Ethics Commission concludes that the privately-financed candidate exceeded the MCEA's spending limits, it will dispense additional Clean Election funds to the Clean Election candidate to match the excess spending disclosed in the reports. *Id.* § 1125(9). As the campaign cycle wanes, privately-financed candidates must file campaign finance reports with greater frequency to prevent them from vastly outspending their Clean election opponents in the campaign's final hours. *Id.* § 1017.

91. The MCEA defines an "independent expenditure" as:

[a]ny contribution or expenditure by a person, party committee, political committee or political action committee aggregating in excess of \$50 in an election that expressly advocates the election or defeat of a clearly identified candidate, other than by contribution to a candidate or a candidate's authorized political committee.

Id. § 1019.

92. *Id.* § 1125(9). If a non-candidate makes an independent expenditure that causes the privately-financed candidate's total spending to exceed the Clean Election candidate's spending limit, then the Clean Election candidate will receive matching public funds. When "[a]ny person, party committee, political committee, or political action committee" makes an independent expenditure, they must file a disclosure report with the Ethics Commission. *Id.* § 1019. The report must state: (1) an itemized list of contributions in excess of \$50, including the date of the expenditure and the name of the payee, (2) the purpose of each independent

the matching fund provision, the MCEA limits the Clean Election candidate's matching funds to twice the amount he originally received under the act.⁹³

Supporters hailed the MCEA as innovative and comprehensive campaign finance reform necessary to ameliorate the problems plaguing Maine's traditional private campaign finance system.⁹⁴ Not only does the MCEA's voluntary expenditure limits control the cost of state campaigns by forcing Clean Election candidates to adhere to spending limits and donors who contribute to privately-financed candidates to abide by lower contribution limits, but the MCEA alleviates time-consuming fundraising by allowing Clean Election candidates to concentrate their efforts into communicating with voters.⁹⁵ The virtues of the MCEA do not end there. It is argued that under the statute election candidates are free from the influence of large campaign contributions from special interests because the MCEA forbids private contributions to Clean Election candidates. While the Clean Election Option provides access to the political process to qualified candidates who otherwise are precluded from running a competitive political campaign because they lack the wealth to fund a large war chest.

C. The Legal Challenges Directed at the MCEA

Upon enactment the MCEA received accolades from campaign finance experts, elected officials, the media, and the public, all who were anxious to use it as a model for similar legislation in other states when constitutional scholars and campaign finance experts endorsed its constitutional validity.⁹⁶ However, being the first campaign

expenditure, (3) whether it is in support of or in opposition to the candidate, and (4) whether it is made in coordination with a candidate's campaign. *Id.* § 1019(2).

93. ME. REV. STAT. ANN. tit. § 1125(9). For example, if a Clean Election gubernatorial candidate initially received \$1 million for his general election campaign, he could potentially receive up to \$2 million in matching funds.

94. See *supra* notes 13, 15, 19 and *infra* note 96 for the views of MCEA supporters. See also *supra* notes 7-12 and accompanying text, discussing four fundamental problems with the traditional private campaign finance system. See also *Campion, supra* note 19, at 2395, 2397-98.

95. See *supra* note 94.

96. See *Jezer & Miller, supra* note 5, at 492 (asserting that publicly-financed elections are the only way "to effectively assure that elections live up to rather than diminish the ideals of

finance system of its kind, the MCEA inspired unprecedented legal challenges.

The National Right to Life Political Action Committee (NRLPAC) and the Maine Civil Liberties Union (MCLU) attacked the constitutionality of the MCEA's framework in *Dagget v. Devine*, claiming that by coercing candidates into participating in the Clean Election Option, the MCEA violated candidates' First Amendment rights by forcing candidates to limit their overall campaign

democracy"); Neuborne, *supra* note 19, at 21, 24 (asserting that public funding is constitutional and "the best possible option under *Buckley*"); Jamin B. Raskin, *Dollar Democracy*, THE NATION, May 5, 1997, at 11-12 (lauding a campaign finance system reform modeled after the MCEA for its ability to "liberate the time and imagination of participating elected officials . . . [and] enable new voices and new choices to emerge").

See SPEAKING FREELY, *supra* note 9. For example, Former Representative Jim Bacchus (D-FL) explained that "[t]he cost of public financing of political campaigns would be a pittance compared to the cost incurred by the taxpayers due to the inadequacies of the current system." *Id.* at 116. Former U.S. Senate Majority Leader George Mitchell (D-ME) recommended that an effective campaign finance system have "spending limits and full public financing, so as to completely eliminate the problem." *Id.* at 114.

There is a plethora of editorial support for reforms modeled after the MCEA as an effective method to control spiraling campaign costs, reduce special interests influence, and liberate candidates from time-consuming fundraising. See Editorial, *End Auctioning of Candidates*, GREEN BAY PRESS-GAZETTE, May 31, 1997, at A5; Editorial (Wisconsin Rapids), *Public Financing Will Give True Reform*, DAILY TRIBUNE (Wisconsin Rapids), Apr. 22, 1997, at 4A; Rauch, *supra* note 19, at 54. See also *supra* note 17, 21 for additional examples of the MCEA's editorial endorsements.

Surveys reveal 68 percent of Americans support a campaign finance system modeled after the MCEA. PUBLIC CAMPAIGN, PUBLIC SUPPORT FOR A CLEAN MONEY, CLEAN ELECTIONS APPROACH, (visited Feb. 1, 1998) <<http://www.publiccampaign.org/pollsumm.html>>. But see Smith, *supra* note 8, at 1085 (arguing that public financing is unlikely to achieve reformers' goals of lessening the "allegedly corrupting influence of money," leveling the electoral playing field for candidates, or eliminating candidates' incessant fundraising); David J. Weidman, Comment, *The Real Truth About Federal Campaign Finance: Rejecting the Hysterical Call for Publicly Financed Congressional Campaigns*, 63 TENN. L. REV. 775, 776 (1996) (claiming that public financing would be neither a reasonable or viable method of campaign finance reform).

See BURT NEUBORNE, CAMPAIGN FINANCE REFORM & THE CONSTITUTION: A CRITICAL LOOK AT *BUCKLEY V. VALEO*, 18 (Brennan Center for Justice Campaign Finance Reform Series 1997) (explaining that the MCEA is consistent with *Buckley*'s holding that public funding can be conditioned on spending limits); E. Joshua Rosenkranz, *Clean and Constitutional*, BOSTON REVIEW, Apr./May, 1997 (noting that among various campaign finance reforms schemes, "the Clean Money Option is the least susceptible to constitutional challenge—at least under current doctrine"). But see Joel M. Gora, *Campaign Finance Reform: Still Searching for a Better Way*, 6 J.L. & Pol'y 137, 160 n.101 (1997) (characterizing the MCEA model as unconstitutionally coercive); Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 78 (Oct. 1997) (claiming that a proposal modeled after the MCEA is "probably unconstitutional under the doctrine of 'unconstitutional conditions'").

spending.⁹⁷ According to the plaintiffs' complaint, participation in the Clean Election Option was not an option, but a compulsory "alternative" that maintained a "profound disparity" between the benefits available to Clean Election candidates and those available to their privately-financed opponents.⁹⁸ It did so because it conditioned the grant of a governmental benefit—public funding—on the relinquishment of the First Amendment rights of privately-financed candidates and their supporters.⁹⁹ This, the plaintiffs argued, was an "unconstitutional condition,"¹⁰⁰ because the overall effect was to "penalize and chill" the First Amendment rights of privately-financed candidates by deterring privately-financed candidates from outspending their Clean Election opponents.¹⁰¹ It also deterred non-candidates from making independent expenditures on behalf of privately-financed candidates.¹⁰² The *Daggett* court ultimately dismissed the case for lack of standing and did not discuss the plaintiffs' claims on the merits. However, the following section analyzes the primary arguments the plaintiffs made in their complaint against the Clean Election Option and, after considering both public-financing jurisprudence and policy, concludes that the plaintiffs

97. *Daggett v. Devine*, 973 F. Supp. 203 (D. Me. 1997). Plaintiff's Complaint at 26-29, *Daggett v. Devine* (No. 97-56-B-H). See also *supra* note 20 for the other plaintiffs who joined in the MCLU's complaint. In *Buckley v. Valeo*, 424 U.S. 1, 58 (1976), the Supreme Court held that involuntary limits on campaign expenditures were unconstitutional. However, conditioning public funding upon a candidate's voluntarily agreement to spending limits was constitutional. *Buckley*, 424 U.S. at 57 n.65. Accordingly, the plaintiffs, in *Daggett v. Devine*, argued that because the candidates' participation in the MCEA was involuntary, the statute effectively imposed mandatory spending limits on them in violation of their First Amendment rights. Plaintiff's Complaint at 26-29.

98. Plaintiff's Complaint at 24, *Daggett v. Devine* (No. 97-56-B-H). The plaintiffs claimed that Clean Election candidates were unduly benefited by, *inter alia*, the state's "endorsement" in designating them as "Clean Election" candidates; the initial grant of Clean Election funds; and the triggered matching Clean Election Funds. *Id.* at 26-29.

99. The doctrine of unconstitutional conditions holds that the government may not condition a governmental benefit on the relinquishment of an otherwise protected constitutional right. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1988) ("[G]overnment may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.").

100. *Id.*

101. *Id.* at 2, 26-29. See *infra* Part IV for an explanation of this claim.

102. *Id.* at 20-24. The plaintiffs claimed that the provision would burden non-candidates' free speech rights by making them "decide whether to limit or to exercise their right to unfettered political speech, knowing that if they exercise their right to unfettered political speech they will trigger a publicly-financed response by the 'clean' candidate." *Id.* at 24.

complaint is without merit and endorses the constitutionality of the MCEA.

IV. IS THE MCEA CONSTITUTIONAL?

A. Conditioning Clean Election Funds Upon a Candidate's Agreement to Spending Limits

The plaintiffs' overarching claim that the Clean Election Option is unconstitutional because it allegedly conditions the grant of public funds on the relinquishment of privately-financed candidates' First Amendment rights, is without merit.¹⁰³ The MCEA's framework is consistent with the Supreme Court's pronouncement that public financing is constitutional.¹⁰⁴ The MCEA offers candidates a choice: either run as a privately-financed candidate or run as a Clean Election candidate using Clean Election funds as the only source of campaign revenue.¹⁰⁵ This choice is voluntary and does not burden candidates' First Amendment rights. Neither does the MCEA's trigger provision. Though the public financing systems upheld in *Buckley* and *Republican National Committee* did not contain the matching funds trigger found in the MCEA, the constitutional analysis is the same.¹⁰⁶ In *Buckley* and *Daggett*, the drafters of both FECA and the MCEA made rational determinations regarding the amount of money necessary for candidates to run competitive campaigns; they simply made their determinations in different ways based on the current realities of campaign financing.¹⁰⁷

103. See *supra* note 99.

104. See *supra* notes 27-32 and accompanying text (discussing *Buckley*, 424 U.S. 1, and *Republican Nat'l Comm*, 487 F. Supp. 280).

105. ME. REV. STAT. ANN. tit. 21-A, § 1123 (West Supp. 1997).

106. Weine, *supra* note 44, at 235.

107. *Id.* at 236. In *Buckley*, the Supreme Court deferred to Congress' determination regarding the amount of public funding necessary for presidential candidates to run competitive campaigns. *Id.* at 235. In its determination, Congress relied, in part, on the average spending of presidential candidates in prior elections. *Id.* Similarly, the MCEA's drafters sought to provide Clean Election candidates with adequate public funds in order to run competitive campaigns.

In order to achieve this purpose, they established a system that monitors campaign spending during the election. *Id.* at 236. Given the increasing prevalence of both independent and personal expenditures in recent campaigns, the MCEA's trigger ensures that Clean Election candidates receive adequate funding in the context of modern elections. *Id.* at 236.

Even assuming *arguendo* that MCEA imposes some burden on candidates' First Amendment rights, the Maine legislature narrowly tailored the statute to further the compelling state interests of combating electoral corruption, curtailing rigorous fundraising, and facilitating candidates' communication with the electorate. This was recognized as constitutional by the Supreme Court in *Buckley* and *Republican National Committee*.¹⁰⁸ The MCEA shepherds candidates away from corrupt influences—actual or apparent—by forbidding Clean Election candidates to rely on any private contributions; thus avoiding becoming tethered to special interests through indebtedness.¹⁰⁹ Accordingly, the MCEA's basic framework is constitutional under Supreme Court precedent as a voluntary campaign-financing alternative that furthers compelling state interests.

B. The Matching Funds Trigger: Providing Matching Funds to Clean Election Candidates When Their Privately-Financed Opponents Begin to Outspend Them

The plaintiffs also argued in their *Daggett* complaint that MCEA's matching-funds trigger coerced candidate participation in a restrictive public financing scheme by compelling candidates to either accept the Clean Election Option (and its attendant restrictions) or limit spending of privately-raised funds to avoid releasing matching funds to their Clean election opponent.¹¹⁰ Either way, the state imposed

108. *Buckley*, 424 U.S. at 91; *Republican Nat'l Comm.* 487 F. Supp at 285. *See supra* note 96; *see also infra* notes 122-25, 132-36 and accompanying text (discussing how the MCEA furthers these compelling state interests).

109. With the exception of the limited number of \$5 "qualifying contributions" and \$100 "seed money" contributions that Clean Election candidates may accept. ME. REV. STAT. ANN. § 1125. *See also* *Wilkinson v. Jones*, 876 F. Supp. at 928 (reasoning that Kentucky's public financing scheme was narrowly tailored to "combat corruption by reducing candidates' reliance on fundraising efforts"); *Rosenstiel v. Rodriguez*, 101 F.3d at 1553 (concluding that the state's public financing scheme was narrowly tailored to reduce the possibility for corruption resulting from large campaign contributions). *See also* *Campion*, *supra* note 19, at 2429-30 (asserting that the MCEA is narrowly tailored); *Rosenkranz*, *supra* note 5, at 890 (explaining that "[a] voluntary spending cap addresses the corrupting influence" of unlimited spending because a candidate who accepts the cap and, thus, reduces his demand for cash "subject[s] himself to fewer opportunities for corruption and fewer constraints on his official activit[ies]").

110. *See supra* notes 87-92 and accompanying text for an explanation of how the matching funds trigger provides Clean Election candidates with additional public funds.

indirect spending limits.¹¹¹ This, the plaintiffs asserted, penalized the “protected activities” of privately-financed candidates, thereby violating their First Amendment rights.¹¹² However, under existing public-financing jurisprudence, upholding restrictions on campaign expenditures when compelling state interests are at stake, this claim also fails.

1. The Matching Funds Trigger Does Not Inflict a Cognizable First Amendment Injury

The MCEA’s matching funds trigger does not burden a candidate’s First Amendment rights.¹¹³ The MCEA does not “penalize” privately-financed candidates for outspending their Clean

111. Plaintiff’s Complaint at 24, The plaintiff’s argument is as follows:

While the MCEA is touted as a voluntary, alternative campaign finance option, the disparity created by the MCEA between a “clean” and a non-participating candidate is so profound that in practical terms the decision to participate is in fact non-voluntary and coercive. Whether viewed as providing inducements to participation, or penalties for non-participation, the MCEA’s practical effects—particularly when combined with the reduced contribution limits imposed by the Act—are the same: the imposition of involuntary spending ceilings on the “clean” candidate, who feels compelled to participate in the public financing mechanism, as well as on the non-participating candidate and non-candidates, who must decide whether to limit or to exercise their right to unfettered political speech, knowing that if they exercising [sic] their right to unfettered political speech they will trigger a publicly-financed response by the “clean” candidate. Instead of equalizing the process, the MCEA ensures that the “clean” candidate has a substantial advantage over the candidate who either chooses not to accept public financing or fails to qualify for it.

Id.

112. *Id.* at 28. Count nine of the plaintiff’s Claims for Relief reads as follows:

By using the funds raised or spent by a non-participating candidate as a trigger for making additional public funds available to “clean” candidates and as a trigger for raising the spending levels to which “clean” candidates have agreed, the matching funds provision of the MCEA both coerces participation in the public financing scheme and its attendant restrictions on expenditures, and penalizes and chills the protected activities of non-participating candidates, all in violation of the rights of candidates and their supporters to freedom of speech and freedom of association guaranteed by the First and Fourteenth Amendments of the United States Constitution.

Id. at 28. Hence, the MCEA penalizes the First Amendment rights of the privately-financed candidate and his campaign supporters by releasing matching funds to his Clean Election opponent once his campaign spending breaches the MCEA’s threshold.

113. *See* *Weine*, *supra* note 44, at 232-36 (explaining why trigger funds do not inflict a cognizable First Amendment injury); *Campion*, *supra* note 19, at 2423-26.

Election opponents; they remain free to either conform to or deviate from the MCEA's spending limits.¹¹⁴ The MCEA's trigger also does not "coerce" candidates to run as Clean Election candidates. Instead, the MCEA offers candidates a permissible choice between running as either a publicly or privately-financed candidate by tempering the MCEA's financial benefits with harsh restrictions. If a Clean Election candidate exceeds the MCEA's strict expenditure limits, not only must the candidate return all Clean Election funds, but he exposes himself to both civil and criminal liability as well.¹¹⁵ Given the fact that the Clean Election Option limits matching funds to twice the initial distribution, the MCEA does not stop privately-financed candidates from outspending their Clean Election opponents.¹¹⁶ Privately-financed candidates are free to finance a robust campaign; the MCEA's matching funds provision only levels the playing field.¹¹⁷

The plaintiffs' assumption that the MCEA's litany of financial benefits "compels" candidates to run as Clean Election candidates or spend within the MCEA's expenditure cap ignores the fact that financial remuneration is not the *only* reason a candidate might choose the Clean Election Option. For instance, a candidate with the ability to fund a bottomless war chest may nevertheless choose the Clean Election Option for fear of the dubiousness that accompanies

114. See *supra* notes 60-61, 65-68, 80 and accompanying text (discussing *Day*, 863 F. Supp. 940, *Wilkinson*, 876 F. Supp. 916, and *Gable*, 142 F.3d 940). See also *Weine*, *supra* note 44, at 233-35 (explaining why permitting and encouraging a response to speech will not "chill" the exercise of protected speech); *Campion*, *supra* note 19, at 2426-26; *Raskin*, *supra* note 96, at 11, 15 (asserting that it is strange to claim that a matching funds trigger will have a "chilling effect" on contributors and spenders, when such a provision really promotes First Amendment values such as competition, dialogue, and equality); *Burt Neuborne*, *One Dollar-One Vote: A Preface to Debating Campaign Finance Reform*, 37 WASHBURN L.J. 1, 42 n.110 (noting that it is "difficult to see why funding a response should be treated as an unconstitutional penalty"). See *supra* notes 60-61, 65-80 and accompanying text (discussing *Wilkinson*, 876 F. Supp. 916, and *Rosentiel*, 101 F.3d 1544).

115. ME. REV. STAT. ANN. tit. § 1127. See *supra* notes 48-55 and accompanying text (discussing *Vote Choice*, 4 F.3d 26, and explaining what constitutes a "permissible choice" between campaign financing alternative).

116. *Id.* § 1125(9).

117. See *Kenneth J. Levit*, *Campaign Finance Reform and the Return of Buckley v. Valeo*, 103 YALE L.J. 469, 492 (asserting that, under a public financing system with triggers, some privately-financed candidates will "undoubtedly" continue to outspend their publicly-financed opponent, even if such outspending triggers additional benefits to the opponent).

traditional private campaign financing.¹¹⁸ No First Amendment rights are abridged because candidates do not have a constitutional right to outspend their opponents.¹¹⁹ Hence, the MCEA does not burden First Amendment rights. Rather, it promotes free speech and debate by allowing Clean Election candidates to amplify their message when their privately-financed opponents threaten to mute their voice through money.¹²⁰

2. The Trigger Is Narrowly Tailored to Further Compelling State Interests

Assuming *arguendo* the matching funds trigger does burden candidates' First Amendment rights, the trigger is constitutional because it furthers Maine's compelling interest in encouraging candidates to participate in the MCEA and is narrowly tailored to activate only when a Clean Election candidate's privately-financed opponent exceeds the MCEA's spending limits.¹²¹ Without the

118. See *SPEAKING FREELY*, *supra* note 9 (documenting lawmakers' disgust with the pressures of constant fundraising). For instance, former U.S. Representative Mel Levine (D-CA) recalls that raising money for his U.S. Senate race while serving in the U.S. House "crippled my ability to do my job properly . . . or to run an effective campaign beyond the fundraising part of it." *Id.* at 42. Former Rep. Bill Green (R-NY) recalls: "We started [fundraising] the day after Election Day, and I kept the campaign finance office going year round . . ." *Id.* at 43-44. Additionally, candidates might also choose the Clean Election Option because of the public's growing distaste for the private campaign finance system. See *supra* notes 10-11, 13.

119. See Joel Bleifuss, *Cleaning Up Elections*, IN THESE TIMES, May 12, 1997, at 12 (quoting John Bonifaz, Executive Director of the National Voting Rights Institute, who emphasizes that there is no constitutional right to outspend one's opponent). The plaintiffs seem to imply that such a right exists by claiming that privately-financed candidates are "penalized" when they decide not to outspend their Clean Election opponents or when their outspending triggers matching funds to their Clean Election opponents. If the right to outspend one's political opponent existed, however, the *Buckley* court would have never approved a public financing system. Under a public financing system, participating candidates could potentially outspend any privately-financed opponents who fail to raise as much money as the publicly-funded candidate receives.

120. See *supra* notes 48-55, 60-61, 65-80 and accompanying text (discussing *Vote Choice*, 4 F.3d 26, *Day*, 863 F. Supp. 940, *Wilkinson*, 876 F. Supp. 916, *Rosentiel*, 101 F.3d 1544, and *Gable*, 142 F.3d 940). Weine, *supra* note 44, at 234-35 (reasoning that triggers promote First Amendment values because they increase the overall amount of public discourse in political campaigns); *Campion*, *supra* note 19, at 2426-29.

121. See *supra* notes 33-41 and accompanying text (noting that where compelling governmental interests exist, Congress may place reasonable conditions upon expenditures of public funds, even where they affect the exercise of First Amendment rights). See also *supra* notes 48-55, 65-80 and accompanying text (discussing *Wilkinson*, 876 F. Supp. 916, *Vote*

trigger, candidates who would normally participate in public financing would not for fear that their privately-financed opponent would outspend them.¹²² Encouraging candidates to run as Clean Election candidates also advances Maine's compelling interest in reducing actual or apparent electoral corruption and promotes participation in the political process by allowing candidates without personal wealth to compete for political office.¹²³ It also frees candidates from the rigors of fundraising by providing them with sufficient funding to run a competitive campaign and more time to communicate with the electorate.¹²⁴

C. The Matching Funds Trigger: Providing Matching Funds to Clean Election Candidates In Response to Independent Expenditures

The *Daggett* plaintiffs also challenged the constitutionality of the mechanism within the matching funds trigger that releases additional public funds to Clean Election candidates once their opponent's supporters use independent expenditures to campaign against them.¹²⁵ The plaintiffs argued that the release of additional public funds burdens the First Amendment rights of both privately-financed candidates and the supporters making independent expenditures on their behalf.¹²⁶ Like their attack on the trigger itself, this argument

Choice, 4 F.3d 26, *Rosentiel*, 101 F.3d 1544, and *Gable*, 142 F.3d 940).

122. See *Weine*, *supra* note 44, at 226-27 (explaining why triggers are necessary to encourage participation).

123. In *Buckley*, the Supreme Court recognized this goal as "vital to self-governing people." *Buckley*, 424 U.S. at 93.

124. See *supra* notes 27-41, 48-55, 65-72 and accompanying text (discussing *Buckley*, 424 U.S. 1, *Republican Nat'l Committee*, 487 F. Supp. 280, *Vote Choice*, 4 F.3d 26, *Wilkinson*, 876 F. Supp. 916, and *Rosenstiel*, F.3d 1544).

125. Plaintiff's Complaint at 28-29, *Daggett* (No. 97-56-B-H). The plaintiffs also claim that the trigger operates unfairly because privately-financed candidates lack control over their supporters who make independent expenditures and, thus, can not prevent expenditures from being made on their behalf. *Id.* at 4. See *supra* notes 90-92 and accompanying text for the MCEA's definition of "independent expenditure" and a description of the matching funds trigger.

126. Plaintiff's Complaint at 28-29. The plaintiffs directed three complaints at the inclusion of independent expenditures in the matching funds trigger. First, it would "penalize" privately-financed candidates when independent expenditures triggered funds to their Clean Election opponents. *Id.* Second, it would coerce candidates' participation in the Clean Election Option because it would enable Clean Election candidates to "significantly outspend" their privately-financed opponents. *Id.* at 29. Such outspending was possible because independent expenditures

also fails.

1. The Trigger Does Not Inflict a Cognizable First Amendment Injury

The MCEA's does not "penalize" the First Amendment rights of privately-financed candidates or their supporters. Except for the Eighth Circuit's decision in *Day v. Hayes*, every circuit has upheld campaign finance systems with public matching fund provisions triggered by either a privately-financed candidate or his supporters exceeding state mandated spending limits; this, the courts hold, does not violate the First Amendment rights of either privately-financed candidates or their supporters.¹²⁷ Nor do triggers activated by independent expenditures "chill" the supporters' First Amendment rights.¹²⁸ The MCEA does not limit the amount of money supporters can contribute to a privately-financed candidate,¹²⁹ it only attempts to inject a modicum of fairness into the campaign by providing the publicly-financed candidate with funding equal to that of his

made on behalf of Clean Election candidates would not count towards their total expenditure limit. *Id.* Third, the trigger would "penalize[] and chill[]" the protected speech of non-candidate supporters wishing to make independent expenditures on behalf of privately-financed candidates. *Id.* at 28. These supporters will be "far more likely" to limit their independent expenditures, knowing that their spending could trigger the release of matching public funds to a Clean Election candidate.

127. *Day v. Hayes*, 863 F. Supp. at 940. *Weine*, *supra* note 44, at 233-34 ("Each court reviewing a trigger concluded that the trigger did not cause a cognizable First Amendment injury because the government was not actually inhibiting speech."). *See supra* notes 59-61, 65-68, 73-80 and accompanying text. (discussing *Day*, 863 F. Supp. 940, *Wilkinson*, 876 F. Supp. 916, and *Gable*, 142 F.3d 940). *See also* *Campion*, *supra* note 19, at 2426-29; Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 360 (1989) (asserting that "it is hardly a sympathetic ground for objection that speaking has the effect of triggering resources permitting one's opponent to reply").

128. *See* *Weine*, *supra* note 44, at 16 (criticizing the Eighth Circuit's reasoning in *Day* and explaining that "[a] candidate's First Amendment rights cannot be chilled by the 'knowledge' that an opponent will be able to respond to his speech"). *See also* *Blasi*, *supra* note 11, at 1323 n.143 (asserting that "[t]here is little reason to suppose that fewer independent expenditures [will] be made under a [trigger] scheme" than under any other campaign finance scheme).

129. While the MCEA does not place a limit on the total amount of independent expenditures candidates can receive, beginning January 1, 1999, individuals can not make contributions to a candidate in support of the candidacy of one person totaling more than \$500 in any gubernational election or \$250 in any other election. 21-A M.R.S.A. § 1015(1). The limits are the same for political committees, corporations, or associations.

privately-financed opponent.¹³⁰ Contrary to the plaintiffs' argument, allowing independent expenditures to trigger the release of matching funds will not coerce candidates into choosing the Clean Election option, because the MCEA limits matching funds to twice the amount the Clean Election candidate originally received.¹³¹ Thus, the Clean Election option does not allow publicly-financed candidates to outspend significantly their privately-financed opponents, because privately-financed candidates are always free to engage in unlimited spending under the MCEA.

2. The Trigger Is Narrowly Tailored to Further Compelling State Interests

The argument for allowing independent expenditures to trigger the MCEA's matching funds provision is the same as argument for upholding as constitutional the matching funds trigger. The trigger is narrowly tailored to further Maine's compelling interest in encouraging candidates' participation in the Clean Election option because it takes effect only when independent expenditures threaten to disadvantage unfairly a Clean Election candidate.¹³² Given the growing prevalence of independent expenditures in electoral races,¹³³ potential candidates will be far less likely to participate in the Clean Election option if independent expenditures do not trigger the MCEA's matching funds provision.¹³⁴ Encouraging candidate

130. See *infra* note 131.

131. 21-A M.R.S.A. § 1125(8)-(9).

132. See *supra* notes 48-55, 65-80 and accompanying text (discussing *Vote Choice*, 4 F.3d 26, *Wilkinson*, 876 F. Supp. 916, *Rosenstiel*, 101 F.3d 1544, and *Gable*, 142 F.3d 940). The Eighth Circuit in *Day* decided that increasing candidate participation was not a sufficiently "compelling" interest because nearly 100 percent of Minnesota's candidates were already participating in the public financing system. *Day*, 34 F.3d at 1361. In contrast, the Maine Clean Election Option presents Maine candidates with a brand-new campaign financing alternative.

133. See *Weine*, *supra* note 45, at 227 (explaining how the increased power and prevalence of independent expenditures "has given candidates a new potential opponent" which may pose an even greater threat than their actual political opponents); *Carney*, *supra* note 16, at 111-13 (discussing the growing use of independent expenditures); *Ruth Marcus & Charles R. Babcock, The System Cracks Under the Weight of Cash; Candidates, Parties and Outside Interests Dropped a Record \$2.7 Billion*, WASH. POST, Feb. 9, 1997, at A1 (noting that the unprecedented sums that national political parties and outside interests groups spent on independent expenditures caused candidates to feel like bystanders in their own campaigns).

134. *Weine*, *supra* note 44, at 226-27 (explaining that triggers help alleviate the concern of

participation in the MCEA furthers Maine's compelling interests in reducing actual and apparent corruption in the electoral process by removing the influence of political patronage and facilitating candidate communication with the electorate by promoting more robust political speech and debate.¹³⁵ Thus, the MCEA and its matching funds trigger are a constitutionally permissible alternative allowing Maine candidates to choose the campaign financing option they feel is most advantageous to their candidacy.

IV. PROPOSALS FOR FUTURE CAMPAIGN FINANCE REFORM LEGISLATION MODELED AFTER THE MCEA

The MCEA is constitutional. States drafting similar "Clean Money" campaign reform legislation, however, should consider the implications of the legal challenges to the MCEA and draft their reforms accordingly.¹³⁶ This section proposes several measures to assist reformers in this endeavor.

Reformers should include a set of "Findings and Declarations" in their campaign finance legislation to articulate the objectives behind the legislation and explain the constitutional underpinnings of their reforms.¹³⁷ Such findings provide legislatures an opportunity to

candidates who accept voluntary spending limit that they would be unable to respond to independent expenditures). See also Stein, *supra* note 33, at 782 (noting that triggers are essential because candidates would not participate in a public financing system unless they are insured protection from independent expenditures); Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126 (1994).

135. See *supra* note 109 and accompanying text for an explanation of how the Clean Election Option would help combat actual and apparent electoral corruption. However, furthering the anti-corruption purpose is only possible if Maine candidates choose to participate in the Clean Election Option. Candidates will be more likely to participate if the matching funds trigger accounts for independent expenditures.

See *supra* notes 32, 38, 55, 61 and accompanying text (discussing *Buckley*, 424 U.S. 1, *Republican Nat'l Committee*, 487 F. Supp. 280, *Vote Choice*, 4 F.3d 26, *Day*, 863 F. Supp. 940, and *Wilkinson*, 876 F. Supp. 916). The MCEA's trigger will facilitate candidates' communication by allowing them to respond when they start getting outspent by independent expenditures. See also Weine, *supra* note 44, at 234-35 (noting that "each of the decisions upholding triggers recognized that triggers advance, not chill, First Amendment rights" and would increase the total amount of public discourse); Rosenkranz, *supra* note 96.

136. See *supra* note 23 for a list of states that are currently advocating, drafting, or considering their own "Clean Money" campaign reform legislation.

137. Several draft bills, modeled after the MCEA, include a "Findings and Declarations"

present evidence of the campaign finance problems the new legislation seeks to ameliorate.¹³⁸ Legislatures should bolster their “Findings and Declarations” with several key elements designed to insulate their reforms from judicial attack.¹³⁹ First, reformers must draft legislation consistent with the First Amendment by ensuring that any public financing provision is voluntary and offsets the benefits afforded to publicly-financed candidates with sufficient spending limits so as not to “penalize” or “chill” the First Amendment rights of privately-financed candidates.¹⁴⁰

The legislature should also attempt to tie its reforms to a judicially recognized “compelling” state interest—such as encouraging candidate participation in public financing, eliminating actual or apparent electoral corruption, increasing candidate communication with the electorate, or freeing candidates from the rigors to fundraising—to further inoculate their reforms against First Amendment attack.¹⁴¹ Once identified, the reformers must show that current campaign finance laws cannot achieve compelling state interests by presenting evidence of specific problems with their particular campaign finance system and showing that the new

section which lists the problems inherent in the private campaign finance system, the objectives of the Clean Money campaign reform legislation, the compelling government interests that the legislation, and explanations of how the legislation would further these compelling government interests. See PUBLIC CAMPAIGN, MODEL LEGISLATION FOR CLEAN MONEY CAMPAIGN REFORM, (visited Feb. 1, 1997) <http://www.publiccampaign.org/model_bill/bill1.html> [hereinafter CMCR MODEL LEGISLATION]; Clean Money, Clean Elections Act, H.R. 2199, 105th Cong. § 101 (1997); Clean Money, Clean Elections Act, S.918, 105th Cong. § 101 (1997).

138. *Id.*

139. *Id.* See also H.R. 2199.

140. See CMCR MODEL LEGISLATION, see also *supra* notes 27, 32, 38, 41, 44, 48-55, 60-61, 65-80 and accompanying text; Campion, *supra* note 19, at 2423-29. See also Weine, *supra* note 44, at 232-35. H.R. 2199, § 101(b); S. 918, § 101(b).

141. See *id.* Other compelling state interests may include: (1) leveling the playing field between incumbents and challengers, (2) controlling the escalating cost of campaigns, and (3) allowing more qualified candidates to run for political office regardless of their personal wealth or access to wealth. See CMCR MODEL LEGISLATION; H.R. 2199; S. 918 § 101(b). See also Colorado Republican Fed. Campaign Comm. v. Federal Election Comm’n, 581 U.S. 604, 649 (1996) (Stevens J., dissenting) (arguing that “the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns”); Neuborne, *supra* note 96, at 19 (noting that other possible compelling interests could include “[i]mproving the quality of campaign discourse, preserving confidence in the democratic process, increasing voter turnout, and equalizing access to the ballot”).

legislation is narrowly tailored to address these problems to further the state's compelling interests.¹⁴²

As the MCEA's "statement of fact" section does not include any of these elements, the Maine Legislature must significantly expand on this section to include as many specific factual findings as possible regarding the state's current campaign finance system to bolster the reformers' assertions.¹⁴³ A number of states currently collect statewide campaign finance data; however, every state pursuing campaign finance reform should establish similar research initiatives to justify public financing legislation.¹⁴⁴ Providing detailed

142. For example, reformers should explain why their state's campaign contribution limits fail to effectively combat actual or apparent electoral corruption, free candidates from the rigors of fundraising, or facilitate communications with the electorate. *See* CMCR MODEL LEGISLATION, H.R. 2199, § 101(a), S. 918, § 101(a).

For example, drafters could document their state's escalating campaign costs to help explain why their state's current contributions limits do not combat electoral corruption or free candidates from the rigors of fundraising. Faced with the need to raise increasingly large sums of money in limited increments, candidates will be compelled to devote increasing amounts of time to fundraising and may possibly attempt to subvert the legal contributions limits.

As a starting point, reformers should document: (1) recent campaign finance scandals, (2) average campaign costs in recent election cycles, (3) incumbents' reelection rates, (4) the prevalence of independent expenditures, (5) contributions by made by various special interest groups, (6) the amount of time candidates devoted to fundraising, (7) public opinion polls regarding the public's view of money and politics. *See* CMCR MODEL LEGISLATION.

See supra notes 39, 67, 72 (discussing Republican Nat'l Comm., 487 F. Supp. 260, *Wilkinson*, 876 F. Supp. 916, and *Rosenstiel*, 101 F.3d 1544). For example, a Clean Election bill's trigger provision would further the state's compelling interest in encouraging candidates' participation in the Clean Election Option and is narrowly tailored because it would take effect only to avoid a circumstance in which a Clean Election candidate would be grossly outspent by a privately-financed opponent.

143. *See* H.R. 1823, 117th Me. Legis. 16-17 (1996). The MCEA's Statement of Fact consists of four brief paragraphs, in which the MCEA (1) establishes an alternative, publicly-financed campaign financing option, funded by the Maine Clean Election Fund; (2) amends laws regarding the Commission of Governmental Ethics and Election Practices; and (3) reduces election campaign spending by capping the campaign expenditures of certified Clean Election candidates and limiting the amount of money donors may give to privately-financed candidates. *Id.*

See Neuborne, *supra* note 96, at 16 (advising future reformers to assemble factual findings about the role of money and politics because "[t]he success of any future effort to reform the campaign process is likely to turn on the persuasiveness of the factual record (not the factual assertions) developed to justify it"). The Money and Politics Project also compiled extensive factual findings regarding Maine's campaign finance system. *See supra* note 82. While the MCEA's Statement of Facts did not include some of these findings, other states that are drafting Clean Money bills should include factual findings from their campaign finance research.

144. For example, Missouri, Maine and Connecticut have non-profit educational organizations that conduct research and analysis on their campaign finance systems. *See also*

“Findings and Declarations” supported by a solid factual record will legitimize public financing as a constitutionally permissible, voluntary alternative necessary to further compelling state interests and restore integrity to the electoral process. “If voters are to take back democracy, they will have to do it state by state.”¹⁴⁵

V. CONCLUSION

In 1996, the MCEA achieved unprecedented and comprehensive campaign finance reform and prompted other states to emulate its innovations.¹⁴⁶ Campaign finance reform proponents are hopeful that a significant number of states will enact legislation modeled after the MCEA so that widespread public support for “clean money” campaigns will eventually prompt federal legislators to pass similarly comprehensive campaign finance reform at the national level.¹⁴⁷ The MCEA’s reforms ameliorate the fundamental problems with the traditional, private campaign finance system and, assuming that it survives any future constitutional challenges, will continue to serve

Public Campaign, The State Level (visited Feb. 1, 1998) <<http://www.publiccampaign.org/stateresources.html>>.

145. *Sign Up for Clean Elections*, BOSTON GLOBE, *supra* note 19, at A18.

146. *See supra* note 23 for a list of states that are currently advocating, drafting, or considering legislation modeled after the MCEA.

147. *See* Gerald F. Seib, *Election Reform Goes Haywire, How to Continue*, WALL ST. J., Oct. 8, 1997, at A24 (lauding Maine and Vermont for adopting “Clean Money” campaign reform and noting that further “[a]ction in the states might shame Washington into ending partisan bickering over campaign finances”); Editorial, *Campaign Reform Dead? Not According To Public*, USA TODAY, Oct. 22, 1997, at 14A (positing that “[a]n explosive demand for change in the states could be the force needed to end Washington’s stalemate [over campaign finance reform] that protects the tawdry status quo”).

Even Congressional leaders acknowledge that states are creating reform momentum. In his October 26, 1997 appearance on NBC News’ “Meet the Press,” then-U.S. Senator John Glenn (D-OH) (and co-chair of U.S. Senate’s hearings on 1996 campaign finance abuses) observed:

States are beginning (to demand campaign finance reform). Sometimes the states lead the federal government in areas of particular interest . . . Maine has already passed . . . [campaign reform] for financing their own state campaigns and [there are] about 15 or 18 other states following that same lead, considering it right now . . . To clean up national campaign finance, the scandal of it, I think will go to some sort of federal financing of campaigns, and I think we should. That would be the biggest bargain this country ever got.

Meet the Press (NBC television broadcast, Oct. 26, 1997) (cited in *Public Campaign* (visited Feb. 1, 1998) <<http://www.publiccampagin.org/quotesmain.html>>).

as a “blueprint for national change.”¹⁴⁸ However, states following the MCEA’s blueprint must remain mindful of the legal challenges to the MCEA when drafting their own reform legislation. Judicial reaction to campaign finance reform in Maine and other states will determine whether “as goes Maine, so goes the nation.”¹⁴⁹

148. See *supra* notes 94-96 and accompanying text for a discussion of four fundamental problems with the traditional private campaign finance system and how the MCEA is tailored to address them. See also *A Worthy Experiment in Maine*, *supra* note 19, at A26.

149. Robert Kuttner, *Campaign Reform Depends on Grass-Roots Action*, BOSTON GLOBE, Mar. 25, 1996, at A10 (championing the MCEA’s reforms and concluding “let’s hope that as goes Maine, so goes the nation”).