

CHAPTER NINE

PUBLIC FINANCING OF CANDIDATES' CAMPAIGNS

Public funding is an important part of the state and local campaign finance landscape. At this time, 23 states have some form of public financing, including 17 states that provide grants or matching funds for candidates with at least seven that authorize funding for political party organizations.¹ Sixteen localities also have full or partial public funding programs for candidates.²

This Chapter discusses some of the more common mechanisms for subsidizing *candidates'* campaigns—lump-sum grants, matching funds, refunds and tax incentives for contributors, and free or reduced-fee television or radio time—all of which may be adopted with or without voluntary spending limits.³ Most of the discussion concerns the basic components of full and partial public funding systems, including eligibility criteria, allocation of public funds, spending limits, reporting requirements, and administration of the program.⁴

To function properly, a public funding program should be part of a more comprehensive campaign finance system, which governs all candidates, including those who choose to decline public funds. The elements of those systems are discussed in detail in Chapters Three through Eight. Recently, pay-to-play provisions (*see* Chapter Three) adopted in conjunction with public funding laws have drawn constitutional attacks.

Tip: *Include a severability clause in any law establishing public funding.* Many public funding systems have been challenged by opponents of campaign finance regulation, sometimes repeatedly over many years. A severability clause states that if a court finds any provision of a law unconstitutional or otherwise invalid, the invalidity will not affect other provisions, which can continue in effect.

I. Full and Partial Public Funding: “Clean Money” and Matching Systems

There are two principal types of public financing systems that operate by providing funds directly to candidates. One model is often known as a “Clean Money” or full public funding system. Under that system,

¹ Jessica Levinson, *State Public Financing Charts 2009*, Center for Governmental Studies (2009), *available at* http://www.cgs.org/images/publications/cgs_state_pfc_050409.pdf. The regulatory scheme generally is lightest in states that provide financing solely for political party organizations, where funding appears to be aimed at encouraging additional party involvement in the political system. *See* Michael Malbin & Thomas Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* 52-53 (1998). In contrast, the states that fund candidates tend to regulate private money in campaigns more rigorously and attempt to limit the role of parties in electoral politics. *Id.*

² Jessica Levinson, *Local Public Financing Charts 2009*, Center for Governmental Studies (2009), *available at* http://www.cgs.org/images/publications/cgs_local_pfc_050409.pdf.

³ For a review of some of the common forms of public financing, see S. Levin, *Keeping It Clean: Public Financing in American Elections*, Center for Governmental Studies (2006), *available at* http://www.cgs.org/images/publications/Keeping_It_Clean.pdf; Elizabeth Daniel, *Subsidizing Political Campaigns: The Varieties & Values of Public Financing*, Brennan Center (2000), *available at* http://brennan.3cdn.net/2f2a961589ad86b21f_7um6iic72.pdf.

⁴ For an array of resources on full public funding systems, visit Public Campaign’s website at <http://library.publiccampaign.org>.

candidates raise a threshold number of small donations and then receive a lump sum sufficient to run a typical campaign. Once the grant is supplied, candidates may not raise or spend private funds. Most states that have adopted statewide public funding in recent years, including Arizona, Connecticut, Maine, New Mexico, and North Carolina, have implemented this system.

The second model is a partial public funding system in which candidates raise qualifying contributions at the beginning and then receive a grant covering only a portion of campaign expenses or have small amounts of contributions matched with public funds throughout the campaign. The match may be small or generous; New York City provides a six-to-one match for up to \$175 of each individual's contribution (capped at a higher amount). The presidential public financing system offers matching funds for the primaries and a lump-sum grant for the general election.

A third approach is a hybrid model. The Fair Elections Now Act or "Fair Elections" (H.R. 6116 in the 111th Congress) utilized this model. The bill provides both grants for publicly financed Congressional candidates as well as small dollar donor match throughout the election cycle. "Fair Elections" does not require participating candidates to abide by an expenditure cap, but does require them to gather all of their donations from small donors.

Tips

Tip: For tips pertaining to full public funding programs, we highly recommend the excellent policy guide written by Janice Thompson, *Clean Money Comparisons: Summaries of Full Public Financing Programs, Public Campaign*, (2006), available at <http://library.publiccampaign.org/sites/default/files/Clean%20Money%20Comparisons.pdf>. Much of the guidance provided in Ms. Thompson's publication also applies to matching systems.

Tip: Think seriously about the role of political parties and other political associations within a full public funding scheme. Some critics have argued that contributors seeking political influence under a full public funding system will simply shift their money from candidates' campaigns to political parties, political action committees ("PACs"), or independent expenditures. If financing of parties and PACs also is limited, the law should be crafted so as not unduly to undermine the work they do to register and mobilize voters. Consider an exemption from the definition of "contribution" for certain kinds of grassroots activity.

Tip: Matching programs carry ongoing administrative costs, but nevertheless may be less expensive than full public funding programs, depending upon the number of qualifying candidates, the amount of private funds raised, and the generosity of the match.

Tip: A matching system encourages the involvement of small donors throughout the campaign, but it requires that more candidate time be spent on fundraising than a full public funding system.

Tip: A generous matching program can help open the political process to candidates who lack wealthy supporters without creating unintended incentives for increased independent expenditures. Studies show that groups

sometimes shift funds that otherwise would be contributed to candidates into independent expenditures, when candidates may not accept contributions. This dynamic sometimes develops in matching systems as well once donors make the maximum permitted contributions to candidates.

A. Eligibility Criteria

Drafters of either form of public financing legislation must establish criteria for determining which candidates qualify for public funds. Generous subsidy programs risk losing public support and legitimacy if their thresholds for participation are so low that they appear to finance individuals who are not serious candidates. On the other hand, if the threshold is too high, the requirements for qualification will weed out serious candidates who do not have the extensively organized support that major-party incumbents tend to have, such as challengers, new candidates, or independent or third-party candidates.

Tips

Tip: Structure the system to require a showing of some public support before candidates qualify for public funds. There are three principal mechanisms for identifying candidates entitled to funding:

- *Collection of signatures on a petition.* Some people want candidates to be able to demonstrate support without raising any money at all. Others believe that people will sign anything if it costs them nothing, so signature gathering does not serve as a meaningful way to identify serious candidates.
- *Collection of a specified number and dollar amount of “qualifying contributions.”* This system generally includes a limit on the amount of each contribution counted toward qualification (e.g., \$200 or less) and often restricts the source of contributions to individuals. Limiting the size of qualifying contributions allows candidates without access to wealthy donors to participate on the same terms as those with such access and ensures a showing of broad support.
- *Votes in a prior election.* This method is often used to distinguish among major party candidates and those who are independents or members of minor parties. In the federal system, for instance, non-major party presidential candidates receive a reduced grant based on the percentage of the vote received in the previous election. They are, however, permitted to raise private money up to the spending limit placed on major party candidates who accept full public funding.⁵ Candidates of new parties do not receive any money before the election, but they may receive funds afterward if they win a threshold number of votes.⁶

Tip: Where contributions must be collected to establish eligibility, require candidates to provide identifying information from contributors, including their names, addresses, employers, occupations, and signatures. Such

⁵ See 26 U.S.C. § 9003(c).

⁶ *Id.* § 9004(a)(3).

information will help to inform the public about the nature and extent of the candidate's support and guard against fraud.

Tip: Consider whether to permit non-residents, residents, or only registered voters in the jurisdiction to provide qualifying signatures or contributions. Most systems require that qualifying signatures or contributions come from a candidate's potential constituents. Limiting signatures or contributions to registered voters simplifies the verification process, when seeking to confirm residency. The restriction bars participation, however, by members of the community who cannot vote but want to support a candidate who will represent their interests. The restriction thus may cut off important sources of support for minority candidates seeking to represent communities with substantial numbers of non-citizens.⁷

Tip: If elections are partisan, take care in establishing qualification requirements for third parties. Consider whether third parties should need the same number of qualifying contributions as major parties and whether they should receive the same amount of public funding. This issue is discussed in more detail in Section I(B) (Allocation of Public Funds).

Tip: Make sure that there is a logical link between the time allowed for collecting qualifying signatures or contributions, the number of signatures or contributions required, and the major events of the election cycle. For instance, consider whether the jurisdiction has early or late primary elections.

Tip: Candidates must be able to collect private funds to cover the expenses of setting up a campaign and gathering petition signatures or qualifying contributions. Such funds are often known as "seed money." A full public financing law should specify limits on the amount of each seed money donation (usually \$100 or less), an aggregate limit on the amount of seed money that can be collected, the amount of personal funds the candidate may contribute toward that limit, and restrictions on the use of seed money, *i.e.* whether it may be used solely to gather qualifying contributions or signatures or also may be used for other campaign expenses.

Tip: Consider prohibiting or limiting seed money donations from the candidates' personal funds. Such provisions further the purposes of public financing by limiting the significance of personal wealth and prior fundraising ability.

Tip: Participating candidates should be required to declare their intent to participate in the funding program. The declaration must make clear that the candidate will abide by all the rules of the program or lose public funds. Such a declaration may be made before or after fulfilling the requirements for qualification as a participating candidate.

Tip: Provide for the possibility that a candidate may withdraw from participation in the funding program or from the race itself. If you decide to allow withdrawal from the funding program after a declaration of intent to

⁷ Under federal law, legal permanent residents (or "green card holders") are permitted to contribute to federal candidates. See 11 C.F.R. § 110.20(a)(3)(ii) (defining "foreign national" to exclude permanent residents).

participate, consider requiring candidates to continue to abide by spending limits in the campaign, to return unused public funds, and to pay interest on returned public funds.

Legal Analysis

Two legal claims have been raised in challenges of eligibility criteria. The first challenges the time limits for raising qualifying contributions. Courts have established that states and localities may impose reasonable time limits in which candidates must qualify for public funds. *See Piccolo v. N.Y. City Campaign Finance Bd.*, No. 05-CV-7040, 2007 WL 2844939, at *3, *11 (S.D.N.Y. Sept. 28, 2007) (upholding a June 1 deadline for a November election); *Ostrom v. O’Hare*, 160 F. Supp. 2d 486, 495 (E.D.N.Y. 2001) (same); *Rogers v. New York City Bd. of Elections*, 988 F. Supp. 409 (S.D.N.Y. 1997) (upholding an April 30 deadline for a November election).

The second claim challenges both eligibility criteria and provisions allocating public funds, when a law provides different qualification requirements and funding levels for major parties and minor parties or independent candidates. An analysis of this case law is provided in the next section.

B. Allocation of Public Funds

The public purse is not bottomless. For a public financing program to work, the number of elections and offices covered must reflect the amount of funding available. If funds are spread too thinly among too many elections and offices, the scheme may not afford candidates sufficient funds to get out their message and thus may not attract meaningful participation. Factors to consider when deciding coverage include:

- *The impact of certain races on the public perception of electoral integrity.* Funding a few, high-priced statewide elections may go farther to eliminate perceived corruption than funding many, lower cost legislative races.
- *The level of and reasons for competition in different elections.* For instance, if most campaigning occurs in the primaries, and there rarely is competition in the general election, the funding system may be structured so that candidates receive much of their funding for the primary. On the other hand, if there has traditionally been little competition in the primary, you may wish to focus on the general election. You also may want to structure the program so that candidates in uncontested races do not qualify for the full grant otherwise provided.

A public funding scheme must give serious third-party and independent candidates a reasonable chance to participate.⁸

⁸ *See Green Party of Conn. v. Garfield*, 616 F.3d 213, 236 (2d Cir. 2010) (finding a “performance-based” system that provided full public funding only to parties that garnered at least 20% of the previous vote, with two-thirds funding for parties with 15% and one-third funding for parties with 10%, fell just within the “outer edge of the constitutionally permissible range”). In this case, the Second Circuit rejected claims that Connecticut’s performance-based system unconstitutionally burdened the First Amendment rights of minor parties, noting that minor parties were “arguably stronger” and “certainly not weaker” due to the system. *Id.* The district court in *Garfield* suggested that a party-neutral system, such as that in Maine and Arizona, offered a

Tips

Tip: Public funds should be available only for qualified campaign expenditures and payment of legitimate campaign debts, not for personal use.

Tip: In full public funding systems, grants calculated district-by-district are more difficult to administer but better take into consideration geographic variation in the costs of campaigns.

Tip: In matching systems, the lower the matched amount of each contribution (e.g., up to \$100 or \$200) and the more generous the match-ratio, the greater the incentive to collect relatively small contributions from more people, and the more the subsidy reflects popular support rather than access to wealthy donors. The lower the matched amount, the greater the ratio of public to private funds should be, or the burdens of fundraising may deter potential candidates from running for office or from participating in the program if they decide to run.

Tip: Consider linking public financing with other mechanisms designed to increase and improve the quality of political speech during the campaign, such as a requirement that candidates who accept public money participate in debates.⁹ If there are at least two candidates participating in the funding program who are vying for the same office, they should be required to take part in a public debate hosted by a neutral entity.

Legal Analysis

The Federal Election Campaign Act (“FECA”) includes a matching funds program for candidates who run in primary elections and a lump-sum grant for general election candidates. *Buckley v. Valeo* upheld the program against claims that it discriminated against candidates who qualified for the ballot by means other than party primaries. 424 U.S. 1, 105-06 (1976) (per curiam). In so doing, the Court recognized the legitimacy of requiring small contributions from numerous people. *See id.* at 106. The Court also permitted Congress to require some geographic dispersion of contributors to a presidential campaign as a qualifying condition for matching funds. *See id.* Finally, *Buckley* noted that the voluntary spending limit linked with the matching program, like that linked with the subsidy program for general presidential elections, made it possible for “candidates with little fundraising ability . . . to increase their spending relative to candidates capable of raising large amounts in private funds.” *Id.* at 108.

Public funding statutes also may be subject to equal protection challenges to their method of allocating money to candidates. For instance, FECA—which provided less (or no) money to candidates of non-major parties, based on the vote in the prior election—was attacked on the ground that it “work[ed] invidious discrimination against minor and new parties in violation of the Fifth Amendment.” *Id.* at 97. The *Buckley*

less restrictive alternative to the Connecticut system. *See Green Party of Conn. v. Garfield*, 648 F. Supp. 2d 298, 359 (D. Conn. 2009), *rev’d*, 616 F.3d 213. At the time this publication was written in 2010, the *Garfield* case was still on-going.

⁹ Where campaign finance systems use public funding as an incentive for candidates to accept spending limits, these additional conditions will help to balance the benefits and disadvantages of participation and thus improve the chances that the spending limit scheme will be found truly voluntary and therefore constitutional.

Court applied a rational basis test to uphold FECA's allocation method, reasoning that "there are obvious differences . . . between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other." *Id.* (internal quotation omitted). Moreover, because the major party candidates were subject to spending limits and a ban on private fundraising for general elections, while other candidates could raise private funds, the Court believed that the latter might well do better relative to the major party candidates under the public funding scheme than with universal private fundraising. *Id.* at 99. Finally, "Congress could properly regard [the vote-based eligibility system] as preferable" to petition drives or public opinion polls, which presented administrative and other problems. *Id.* at 100. In short, if the government has some rational basis for its allocation plan, it need not treat non-major parties identically to major parties. See *Anderson v. Spear*, 356 F.3d, 651, 676 (6th Cir. 2004) (holding Kentucky's interest in "maintaining and managing scarce resources" justified its refusal to offer public funds to write-in candidates). On the other hand, the Second Circuit warned that Connecticut's differential provisions for minor party candidates only fell just within the "outer edge of the constitutionally permissible range." See *Green Party of Conn.*, 616 at 236 (upholding public financing system despite reservations because it left minor parties "arguably stronger" and "certainly not weaker"). The system that was challenged in *Garfield* based the public funding available to non-major parties, in part, on the party's percentage of the vote in the last election. *Id.* at 234. In upholding Connecticut's provisions, the Second Circuit relied heavily on evidence that more than one-third of non-major party candidates qualified for funding, and one-eighth qualified for full funding. Connecticut's requirements for funding were therefore "high," but not "so high as to shut-out minor-party candidates who enjoy public support." *Id.* On that basis, the Court held that Connecticut's public financing system was "narrowly drawn" to support the Government's "sufficiently important interest" in eliminating the improper influence of large private contributions. *Id.* at 230, 236. A system that "operated to reduce the strength of minor-party candidates," in contrast, would likely not survive the Court's exacting scrutiny. See *id.* at 239.

C. Voluntary Spending Limits

Currently, all public funding systems—federal, state, and local—condition the receipt of public funds on the acceptance of a spending limit. It would be possible to provide candidates with a grant designed to cover many expenses of their campaigns, with no limit on the use of private funds to cover the rest. For example, the federal "Fair Elections" bill limits contribution amounts and matching grants, but has no overall expenditure ceiling for participating candidates.¹⁰ We know of no jurisdiction that has implemented such a proposal, but some civil libertarians continue to advocate this "floors without ceilings" approach.¹¹

States have selected a variety of public funding schemes to induce candidates to agree to spending limits. The cash forms include the full or partial public funding systems described above as well as refunds or tax

¹⁰ The Fair Elections Now Act, ("Fair Elections"), H.R. 6116 (111th Cong.), which would provide public financing for congressional elections does not have expenditure limits. This bill has not become law yet.

¹¹ Mark Schmitt, "Mismatching Funds How Small-donor Democracy Can Save Campaign Finance Reform," *Democracy Journal* (Spring 2007) (discussing what the "American Civil Liberties Union used to call 'floors without ceilings': public funding that was not tied to limits on spending and that did not attempt to shut down all sources of outside money.").

incentives for donors, and some systems involve a mix of these. Minnesota provides a tax credit for contributions to participating candidates and a direct subsidy. Rhode Island provides free television time on public and community access stations to candidates who agree to public funding. Other states have included, usually (but not always) along with another form of funding, a free statement in the official voters' guide.

If full public funding is coupled with voluntary spending limits, the system must be structured to encourage participation. Factors that affect participation include the following:

- *The amount of public funding.* Candidates are unlikely to participate if public funding is not sufficiently generous. Study campaign finance data in your state to determine how much it would cost a challenger to win a competitive race in each affected election district. It may be possible to offer higher levels of funding for challengers. Solicit the opinions and take seriously the advice of elected officials and political consultants about the appropriate funding levels.
- *Availability of a “trigger” provision that allows spending above the voluntary limit if the opposition spends a certain amount.* Triggers may be set off by nonparticipating candidate spending, independent spending, or both. Full public funding systems typically match opposition expenditures dollar-for-dollar, up to a new limit (usually 2-3 times the original base amount); matching systems may increase the rate of the ongoing match.

Triggers are designed to ensure that all viable candidates can compete in a world where mandatory spending limits are unconstitutional. See generally Kenneth N. Weine, *Triggering the First Amendment: Why Campaign Finance Systems That Include “Triggers” Are Constitutional*, 24 J. Legis. 223 (1998). Triggers prevent the unilateral disarmament that would result if one candidate were bound by a low expenditure limit, while the opposition's spending went unchecked, so they are often regarded as useful incentives for acceptance of the limit. Recent case law, however, has thrown into doubt the constitutionality of trigger fund provisions that directly subsidize participating candidates. E.g., *McComish v. Bennett*, 605 F.3d 720 (9th Cir. 2010), *stay granted*, 130 S. Ct. 3408 (Jun. 8, 2010), *cert. granted*, 10-239 (Nov. 29, 2010).¹² It would be wise to accompany any trigger fund provisions with a severability clause, to ensure that the rest of the public financing system survives any hostile court ruling.

Tips

Tip: *As a practical (rather than constitutional) matter, voluntary spending limits must be high enough to permit effective advocacy.* If limits are too low, candidates will not accept them.¹³ Before setting limits, talk to elected

¹² See also *Scott v. Roberts*, No. 10-13211, 2010 WL 2977614 (11th Cir. July 30, 2010) (enjoining trigger fund provisions); *Green Party of Conn. v. Garfield*, 616 F.3d 213 (2d Cir. 2010) (same). Cf. *Davis v. FEC*, 128 S. Ct. 2759, 2772 (2008) (invalidating provisions that increased private contribution limits following high personal expenditures of the self-financed opponent).

¹³ Jurisdictions that have placed spending limits well below typical spending levels have not been successful in securing candidate participation, while well-funded programs have been more successful. Michael J. Malbin & Thomas L. Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* 62 (1998).

officials, unsuccessful challengers, political consultants, and others who may provide guidance about the costs of campaigning for various different offices. Limits may be reduced in uncontested elections.

Tip: *Inducements to accept spending limits must be generous enough to encourage candidate participation without being so enticing as to become irresistible.* Examples of incentives include: grants, matching funds, increased contribution limits (“cap gaps”), free statements in voter guides, and free television time.¹⁴ But if, for example, a large cap gap is paired with a generous matching program, their combined effect could produce a package of inducements that is so benefit-laden that candidates will have no choice but to accept the spending limit—rendering the laws unconstitutional.

Tip: *Inducements should be focused on benefiting participants, not punishing nonparticipants.* Subsidies to participating candidates, for instance, enhance the speech of participants without burdening the ability of nonparticipating candidates to raise money for their campaigns. By contrast, a program that attempted to limit the sources of contributions available to nonparticipating candidates could be found to be an unconstitutional burden on speech, especially if the Supreme Court extends the rationale of *Davis* to apply to public financing cases. In *Davis*, the Supreme Court struck down provisions that increased contribution limits for privately funded candidates after self-funded opponents spent more than a threshold amount, out of concern that the “asymmetrical” benefits for one candidates might deter personal expenditures from his or her opponent. *Davis*, 128 S. Ct. at 2772.

Tip: *It is a good idea to index the limits for inflation.* Automatic increases provide some assurance that the limits will keep pace with rising costs and avoid the need for constant legislative tinkering with the law.

Tip: *Consider a variety of factors when introducing trigger provisions for independent expenditures.* Relevant factors include:

- whether the public financing program already provides a dollar-for-dollar match for all expenditures that nonparticipating candidates make over the participants’ spending limits;
- whether any matching funds should be set off by independent expenditures made in support of a participating candidate, in opposition to a nonparticipating candidate, or some combination of the two, taking races with more than two parties into account; and
- whether there should be maximum distribution amounts that cannot be exceeded regardless of the extent of independent expenditures.

Tip: *If a trigger is used to encourage acceptance of a spending limit in a full public financing system, structure the system to minimize the risk that nonparticipating candidates or their supporters will undermine the trigger with last-minute expenditures.* For example, you may want to require expenditure reports within 24 hours in the last week or two of the campaign.

¹⁴ States may provide free television time only if they operate or control a television station.

Legal Analysis

Because public funding programs typically include an agreement by participating candidates to abide by a spending limit and to decline (or limit) private contributions, such programs might theoretically be subject to attack on the ground that they violate the First Amendment rights of contributors as well as candidates. *Buckley* recognized, however, that public funding offered in exchange for a candidate's agreement to abide by spending limits is consistent with constitutional principles.¹⁵ See 424 U.S. at 92-93; see also *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 286 (S.D.N.Y. 1980) (three-judge court) (“[S]ince the candidate has a legitimate choice whether to accept public funding and forego private contributions, the supporters may not complain that the government has deprived them of the right to contribute.”), *aff'd*, 445 U.S. 955 (1980). Public funding of campaigns, the *Buckley* Court stated, reflects a proper effort “to use public money to facilitate and enlarge discussion and participation . . . [It] furthers, not abridges, pertinent First Amendment values.” 424 U.S. at 93. Additionally, public financing advances the substantial government interest in combating corruption and the appearance of corruption. See *id.* at 96.

Since *Buckley*, courts generally have approved public subsidies offered in exchange for an agreement to accept spending limits.¹⁶ See *Daggett v. Comm'n on Gov'tal Ethics & Elections*, 205 F.3d 445, 472 (1st Cir. 2000) (upholding full public funding system); *Gable v. Patton*, 142 F.3d 940, 948-49 (6th Cir. 1998) (upholding matching fund system); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1550 (8th Cir. 1996) (upholding subsidy plan); *Republican Nat'l Comm. v. FEC*, 487 F. Supp. at 285-86 (reviewing and upholding the federal system). The one exception to date is the Kentucky scheme, which paired a two-to-one matching grant with a five-to-one cap gap. *Wilkinson v. Jones*, 876 F. Supp. 916, 929 (W.D. Ky 1995) (invalidating an effective fifteen-to-one disparity between candidates accepting spending limits and those who declined them).

1. The Legal Standard, Generally

The first question courts will ask when public funding schemes with voluntary spending limits are challenged is whether the limits are truly voluntary. If the spending limit is genuinely voluntary, it does not burden First Amendment rights and is therefore constitutional. If the limit is voluntary in name only, and candidates are effectively coerced to accept it, the state will have to prove that the scheme satisfies strict scrutiny.

a. The Coercion Analysis

In *Buckley*, the Supreme Court indicated that a system of spending limits, accepted voluntarily in exchange

¹⁵ For a discussion of legal issues involved in the use of inducements to accept voluntary spending limits, other than public funding, see Chapter Five, Section I.

¹⁶ To date, lawsuits attempting to compel implementation of public funding systems have been dismissed by the courts without consideration of the merits. *Georgia State Conference of NAACP Branches v. Cox*, 183 F.3d 1259 (11th Cir. 1999); *Albanese v. FEC*, 78 F.3d 66 (2d Cir. 1996); *Royal v. North Carolina*, 570 S.E.2d 738 (N.C. Ct. App. 2002) (finding claim to be issue for the legislature), *appeal dismissed, review denied*, 576 S.E.2d 111 (N.C. 2003).

for some form of public funding, is constitutional.⁶ 424 U.S. at 57 n.65. The Court has never addressed what parameters courts should consider in determining whether a specific program is voluntary or coercive. Lower federal courts agree, however, that providing incentives to induce acceptance of expenditure limits is lawful even if the inducements create some pressure for participation. *Gable*, 142 F.3d at 948; *Rosenstiel*, 101 F.3d at 1550-51; *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993); *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 285 (S.D.N.Y. 1980) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980). The compelling state interests that justify spending limits allow states to tilt the scales in favor of participation. *Vote Choice*, 4 F.3d at 39 (noting that the “state need not be completely neutral”); *Wilkinson*, 876 F. Supp. at 928 (“Kentucky has a compelling interest in encouraging candidates to accept public financing and its accompanying limitations . . .”).

On the other hand, courts will examine spending limit schemes closely to determine whether they are truly voluntary or in fact coercive. In addressing this question, courts usually adopt one or more of three approaches. First, some courts have held that the system is not coercive if there is “rough proportionality” between the benefits given participating candidates and the restrictions they accept. *Vote Choice*, 4 F.3d at 39 (noting that the scheme need not achieve “perfect equipoise”); see *Daggett v. Commission on Gov'tal Ethics & Election Practices*, 205 F.3d 445, 467 (1st Cir. 2000) (quoting *Vote Choice*). Courts have not offered particularly clear explanations of how to balance those benefits and burdens.

Second, courts may ask whether the package of inducements provided to encourage candidates to accept spending limits is so “benefit-laden as to create such a large disparity between benefits [to participants] and restrictions [on nonparticipants] that candidates are coerced” to participate in the scheme. *Rosenstiel*, 101 F.3d at 1550. Courts have noted that “there is a point at which regulatory incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive.” *Vote Choice*, 4 F.3d at 38; see *Gable*, 142 F.3d at 948 (noting that offering benefits to participating candidates does not “per se result in an unconstitutional burden, [but] such benefits could conceivably snowball into a coercive measure upon a nonparticipating candidate”) (internal quotation omitted); *Wilkinson*, 876 F. Supp. at 929 (five-to-one disparity in contribution levels, combined with two-to-one matching fund subsidy, pushed Kentucky scheme “beyond the pale”).

Under this analysis, courts must decide when financing regimes reach the “point” where they become coercive. Under the Kentucky system considered in *Gable*, participating candidates receive a \$2 subsidy for every \$1 raised, and these matching grants continue even if the nonparticipating candidate’s spending triggers the removal of the spending limits—making the subsidy virtually unlimited. Nevertheless, the *Gable* court concluded that this generous benefit, specifically including the trigger, was not so great that it reached the point of coercion. 142 F.3d at 947-49 (noting, however, the lower court’s view that a four-to-one matching scheme would be coercive, because once the trigger lifted the ceiling, a nonparticipating candidate could not keep up in the fundraising race).

⁶ *Buckley* upheld a system of public subsidies offered in exchange for spending limits in the presidential primary and general elections. 424 U.S. at 97-108. The challenge in *Buckley* was grounded not on the coerciveness of the system, however, but on its alleged discrimination against non-major political parties.

Finally, courts may ask whether the scheme is based essentially on rewarding candidates who accept spending limits or on punishing candidates who reject such limits. *See Daggett*, 205 F.3d at 470 (“The question before us is whether the ‘tilt’ rises to the level of a coercive penalty.”). Inducements, even generous ones, are rarely found to render the state’s scheme coercive, while plans that appear to be based on penalizing those who do not agree to limits are likely to be found coercive. For example, a plan that allows participating candidates to raise private funds at twice the limit applicable to nonparticipating candidates is likely to be upheld as long as the basic contribution limit permits nonparticipating candidates to raise sufficient funds for effective advocacy. *See Vote Choice*, 4 F.3d at 38 (finding “nothing inherently penal” in Rhode Island’s two-to-one cap gap). But if the basic limit is too low, the cap gap may be seen as punitive in effect. *See Cal. Prolife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1299 (E.D. Cal. 1998) (preliminarily enjoining two-to-one cap gap because nonparticipant’s limit was so low that it “preclude[d] an opportunity to conduct a meaningful campaign”), *aff’d on other grounds*, 164 F.3d 1189 (9th Cir. 1999); *Wilkinson*, 876 F. Supp. at 929 (striking Kentucky’s five-to-one cap gap because the \$100 nonparticipants’ limit was “palpably penal”). Similarly, one court found a statute that limited nonparticipating candidates to contributions from individuals to be coercive, suggesting that the restriction was inherently unconstitutional. *Shrink Mo. Gov’t Political Action Comm. v. Maupin*, 71 F.3d 1422, 1425 (8th Cir. 1995) (reviewing a statute that also imposed special reporting requirements on nonparticipating candidates who exceeded the voluntary spending limit).

b. Application of Strict Scrutiny

A spending limit scheme that is found to be “coercive,” and thus to burden First Amendment rights, may still be constitutionally permissible. The scheme could be upheld if the state shows that the expenditure limits are narrowly tailored to further compelling government interests. *See Rosenstiel*, 101 F.3d at 1553 (finding that limits were not coercive but commenting that, even if they were, they would survive strict scrutiny); *Vote Choice*, 4 F.3d at 39-40 (same). To date, however, spending limit schemes that have been found coercive have ultimately been found unconstitutional. *See Maupin*, 71 F.3d at 1426 (holding that state “failed to meet its burden” under strict scrutiny); *Wilkinson*, 876 F. Supp. at 929 (holding that \$100/\$500 cap gap was not narrowly tailored to thwart corruption).

Courts have recognized two principal interests that are sufficiently compelling to justify spending limit schemes: (1) reducing the actual or apparent corrupting influence of campaign contributions by reducing the demand for private money, and (2) limiting the time that candidates spend fundraising and thus increasing the time available for a discussion of issues. *See Rosenstiel*, 101 F.3d at 1553 (“It is well settled that these governmental interests are compelling.”); *Republican Nat’l Comm. v. FEC*, 487 F. Supp. at 285 (finding that the statutory scheme, including expenditure limits, was supported by compelling state interests in “reduc[ing] the deleterious influence of large contributions on our political process’ . . . and . . . ‘free[ing] candidates from the rigors of fundraising” (quoting *Buckley*, 424 U.S. at 91)); *McComish v. Bennett*, 611 F.3d 510, 523-24 (9th Cir. 2010) (finding that the statutory scheme, including expenditure limits, was supported by Arizona’s compelling interest in preventing corruption and the appearance of corruption). One court has also acknowledged a state interest in promoting political dialogue among the candidates. *See Wilkinson*, 876 F. Supp. at 928. The Ninth Circuit recently held that a State has a compelling interest in providing matching

funds in order to encourage participation in its public funding scheme, but the Supreme Court stayed enforcement of the relevant provisions pending a *certiorari* decision. *McComish*, 611 F.3d at 523-24, *stay granted*, 130 S. Ct. at 3408.¹⁷ The Eighth Circuit rejected asserted interests in (1) maintaining the individual citizen’s participation in and responsibility for the conduct of government and (2) discouraging the race toward hugely expensive campaigns, especially at the local level.⁸ *Maupin*, 71 F.3d at 1426 (internal quotation marks omitted).

Whether specific provisions will survive scrutiny therefore depends upon whether they are found to be narrowly tailored to serve the recognized interests. Courts upholding spending limits have found that each element of the particular scheme under review was narrowly tailored to further the asserted interests. *See, e.g., Rosenstiel*, 101 F.3d at 1553 (describing narrow tailoring of trigger and subsidy); *Vote Choice*, 4 F.3d at 39-40 (describing narrow tailoring of cap gap). Provisions of spending limit schemes that have failed constitutional scrutiny have been found inadequately tailored to deter corruption. *See Maupin*, 71 F.3d at 1426 (“While the state’s interest in reducing corruption and its related concerns constitute a compelling state interest, the state has failed to explain how the campaign spending limits here in question are narrowly tailored to serve this interest or address these concerns.”); *Wilkinson*, 876 F. Supp. at 930 (“We have been shown no case in which a disparity of greater than two-to-one was found to be narrowly tailored.”).

2. *Application of the Legal Standard to Trigger Provisions*

Campaign finance systems that include voluntary spending limits usually also provide a mechanism that gives participating candidates additional money (or the opportunity to raise additional money) in the event that their nonparticipating opponents—or persons supporting their opponents—spend more than a certain amount. These mechanisms, known as “triggers,” are designed in several different ways and are generally reviewed like the other inducements for participation—that is, courts ask whether the triggers are structured so that they coerce candidates to accept the spending limits. In at least four cases, however, triggers were challenged as direct violations of the First Amendment, without raising a coercion claim. *McComish*, 611 F.3d at 523-24 (upholding triggers in Arizona’s public financing system), *cert. granted*, 10-239 (Nov. 29, 2010); *Scott v. Roberts*, No. 10-13211, 2010 WL 2977614 (11th Cir. July 30, 2010) (enjoining Florida’s trigger fund provisions after *Davis*); *Green Party of Conn. v. Garfield*, 616 F.3d 213 (2d Cir. 2010) (striking Connecticut’s trigger fund provisions after *Davis*); *Jackson v. Leake*, 476 F. Supp. 2d 515 (E.D.N.C. 2006), *aff’d*, *North Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008) (upholding triggers in judicial public financing system), *cert. denied by Duke v. Leake*, 129 S. Ct. 490 (Nov. 3,

¹⁷ At the time this publication went to press in late 2010, the Supreme Court had just granted certiorari in *McComish* and the outcome of the case was not yet known.

⁸ The Eighth Circuit regarded the first proffered interest as an impermissible effort to “level the playing field.” *Maupin*, 71 F.3d at 1426 (internal quotation omitted). But the Supreme Court’s decision in *McConnell v. FEC* suggests that courts should begin to look more favorably on the interest in democratic participation. 540 U.S. 93, 136-37 (2003) (“[M]easures aimed at protecting the integrity of the process . . . tangibly benefit public participation in political debate.”), *partially rev’d on other grounds*, *Citizens United v. FEC*, 130 S.Ct. 876 (2010). Considering the second proffered interest, the *Maupin* court noted that *Buckley* had directly rejected the growing cost of campaigns as a reason in itself for restricting expenditures. 71 F.3d at 1426 (citing 424 U.S. at 57).

2008). The ultimate resolution of the constitutionality of trigger provisions in public financing systems awaits the Supreme Court's ruling in the *McComish* case. As discussed below, triggers based on the independent spending of parties other than the candidate raise distinct constitutional issues.

a. Spending by Nonparticipating Candidates

In the context of public funding systems, courts have generally upheld triggers that release participating candidates from spending limits when nonparticipating candidates spend over a specified amount, explaining that this is necessary to “assuage the wholly legitimate fears of participating slates that they will be vastly outspent due to their agreement to accept spending limits.” *Gable*, 142 F.3d at 947 (internal quotation marks omitted); see *Daggett*, 205 F.3d at 469 (quoting *Rosenstiel*, 101 F.3d at 1551); *Wilkinson*, 876 F. Supp. at 927-28. Recent cases, however, have called into question what types of benefits spending by nonparticipating candidates may constitutionally trigger for participating candidates. The Supreme Court has ruled that raising contribution limits only for non-self-funded candidates would impermissibly burden the right of self-funded candidates to make unlimited personal expenditures. *Davis v. FEC*, 128 S. Ct. 2759, 2772 (2008). The circuits have split on whether the government may match spending by nonparticipating candidates beyond a threshold amount with equal public funding to participating candidates.¹⁸

These triggers take a variety of forms—generally based on the other inducements offered to candidates to accept spending limits. Under the Minnesota statute considered in *Rosenstiel*, for instance, the participating candidate is released from the spending limit if a nonparticipating candidate “receives contributions or makes expenditures equaling 20 percent of the applicable limit prior to 10 days before the primary election, and contributions or expenditures equaling 50 percent of the applicable limit thereafter.” *Rosenstiel*, 101 F.3d at 1547; Minn. Stat. Ann. § 10A.25(10)(a)(1)-(2) (1998)). The participating candidate is then permitted to raise private funds without limit; regardless of how much he raises, he is allowed to keep the public subsidy of up to 50 percent of the spending limit. See *Rosenstiel*, 101 F.3d at 1547-48 (describing scheme).¹¹

Under the Kentucky scheme considered in *Gable*, the spending limit is lifted when the nonparticipating candidate spends any amount over the spending limit. The participating candidate can then raise money over the limit and continue to receive a two-for-one match. See *Gable*, 142 F.3d at 949 (describing advantage of trigger provision). The triggering provisions in Minnesota and Kentucky were attacked as unconstitutionally

¹⁸ See *McComish v. Bennett*, 605 F.3d 720 (9th Cir. 2010) (sustaining trigger fund provisions after *Davis*), stay granted, 130 S. Ct. 3408 (Jun. 8, 2010), petition for cert. filed, 79 U.S.L.W. 3109 (Aug. 17, 2010), cert. granted, 10-239 (Nov. 29, 2010); *North Carolina Right to Life v. Leake* (“*NCRTL*”), 524 F.3d 427, 437 (4th Cir. 2008) (sustaining trigger fund provisions before *Davis*), cert. denied by *Duke v. Leake*, 129 S. Ct. 490 (Nov. 3, 2008); *Daggett v. Comm’n on Gov’tal Ethics and Elec. Practices*, 205 F.3d 445, 463-65 (1st Cir. 2000) (same). But see also *Scott v. Roberts*, No. 10-13211, 2010 WL 2977614 (11th Cir. July 30, 2010) (enjoining trigger fund provisions after *Davis*); *Green Party of Conn. v. Garfield*, 616 F.3d 213 (2d Cir. 2010) (same).

¹¹ The triggering provision considered, and upheld, by the district court in *Rosenstiel* lifted the spending limit when an opposing candidate opted out of the spending limit plan. See *Rosenstiel*, 101 F.3d at 1547. The Minnesota legislature amended the statute while the case was pending before the Court of Appeals.

coercive on the ground that the trigger, in effect, removed any burden on the candidates who accept a spending limit. The *Rosenstiel* and *Gable* courts rejected this argument on the merits.

The *Rosenstiel* court found that the trigger in Minnesota balanced the benefits and restrictions of the spending limit. “The expenditure limitation waiver . . . is simply an attempt by the State to avert a powerful disincentive for participation in its public financing scheme: namely, a concern of being grossly outspent by a privately financed opponent with no expenditure limit.” 101 F.3d at 1551. By averting this disincentive through a trigger that funds additional speech, “the State’s scheme promotes, rather than detracts from, cherished First Amendment values.” *Id.* at 1552.

The *Gable* court went so far as to recognize that “[b]ecause of the trigger, a nonparticipating candidate derives no relative advantage” from the spending limit, while the two-for-one matching grant given to participating candidates assesses “a substantial cost for nonparticipation.” 142 F.3d at 948. According to the court, “there is only a narrow set of circumstances under which a candidate could make a financially rational decision not to participate.” *Id.* Relying on the analysis in *Rosenstiel*, the *Gable* court nevertheless held that this kind of financial pressure is not sufficient coercion to render the scheme unconstitutional. *See id.* at 949 (“Absent a clearer form of coercion, we decline to find that the incentives inherent in the Trigger provision are different in kind from clearly constitutional incentives.”).

Only one federal appeals court has invalidated a trigger that released publicly funded candidates from their voluntary spending limits after nonparticipating candidates spent more than a specified amount. In *Anderson v. Spear*, the Sixth Circuit invalidated the very same provision upheld in *Gable* but only as applied to self-financing candidates. 356 F.3d 651 (2004). The opinion effectively privileges candidates who are wealthy enough to bankroll their own campaigns over candidates whose campaigns are privately financed by a large base of supporters.

Other types of triggered benefits, besides the mere release from spending limits, have been deemed more constitutionally problematic. The Court in *Davis* expressed concern that the “asymmetrical” benefits in the privately funded context would unconstitutionally discourage wealthy candidates from enjoying their “unfettered right to make unlimited personal expenditures.” *Davis*, 128 S. Ct. at 2772.

Before the Supreme Court announced its holding in *Davis*, the First and Fourth Circuits had sustained trigger fund provisions in North Carolina and Maine that matched privately financed candidate expenditures beyond a threshold amount with public funds for participating candidates. *North Carolina Right to Life v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008), *cert. denied by Duke v. Leake*, 129 S. Ct. 490 (Nov. 3, 2008); *Daggett v. Comm’n on Gov’tal Ethics and Elec. Practices*, 205 F.3d 445, 463-65 (1st Cir. 2000). Following *Davis*, however, the Second and Eleventh Circuits invalidated similar trigger fund provisions in Connecticut and Florida, citing *Davis*’s prohibition against burdening the right to unlimited personal expenditures. *Scott v. Roberts*, No. 10-13211, 2010 WL 2977614 (11th Cir. July 30, 2010) (enjoining trigger fund provisions in Florida); *Green Party of Conn. v. Garfield*, 616 F.3d 213 (2d Cir. 2010) (invalidating trigger fund provisions in Connecticut).

The Ninth Circuit recently upheld the trigger fund provisions of Arizona’s Clean Elections Act, only to have the Supreme Court stay enforcement of the provisions pending a decision on *certiorari*. *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010).¹⁹ Under Arizona’s trigger fund system, any candidate who voluntarily accepted a spending limit received a lump-sum initial grant. *Id.* at 516. If any privately financed opponent plus third party spenders together spent more than the amount of the initial grant in opposing the publicly financed candidate, this triggered an injection of public funds to the candidate so as to match what the opponent had spent. *Id.* In total, the publicly financed candidate may receive trigger funds equal to no more than twice the initial grant. *Id.* at 517.

The Ninth Circuit distinguished Arizona’s system from that in *Davis*, noting that *Davis*’s trigger was activated solely by the personal expenditures of candidates, while Arizona’s trigger amount included *third-party* expenditures that benefited or opposed candidates. *Id.* at 522. Thus, Arizona’s trigger fund did not aim specifically to “disadvantage the rich,” as did the unconstitutional *Davis* trigger, but sought merely to benefit publicly funded candidates who faced high expenditures from *any* source. *Id.* The Ninth Circuit rejected the arguments of privately financed candidates that Arizona’s trigger fund provisions may have a chilling effect on speech in the form of expenditures, because the privately funded plaintiffs failed to offer “any specific instances” that they were “actually chilled . . . from accepting campaign contributions or making expenditures.” *Id.* at 524. It remains to be seen whether the Supreme Court will also demand specific examples of a chilling effect, or instead reach a decision based on the theoretical chill that the plaintiff candidates have alleged.

b. Independent Expenditures by Third Parties

Some jurisdictions have enacted trigger provisions that lift a participating candidate’s spending limit (and in some cases provide additional funds) when third parties make independent expenditures in opposition to the participating candidate or in support of an opponent. The most recent appellate case ruling on the constitutionality of such a trigger upheld it under a First Amendment challenge, but the Supreme Court issued a stay on those provisions pending a *certiorari* decision. See *McComish*, 611 F.3d at 510; see also *Daggett*, 205 F.3d at 463-65 (upholding the matching funds trigger in Maine’s Clean Election Act).

¹⁹ Certiorari was granted in *McComish* by the Supreme Court on November 29, 2010.

In the earlier *Daggett* decision, which was decided eight years before *Davis*, the First Circuit noted that the complaint about Maine’s trigger “boil[ed] down to a claim of a First Amendment right to outraise and outspend an opponent.” *Id.* at 464. In rejecting that claim, the Court stated:

Appellants misconstrue the meaning of the First Amendment’s protection of their speech. They have no right to speak free from response—the purpose of the First Amendment is to secure the widest possible dissemination of information from diverse and antagonistic sources. The public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures.

Id. (internal quotations and citations omitted); see *AAPS v. Brewer*, 363 F. Supp. 2d 1197, 1201 (D. Ariz. 2005) (quoting *Daggett* favorably); *Jackson v. Leake*, No. 5:06-CV-324-BR (E.D.N.C. Mar. 30, 2007) (dismissing complaint for reasons stated in 476 F. Supp. 2d 515 (E.D.N.C. 2006) (denying preliminary injunction)), *aff’d*, *North Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008). This reasoning echoed a similar analysis in the court below. Speaking of the trigger’s opponents, that court reasoned:

Their view of free speech is that there is no point in speaking if your opponent gets to be heard as well. The question is not whose message is more persuasive, but whose message will be heard. The general premise of the First Amendment as interpreted by the Supreme Court, on the other hand, is that it preserves and fosters a marketplace of ideas. . . . In that view of the world, more speech is better. If a privately funded candidate puts out his/her candidacy and ideas to the public, the public can only gain when the opposing candidate speaks in return. This “marketplace of ideas” metaphor does not recognize a disincentive to speak in the first place merely because some other person may speak as well.

Daggett v. Webster, 74 F. Supp. 2d 53, 58 (D. Me. 1999) (citation omitted), *aff’d*, 205 F.3d 445.

In upholding Maine’s trigger, the First Circuit had explicitly rejected the reasoning of the Eighth Circuit in *Day v. Holahan*, 34 F.3d 1356, 1362 (8th Cir. 1994). The Minnesota statute at issue in *Day* lifted the voluntary spending limit of a participating candidate “by the sum of independent expenditures made in opposition to [such] candidate plus independent expenditures made on behalf of the candidate’s major political party opponents” and granted the candidate public funds equal to one-half the independent expenditure. *Id.* at 1359. The Eighth Circuit “equate[d] responsive speech with an impairment to the initial speaker,” *Daggett*, 205 F.3d at 465, and, because Minnesota already had nearly 100% participation in its voluntary spending limit scheme, ruled that the state could not justify the impairment by asserting a

compelling interest in encouraging participation. *See Day*, 34 F.3d at 1362.²⁰ A federal district judge in Maine ruled in 2010 that *Daggett* is still controlling precedent, at least in the First Circuit.²¹

As discussed above, the Ninth Circuit upheld Arizona’s public financing system in *McComish* largely because it included third-party expenditures toward the trigger activation amount, rather than merely personal expenditures as in *Davis*. 611 F.3d at 522. While the *Davis* system aimed to “disadvantage the rich” by specifically discouraging personal expenditures, in Arizona, the maximum possible amount of matching funds may be triggered entirely by third-party expenditures—even if a wealthy, privately financed candidate declines to spend any money at all. *See id.* Therefore, under Arizona’s system, the privately funded candidate has significantly less incentive to avoid personal expenditures. *See id.* The Supreme Court will soon decide whether Arizona’s efforts to distinguish its public financing system from that in *Davis* have succeeded. *See id.*

3. *Multiple Match for Small Donors*

As an alternative to trigger fund schemes, New York City has devised what is known as a multiple match system.²² The multiple match system not only ensures that publicly financed candidates have adequate resources to mount a resistance against privately wealthy candidates, but also encourages robust participation by low to middle-income contributors. Under the New York City multiple match system, the city government will match the first \$175 of any contribution to a candidate six times. *See* N.Y. City Code §§ 3-703.2(a), 3-705.2(a). For example, if a contributor gives \$150, the city government will supplement that with \$900, for a total of \$1,050. This encourages a candidate to seek contributions from many different sources, including individuals of limited financial means, because a few small contributions end up counting more than a single, somewhat larger contribution. For example, although a single contribution of \$1,500 seems greater at first blush than five contributions of \$150, the \$1,500 contribution ends up counting for only \$2,550, while the five \$150 contributions effectively provide a New York City candidate with \$5,250. As an additional benefit, the multiple match system inspires low to middle-income residents to participate in politics despite their more limited resources, because even a small expenditure will end up providing a hefty boost to the publicly funded candidate.

²⁰ The Supreme Court, however, recently revitalized *Day* by citing it for the proposition that a law increasing a candidate’s expenditure limits based on independent expenditures against her burdened the speech of those making the independent expenditures. *Davis*, 128 S. Ct. at 2772 (citing *Day*, 34 F.3d at 1359-60).

²¹ *Cushing v. McKee*, No. 1:10-cv-330-GZS, slip op. at 12, 15 (D. Me Sept. 15, 2010) (Order denying temporary restraining order of Maine’s triggers) (“Here, the Court is not writing on a clean slate. All of the same arguments currently raised by Plaintiffs in their Verified Complaint were raised, and ultimately rejected, in *Daggett*...” and concluding, “[t]he Court is not convinced that *Davis* and/or *Citizens United* cast *Daggett* into disrepute or otherwise reflect an overruling of *Daggett*), *denial of TRO aff’d sub nom., Respect Maine PAC v. McKee*, No. 10-2119 (1st Cir. Oct. 5, 2010), *aff’d*, No. 10A362 (Oct. 22, 2010).

²² New York City also has trigger fund provisions to increase the maximum amount of matching funds a candidate may receive in the event of high spending by a privately funded opponent, but these provisions are conceptually distinct from the multiple match system itself. *See* N.Y. City Code § 3705.7.

D. Reporting Requirements

Reporting requirements are an essential component of any campaign finance system, and they are discussed in detail in Chapter Eight. Public funding programs that provide cash subsidies to candidates require additional reporting requirements. Full public funding systems require prompt reporting by nonparticipating candidates and independent spenders, so that the agency administering the system can establish when matching funds are triggered. Partial public funding systems require reporting both by participating candidates who are seeking matching funds and by nonparticipating candidates and independent spenders, if the system includes triggers.

Tips

All of the *TIPS* applicable to reporting requirements in general, *see* Chapter Eight, also apply to reporting requirements that are specific to public funding programs.

Legal Analysis

As is noted in Chapter Eight, reasonable reporting requirements have been upheld by court after court. Public funding opponents therefore tend to argue that the reporting requirements specific to the program are unduly burdensome. In most cases, they argue that the burden is so great that they are forced into the public funding system with its spending limit. To date, no court has accepted this argument. *See Daggett*, 205 F.3d at 465-66; *North Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 441 (4th Cir. 2008) (upholding the dismissal of a complaint for reasons stated in 476 F. Supp. 2d 515 (E.D.N.C. 2006) (denying preliminary injunction)).

E. Administration and Enforcement

Every public funding system requires an agency to administer the program and enforce its rules. Fair and efficient administration of the system is crucial to its success, as is impartial and vigorous enforcement. Among the agency's responsibilities are

- making rules and develop forms for qualifying, participation, fund distribution, and reporting;
- distributing public funds;
- auditing compliance with campaign finance rules;
- giving notice and a hearing to alleged violators; and
- imposing civil fines to deter violations.

The agency will need sufficient resources to carry out these duties. In addition, when a new public funding program is introduced, the agency must be given adequate time to staff up and to develop the requisite procedures and forms.

Tip: *If a new administrative agency is created, structure it to maximize the likelihood that it will operate in a nonpartisan fashion.* There should be an odd number of agency members to ensure that the agency is not hamstrung by tie votes.

Tip: *Public funding laws must set reasonable deadlines for distribution of public funds.* In matching systems, speedy distribution of funds is necessary to encourage candidate participation. In full public funding systems, participants should receive the entire amount permissible quickly after they qualify for funding.

Tip: *The program should include funding for education about the mechanics of the program.* Education of the general public will encourage taxpayers to use the check box system. Candidates and campaign treasurers should also be trained as to how to participate.

Tip: *Statutes that do not include criminal penalties may be subject to a lower First Amendment standard of review.* Stiffer civil penalties such as treble damages can be used in place of criminal penalties to ensure adherence to public financing laws.

Legal Analysis

The only challenge to the administration of an agency of which we are aware related to the method of its selection. In *Citizens Clean Elections Comm'n v. Myers*, 1 P.3d 706, 712-13 (Ariz. 2000), the Arizona Supreme Court invalidated the statutory mechanism for appointment of the Citizens Clean Elections Commission. The law allowed judges to participate in the selection of executive agency members, and the court found that the appointment mechanism violated the separation of powers. The selection provision was severed from rest of the Act, leaving the public funding system intact.

We have not reviewed and therefore are not familiar with any challenges to the specific penalties imposed for violations of campaign finance rules. But there are nevertheless reasons why reformers may wish to restrain their punitive instincts and confine penalties for such violations to civil fines or injunctive relief. When criminal penalties are available, courts may look more closely at constitutionally challenged provisions than they do when violation of the provisions results only in a civil sanction. In *Buckley*, for example, the Supreme Court emphasized that the criminal penalties that FECA provided as punishment for violators required it to adopt an extremely restrictive reading of the disclosure requirements of the Act. 424 U.S. at 76-77.²³ When violation of a statute only leads to civil penalties, however, one court held that the difference in sanctions “affects the extent to which a narrowing construction of the [state’s] law is necessary.” *Crumpton v. Keisling*, 982 P.2d 3, 10 (Or. App. 1999). When a statute affecting speech “does not have criminal consequences, the

²³ Criminal sanctions were also discussed critically in *Citizens United*—a case about privately funded elections. See *Citizens United*, 130 S. Ct. at 889 (“In addition to the costs and burdens of litigation, this [] would require a calculation as to the number of people a particular communication is likely to reach, with an inaccurate estimate potentially subjecting the speaker to criminal sanctions. The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day.”).

constitutional requirements appear to be significantly less.” *Id.*; cf. *CSC v. Letter Carriers*, 413 U.S. 548 (1973) (finding that restrictions of political activity were sufficiently precise to overcome vagueness challenge, where the only sanctions for violation were suspension or removal from office). Since the Oregon disclosure law provided only for civil penalties, the *Crompton* court held that the definition of “in support of or in opposition to” could be interpreted more broadly than in *Buckley* without running afoul of the First Amendment.

F. Sources of Public Funding

Different public financing programs draw their funds from different sources. For an excellent review of a wide variety of funding options, see *Public Financing of Elections: Where To Get the Money*, Center for Governmental Studies (2003), available at http://www.cgs.org/images/publications/Where_to_get_the_money.pdf. Care must be taken not to generate revenues by taxing speech or other constitutionally protected activities.

Tips

Tip: *If at all possible, funding should come from general revenues.* The general treasury is the only fully reliable source of funds.

Tip: *The source of public funds may affect the amount of funding available for distribution.* Most states pay for their programs through an income tax check-off provision under which taxpayers do not increase their tax liability.²⁴ A handful of states rely on an income tax add-on in which participating taxpayers agree to increase their tax liability by a small amount. Neither check-off nor add-on programs are consistently effective at producing sufficient funds.

Tip: *Civil fines generated from violations of the state’s campaign finance laws can also be used to fund a public financing program.* As a policy matter, we do not recommend surcharges on criminal fines, as they tend to be regressive in effect.

Tip: *Taxes on lobbyist expenditures are not promising sources of revenues for public funding programs.* Lobbying is constitutionally protected speech, and courts have ruled that it may not be taxed solely for the purpose of raising revenues—even for public financing programs. Lobbying fees may be used to cover the costs of administering systems regulating lobbying.

Legal Analysis

Aspects of the funding mechanisms for the Arizona and Vermont programs have been challenged. The Arizona law originally provided for funding from an income tax check-off, direct donations to the state

²⁴ The Maine program is funded primarily by a \$2 million appropriation from the state general fund and a \$3 income tax check-off. See 21-A Me. Rev. Stat. Ann. § 1124(2) (West 2004).

campaign fund (for which donors may receive up to a \$500 tax credit), a 10% surcharge on civil and criminal fines, and lobbyist fees. Vermont's program (which covers only the races for governor and lieutenant governor) provided for funding from a tax on expenditures by lobbyists, a percentage of the annual report fees paid by corporations, and allocations from the legislature. The Arizona surcharge on fines was found constitutional, *see May v. McNally*, 55 P.3d 768 (Ariz. 2002), *cert. denied*, *May v. Brewer*, 528 U.S. 923 (2003); but the lobbyist fees in both Arizona and Vermont were invalidated under the First Amendment, *see Lavis v. Bayless*, No. CV 2001-006078, slip op. at 4-5 (Ariz. Super. Ct. Dec. 21, 2001); *Vermont Soc'y of Ass'n Executives v. Milne*, 779 A.2d 20, 31 (Vt. 2001).

II. Refunds and Tax Incentives for Small Contributions

Some programs help finance electoral campaigns by offering individuals monetary incentives to make contributions to candidates or political organizations (including PACs and political parties). These programs, like matching fund programs, ensure that the amount of public funds spent on campaigns is directly correlated with the level of the candidates' or organizations' private (financial) support. The incentive may take the form of a rebate, a tax deduction, a tax credit, or a rebate of the amount of the contribution up to a specified limit. Since tax incentives and rebates are available on an equal basis to those supporting third-party and independent candidates, contributors decide which candidates are "serious," not the statutory funding scheme.

Tips

Tip: *Rebates are more likely to encourage lower income people to contribute than are tax deductions or credits.* The value of a tax deduction will vary with the contributor's tax bracket, increasing as income rises. The tax credit is of equal value to all taxpayers. A rebate will reimburse even those contributors whose income is so low that they have no tax liability. Very low income persons may nevertheless be unable to advance a contribution and wait for the rebate.

Tip: *Incentive programs avoid the need for new administrative systems and personnel.* The incentives can be administered by the taxing authority.

Tip: *Consider linking tax incentives or rebates with other campaign finance reforms, such as contribution limits or voluntary spending limits.* In Minnesota, for instance, the rebate is available only if the contribution is made to a candidate who agrees to abide by spending limits.

Tip: *Incentive schemes that encourage small-donor fundraising will increase fundraising costs.* Voluntary spending limits should take into account the costs of fundraising.

Tip: *Consider whether you want to fund parties or other political organizations.* In some states, political parties have assisted competition and have provided funding and organization in a way that discourages corruption.

For example, political parties will have an incentive to create small donor bases under the tax incentive or rebate programs, and the lists can be shared with the parties' candidates.

Legal Analysis

Tax incentives and rebates offer a form of public funding that requires little new administration and is legally uncomplicated. Because those incentives simply provide donors with a no- or low-cost means of contributing to the candidate or political group of their choice, the government does not need to become involved with allocating funds to campaigns. Tax incentives or rebates may also encourage more people to make small contributions.

One of the more interesting financial incentive programs is Minnesota's, which gives a 100% refund for contributions up to \$50 (\$100 for joint filers) made to candidates who have accepted spending limits. Similarly, Arkansas and Ohio have recently enacted 100% tax credits for contributions up to \$50 for single filers and \$100 for joint filers. The programs in Arkansas and Ohio are not linked with voluntary spending limits. These programs are generally aimed at increasing the participation of small donors, and reducing candidates' reliance on large donors, by making it easier to raise smaller donations.

Using a tax credit both as an inducement to encourage contributions to candidates and as an inducement to candidates to accept spending limits is constitutionally permissible; it is simply another kind of public subsidy. *See Buckley*, 424 U.S. at 107 n.146; *see also Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983) (tax credits and deductibility for contributions are a form of government subsidy to the entity receiving the contributions). In *Rosenstiel*, the Eighth Circuit Court of Appeals upheld Minnesota's tax refund scheme against a challenge that it was coercive when used along with trigger provisions and other public funding to encourage candidates to accept spending limits. *See* 101 F.3d at 1551.

III. Free or Reduced-Rate TV and Radio Air Time

Free broadcast or cable services can help candidates without easy access to big money, by making available an otherwise costly campaign resource, thereby reducing the amount candidates must raise to be competitive. Vouchers can be provided to candidates for free air time on public television and radio stations and local access or government cable stations. Where the air-time is not needed, the voucher could be transferred to the candidate's political party in exchange for other assistance.

Tip: Some commercial stations have been persuaded to provide free air-time as a voluntary public service.

Tip: Consider structuring a program where the state purchases air time on commercial stations and makes it available to candidates. Because the federal government has exclusive licensing and regulatory authority over broadcasting airwaves both for radio and television state governments cannot require commercial stations to give candidates free or reduced cost air time, unless the states compensate the stations.

Tip: Consider linking the air time subsidy on public or commercial stations with a requirement that the candidate accept spending limits or abide by campaign advertising guidelines designed to improve the quality of political debate. Some reformers have recommended conditioning free or reduced-cost air time on the candidate's agreement to appear personally during part of the advertisement.

Tip: In addition, or as an alternative, to providing air-time to candidates for advertising, public television stations may be used for debates among the candidates. If a state convenes such debates, it must use reasonable and viewpoint-neutral standards to decide which candidates are entitled to participate.

Legal Analysis

The drive to provide free television and radio time for candidates has been frustrated to some extent because states cannot regulate privately-owned broadcasting stations. Rhode Island and a handful of local governments have responded to this limitation by crafting reforms that provide free time on public stations or government access cable stations.

Rhode Island has provided free air time on community television stations and public broadcasting stations for candidates who agree to spending limits. See R.I. Gen. Laws § 17-25-30(1)-(2) (2003). In *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993), opponents of this law claimed that it was preempted by the Federal Communications Act, which requires licensees to afford all candidates an equal opportunity to use their broadcast time. See 47 U.S.C. § 315(a), (c). In other words, the opponents argued that provisions barring a commercial station from allowing some candidates to buy advertising time while denying that opportunity to others, and from charging different rates for different candidates, precluded the state from offering free air time to candidates who accepted spending limits. The opponents also argued that Rhode Island's program created excessive government entanglement in the operation of political campaigns in violation of the First Amendment.

The *Vote Choice* court rejected the preemption argument, but only by reading Rhode Island's law to allow candidates who refused spending limits to petition under federal law for equal time or equal treatment. By implication, *Vote Choice* appears to suggest that the Federal Communications Act would preempt a state campaign finance law that precluded candidates who declined spending limits from obtaining the same free air time afforded to participating candidates. The court determined that, even if Rhode Island were ultimately required to provide free air time to all candidates, the air time would constitute an incentive for participation in the voluntary spending limit scheme, because candidates who accepted the limits could be assured that their acceptance would not prevent them from getting their message to voters. See 4 F.3d at 42.

The *Vote Choice* court also found that the provision of free air time did not unduly entangle government in the internal conduct of political campaigns. See *id.* at 43. According to the court, free television time did result in slight intrusion by the government, but "offering in-kind benefits actually furthers first amendment values by increasing candidates' available choices and enhancing their ability to communicate." *Id.*

Another mechanism that can be used to enhance candidate communication with voters is a publicly subsidized debate among the candidates. The Supreme Court has held that states need not open such debates to every interested candidate, as long as the standards used to decide which candidates are entitled to participate are reasonable and viewpoint-neutral. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998). No court has yet considered whether inclusion in such debates could be offered as one of the incentives to participate in a voluntary spending scheme. Several states and some major cities require participation in debates as a condition of receiving public funding.²⁵

²⁵ *See, e.g.*, Ariz. Rev. Stat. § 16-956; Ky. Rev. Stat. § 121A.100 (Baldwin 2004); N.J. Stat. Ann. §§ 19:44A-45 to 47 (West 2004); Austin Tex., Code at §2-9-65; Los Angeles Mun. Code § 49.7.19C (2001); New York City, N.Y., Admin. Code §3-709.5; San Francisco, Cal., Campaign and Governmental Conduct Code § 1.146(a) (2005).